



# Product Liability Class Actions and Air Crashes

- *A (Canadian biased) North-American perspective*

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# Class Action Proceedings in Canada

- Procedural vehicle whereby a person (the “representative”) may sue another on behalf of a group of persons (the “class”). In Canada, the Legislation enabling class action proceedings is adopted at the provincial level.
- Before a class proceeding is decided on its merits, it must be “certified” (“authorized” in Quebec) to be allowed to proceed further. This is subject to the plaintiff meeting the following criteria:
  - the pleading discloses a cause of action generally supported by the alleged facts;
  - there is an identifiable class of two or more people;
  - the claims of the class members must raise some common issues;
  - the class proceeding would be the preferable procedure for resolving the common issues (not applicable in Quebec); and
  - the representative plaintiff would fairly and adequately represent the class.
- Even if the class proceeding leads to a settlement, such settlement must be approved by the court, subject to its fairness and adequacy for the class and whether an appropriate plan is suggested to distribute the settlement proceeds to the class members.

## Air Transat Flight 236



- On August 24, 2001, an Airbus A330 airplane bound for Portugal from Toronto ran out of fuel above the Atlantic Ocean, lost power in both engines and had to make an emergency landing in the Azores Islands, gliding the last few kilometers.
- It was eventually revealed that incident resulted from a leak caused by the installation of an incorrect part in the hydraulics system by the Air Transat maintenance team.

## Air Transat Flight 236 (cont'd)

- Class action proceedings were instituted in July 2003 against Air Transat, the operator of the aircraft, **Airbus** and **Rolls-Royce**, respectively the manufacturers of the aircraft and its engines.
- A settlement was eventually reached and approved by the court in *Nunes v. Air Transat A.T. Inc.* (2005 CanLII 21681 (ON SC)), in 2005, including a fund of \$7,650,000 to be distributed among class members and covering damages such as psychological injuries or loss of income, up to certain limits per passenger (the proportion of these funds coming from the manufacturer is unknown).
- In determining whether the Settlement was fair, reasonable and in the best interest of the class, the court commented that a significant litigation risk existed for the plaintiffs considering the fact that most of their damages were psychological and that the Warsaw Convention, at the time governing the liability of air carriers, exclusively covered "bodily injuries".
- It is also mentioned that the *"case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects for establishing liability against it but made it inevitable that the litigation would be protracted and expensive."*

## Air France Flight 358

- An Airbus A340 departed from Paris and was due to land in Toronto on August 2, 2005. Due to inclement weather, on landing *“the aircraft overshot the runway, crashed into a ravine and burst into flames. Miraculously, all escaped with their lives before the aircraft was consumed by fire, although some were seriously injured.”*
- Class action proceedings were instituted in August 2005 against a variety of defendants including Airbus and Goodrich, the manufacturers of the aircraft and emergency evacuation slides. The proceedings were certified in August 2006



## Air France Flight 358 (cont'd)

- On December 24, 2009, a settlement was approved between some defendants including Airbus and Goodrich for a sum of \$13,650,000 (of which \$1,650,000 was provided by Airbus and Goodrich) in *Abdulrahim v. Air France*, [2009] O.J. No. 5550.
- In approving the settlement, the court highlighted the following:
  - When evaluating the litigation risk against Air France, the fact that liability would probably be limited to bodily injuries under the Montreal and Warsaw Conventions was again contemplated as a litigation risk, indeed most passenger suffered only psychological injuries.
  - Against Airbus and Goodrich, although the evacuation slides malfunctioned to varying degrees and forced some passenger to jump from the aircraft, a number of litigation risks were identified, including problems with proof and with establishing a design defect or that the slides were not “state of the art”.
  - As such, *“class counsel acknowledge that the claims against these defendants were weak and there were substantial risks associated with pursuing them.”*

## Air Canada Flight 624



- An Airbus A320 from Toronto crashed on landing at the Halifax Airport in the morning hours of March 29, 2015.
- The plane attempted to land in poor weather conditions **and landed 300 meters short of the airport's main runway**. It smashed through an antenna array, bounced on the ground and slid another 335 meters down the runway before coming to a halt. Several passengers were injured, including broken bones, neck and back injuries
- Two different law firm have **filed class actions** before the Supreme Court of Nova Scotia including against **Airbus**.
- Regarding the claim against Airbus, it is argued that the company **inadequately designed** the plane for use in such conditions and also **inadequately trained and warned the airline and crew** for and against the specific risks of the situation.
- These proceedings are still awaiting certification as class actions.

## What about the United States?

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- Class action proceedings are often considered not to be an appropriate vehicle for aviation crashes in the US.
- During the 70s, a case law developed to this effect, on the basis that (i) damages are inherently individual, (ii) jurisdictional issues (passengers coming from various states), (iii) unfavourable application of the collateral estoppel doctrine, (iv) interest in the US for individual control in these cases. See *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (1975).
- Authors have suggested that this should be revisited and that class action proceedings could be an appropriate vehicle at least to determine the liability. This has not gained much traction.
- Other procedural means have been used so far such as joinders of claim, transfers and consolidation or the use of test cases.

## Asiana Airlines Flight 214

- On July 6 2013, a Boeing 770, approaching at low speed and low altitude struck the sea wall immediately preceding the runway the San Francisco airport.
- The plane was heavily damaged resulting in three deaths and a number of injuries.
- A number of individuals sued the airline and Boeing, the manufacturer of the airplane in front of different courts in the USA and abroad.
- In one case, regrouping 10 passengers, it was argued that there were shortcomings on the part of Boeing regarding the Auto-throttle control system, the low airspeed warning system, seatbelt design and pilot training.
- That case was settled out of court in a first settlement involving 72 passengers of the aircraft (out of 307, including 12 crewmembers) in March 2015
- A class action lawsuit regrouping 53 passengers is also ongoing in front of the South Korean courts, having been introduced in June 2015.



## Key differences between Canadian and US regimes

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- Fewer jury trials in Canada (none in Quebec)
- No treble damages in Canada
- Jurisdiction over national classes is asserted by Canadian Courts and a *Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions* exists which allows for easier coordination between cases at the provincial level
- Canadian Courts tend to be liberal in the interpretation of commonality of issues and representativity of class plaintiff
- Legal fees on contingency are less common (except in class actions)
- Certification criteria and procedures are slightly different in the US

# Pros and Cons of Class Actions

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- Pros for both parties:
  - Eliminate some judicial inefficiency and avoid risk of conflicting decisions
  - Reduced legal fees / better cost control
  - Leads to settlements
  - Which, in turn may lead to better safety...
- Pros for Plaintiffs / Cons for Defendants
  - Pooled resources (experts, discoveries...)
  - Better bargaining power with Defendants
  - Better situation in cases of insolvency of Defendants
- Pros for Defendants / Cons for Plaintiffs
  - More predictability of outcome
  - More control over process
  - More reasonable damages awards

# Any Questions?



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