

"Settling Up: How Lawyers Build A Case To Make Corporations Pay When People Die In An Air Disaster"

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CHICAGO - For at least 21 seconds, the passengers knew they were going to die.

Lawyer Thomas Demetrio couldn't shake that image. Just days before trial, he bet a jury wouldn't be able to, either.

Since USAir Flight 427 crashed outside Pittsburgh on Sept. 8, 1994, Demetrio and a cadre of lawyers for families of the dead had spent years building cases against the airline and jet manufacturer Boeing.

They hired economists to turn the life of each victim into dollars and cents. They bought the tail of a Boeing 737 for a courtroom exhibit. One lawyer even spent \$70,000 for a jet part he could find only on a scrap heap in Peru.

And in perhaps the most gruesome exercise, the lawyers tried to assess what passengers experienced during those final 21 seconds -- from the time the 737's rudder likely jammed and the jet rolled onto its back until it barreled nose-first into the ground, killing all 132 aboard.

Someone, they vowed, would pay for the lives that were lost.

Like more than 90% of lawsuits filed after commercial jet crashes, Demetrio's case would be settled before a jury heard the story. Only hours before a trial was to begin in Illinois state court in November, the family of Marshall Berkman, a Pennsylvania manufacturing executive, agreed to the largest settlement ever paid to the estate of a commercial airline crash victim: \$25.2 million.

Attorneys

- Thomas A. Demetrio

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Now, with 217 dead in the Oct. 31 crash of EgyptAir Flight 990, lawyers have begun preparing scores of new lawsuits. As the litigation from Flight 427 demonstrates, the process will be haunting and complex -- and certain to last for years.

Lawyers for Boeing, USAir (now US Airways) and jet parts-maker Parker-Hannifin -- defendants in suits stemming from the crash of Flight 427 -- declined to talk about the litigation. But lawyers for the families of victims, their expert witnesses and some family members spoke at length in dozens of interviews. Their stories, and hundreds of pages of court documents from the lawsuits, provide a vivid account of how such cases come together, from the moment a commercial jet crashes to the day a suit is settled.

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In air disaster litigation, the small number of suits that aren't settled go to trial in two phases. In the first, the liability phase, lawyers for the victims' families must show that someone -- the airline or jet maker, for instance -- is to blame. Although many lawyers may be representing crash victims, the court appoints a small group of them to handle a single liability trial on behalf of all who died. The rationale: Everyone was killed as a result of the same accident, and consolidating the liability aspect of the lawsuits avoids duplication.

If this group of lawyers, called a "steering committee," can prove who was responsible for the crash, the second stage of the litigation, the damages phase, begins. Unlike a class-action lawsuit, each suit is considered separately to determine how much family members should be compensated for their loss.

Most air crash suits end up in federal court because the victims and defendants are usually from various states, each with different rules that govern how lawyers can build their cases. [Jamie] Lebovitz, Demetrio and some other lawyers wanted to keep their cases in Illinois state court, in part because they considered court rules more favorable there and a jury more likely to award top-dollar damages. They succeeded. Because Flight 427 had originated at Chicago's O'Hare International Airport, the lawyers were able to list USAir maintenance workers based there as defendants.

As part of the liability case, the lawyers had decided to use a computer simulation by the National Transportation Safety Board to show how the 737 went down. For dramatic effect, they planned to synchronize the cockpit voice recorder and the simulation, matching the screams of the pilot to the moments before impact.

Just listening to the voice recorder had left the lawyers ashen. By law, the cockpit recordings are almost never made public; only transcripts are issued, in part to protect the privacy of the pilots. Just a few people -- the lawyers, their experts, federal investigators and others with a stake in the crash -- are allowed to hear the tapes. Lawyers for the families planned to ask the judge to let the jury listen. The screaming of the pilot would be at least as powerful with jurors as it had been with them, they reasoned.

The lawyers also hoped that the defendants might point blame at one another. In past crashes, liability had become a battle between airline and jet maker. By fingering the other, each hoped to avoid paying damages, or at least reduce its share substantially. "As adroitly as possible, we put on our case and watch the two giants blame each other," says Demetrio, 52, who had filed suit on behalf of Berkman's family and 10 others. "We didn't need to be aggressive in blaming Boeing or USAir," he says. "They were going to do that for us."

A Price Tag On Life

As the lawyers built the liability case, they also worked on the second phase of their suits: determining how much money they might collect for the families.

Many hired James Kenkel, a University of Pittsburgh economist, who computed the lost earnings of more than 50 victims of Flight 427.

Using a basic but detailed formula, Kenkel analyzed the amount of financial support that a victim would have provided his family had he not died prematurely. Kenkel projects a victim's earnings from income tax filings, employee handbooks that outline fringe benefits and Department of Labor tables that predict how long a person might work. From that amount, he subtracts money the victim would have spent during his life on everything from food and clothing to transportation and entertainment.

