

# Suing Russia and President Putin: Litigating over the Malaysian Airlines MH17 Tragedy

By [Dr. Binoy Kampmark](#)

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*Thirty three relatives of the MH17 tragedy from Australia, New Zealand and Malaysia, have taken to legal avenues against Russia and its leader, President Vladimir Putin. The claim was filed by Sydney-based LHD Lawyers in the European Court of Human Rights, seeking \$A10 million per passenger. The application, running into 3,500 pages, is awaiting acceptance.*

The legal steward behind the action is Jerry Skinner, who has some form in this rather niche field of aviation law. He managed to successfully seek compensation for families of victims over the Pan Am 103 flight bombing over Lockerbie that killed 270 people, though this also required a series of political moves to take place. "Our clients," explained Skinner, "want them to accept responsibility and be accountable in some measure that will be satisfying to the individuals."

Skinner does not necessarily do his clients much of a service in then describing their motivation and state of mind. It is one of grief and confusion followed by dollar signs of reassurance. "What it takes for an individual to be satisfied after the loss of a loved one and a big political essentially act of war, is something that can only be determined later as time passes and as people's feelings change, people's feeling solidify" (ABC News, May 22). The desire for monetary compensation is one such solidified feeling, presumably.

The circumstances behind the downing of Malaysia Airlines MH17 were politicised from the moment the aircraft was destroyed by what was said to be a Russian-made BUK surface-to-air missile in July 2014. Having been submerged in an intense information war, questions loomed over who, in the chaos of conflict, pulled the trigger that fateful day. ❌

The main Dutch-led investigation into the incident by the Safety Board (OVV) did not conclude who fired the weapon, though the battle of responsibility was long decided by other parties. Russia contends that the missile came from Ukrainian forces; those from the West and the Ukrainian sources argue that it was Russian-backed rebels on Ukrainian soil.

The legal suit here asserts that the Russian Federation failed to conduct an internal investigation or participate with other parties in attempting to reconstruct the cockpit. Another even more serious allegations is that the Russian cyber warfare unit, known as "Pawn Storm", hacked the Dutch Safety Board investigative website.

A not unconnected fact is the finding by the Glebe Coroner's Court in New South Wales last week which decided to wade into a field of assumption. The coroner, Michael Barnes, momentarily forgot his station and began to speculate. "Coroners do not make findings of criminal guilt, but it would be pointless sophistry not to acknowledge that these deaths were part of a gross mass murder."<sup>[1]</sup>

Ignoring the war zone conditions, the political context and the escalation of the conflict at the time the passenger flight was shot down, Barnes saw motive and wicked minds at play. "The fatal injuries were inflicted as a result of a person or persons, who has or have not been identified, deliberately firing a missile, equipped with an exploding warhead, at the jetliner in which the deceased persons were passengers, causing it to disintegrate at high altitude."

Bryan Clancy, who lost his brother Michael and sister-in-law Carol, was not quite so politically oblivious to the circumstances of what had happened. The Australian prime minister, he argued, had to be saddled with some responsibility for his ventilating against Putin. "I believe the comments made by Tony Abbott and the Foreign Minister delayed the recovery and remains of Mick and Carol."

With the crash site still warm, the prosecuting perspective was assumed. Australian Prime Minister Abbott had no compunction finding Putin responsible, as did Australia's opposition leader, Bill Shorten. Professor Payam Akhavan of McGill University considered that a possible basis for legal action might be criminal negligence or recklessness. Putin, in retort, suggested that "the state over whose territory this occurred bears responsibility for this awful tragedy."<sup>[2]</sup>

The mere act of supplying any such weapons used would not, in themselves, amount to responsibility. That state of affairs poses ethical problems, but hardly the line of liability that could hold up in a court. If that had been the case, numerous international legal suits would be mounted against states for the sale of weapons in a nefarious international arms trade. Think Saudi Arabia and its links to Western arms suppliers.

Even the International Court of Justice in 1986 found that the US could not be held responsible for the supply of weapons to the Contra Rebel forces battling the Nicaraguan government. Admitting that US collaboration and supply had taken place did not lead to the finding that Washington had given "direct combat support". There was insufficient evidence "to demonstrate the total dependence of the *contras* on United States aid."<sup>[3]</sup>

Criminal suits might be pursued in the International Criminal Court, but incident took place outside the time frame of the Ukraine's lodging of a declaration with the ICC accepting its jurisdiction.<sup>[4]</sup> Besides, the term "terrorism" is notoriously opaque, and does not form part of ICC jurisdiction.