Lawyers for the airlines or other defendants often hire their own economists, who assess earnings potential more conservatively. They might argue, for instance, that a victim would not have been promoted for the rest of her career, or that she was about to be fired. In either scenario, projected earnings would be greatly reduced.

Lawyers for the families try to go beyond those price tags and give life to those who died. The legal term is "loss of society." For a lawyer, that means talking about the daughter whose mother won't see her marry, or the widower who must raise his kids alone.

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Pre-Crash Terror

When Todd Peters thinks about his father's last moments, he prefers to believe that Bill Peters blacked out in his aisle seat on the exit row. "We picture it being this tragic, screaming event," Todd Peters says. "But I really believe your body would just shut off."

Richard Levy was prepared to testify otherwise.

For 30 years, the psychiatrist has made a career studying how humans react in the last moments of life. His conclusion: "They do know what hit them. They do know what's coming."

Levy's expertise in psychosomatic medicine gave the lawyers a vivid description of the inside of the cabin as Flight 427 dove. In some jurisdictions, lawyers aren't allowed to attach dollar figures to those seconds of suffering. And defense lawyers question how Levy can be sure that any one passenger endured the hell he describes.

Still, families' lawyers often use Levy to create the sort of indelible image that ensures juror empathy. "If you don't have the pre-impact terror in the case, the juries don't see the case from the same point of view," lawyer Broder says. "It brings the case alive."

Levy learned his trade during years as an Air Force psychiatrist and flight surgeon. In the military, he studied survivors and tapes from fatal plane crashes. Today, as an expert witness and aeromedical consultant who charges \$300 an hour, he reviews flight data and cockpit voice recordings, focusing on the final words of the doomed pilots.

"It's a horrible experience to listen to a pilot who knows he's going to die," says Levy, 67. "What impresses you is the tone, the pitch of their voice, the urgency, the terror, the fear."

Levy describes the last moments for the passengers of Flight 427 this way: At 21 seconds to impact, the jet lurches left and "immediately their stomach is going to grab." A few seconds later, as the autopilot disconnects and a horn begins to wail, "they're going to look out the window and say, 'My God! What's happened?' They'll turn white. They'll start to sweat, sweat profusely in what's called a cold sweat. They'll grab their seat. Then when Flight 427 did the descent in the spiral and did a 360, people most probably lost control of their sphincters, their bladder, their bowels." Some vomited, he says.

In the final seconds, as the pilot repeated, "Oh God, Oh God," and as luggage flew about the cabin and passengers slammed against their seats, Levy believes many experienced a "life review process." In as little as three seconds, he says, their lives passed before their eyes.

Some families don't want to envision such a scene and would rather believe as Todd Peters does. Levy understands why. "It's a very hard concept to open your mind to," he says of the final moments.

The Settlement

By November, more than five years had passed since the crash of Flight 427. Donna Rae Peters had settled her suit confidentially more than two years earlier. Of the 18 lawsuits handled in Illinois state court, only five remained.

With their liability trial set to begin in those cases, Lebovitz and Chicago lawyer Michael Demetrio, Thomas' brother, hatched a grand plan. If it worked, they hoped it would bring the remaining cases to a quick and lucrative close.

They wanted to erect the tail of a 737, nearly three stories tall, outside the courthouse in Chicago. Beside it, weather and judge permitting, they would present their opening statement, demonstrating to jurors why they believed the tail's rudder malfunctioned and brought the jet down. Thomas Demetrio doubted the judge would allow it. Too many distractions. He would ask nonetheless, "just to tweak" lawyers for US Airways and Boeing.

But only hours before the trial was to begin, Lebovitz, the Demetrio brothers and other lawyers settled the state court cases, including the record Berkman deal. The liability case they had spent years preparing would never be heard.

Like most cases that end in settlements, much about the negotiations is a closely guarded secret. Lebovitz says only that Boeing and US Airways pushed for settlement talks the week of the trial. But Thomas Demetrio says he always believed a jury would hear his case. In part, he says, that was because the first settlement offer he received in the Berkman case didn't come until the week before the trial was to start.

It was for \$7.5 million, and Demetrio's answer was terse. "I said, 'It's rejected,' and they then asked, 'Is there going to be a counter?'" No, Demetrio says he told defense lawyers. Early the next week -- the week of trial -- Chief Judge Donald O'Connell began supervising the settlement talks. Only then, Demetrio says, did the discussions become serious.

For 10 hours over two days, O'Connell explored settlement options in private conferences with the lawyers. If \$20 million were offered, would it be accepted? he asked Demetrio. No, Demetrio said. He told the judge he needed at least \$25 million, a sum Demetrio says now that he never expected, "not in a hundred years." Finally, less than 24 hours before trial, the defendants made their final offer: \$25.2 million. Demetrio wasted no time settling.

The Berkman case was by far the largest settlement among the lawsuits. Although other cases settled for between \$5 million and \$10 million, one lawyer estimates that most families received between \$1.25 million and \$2 million.

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Of the 84 suits from the crash of Flight 427, four -- all federal court cases in Pennsylvania -- remain unsettled. No trial date has been set for those suits.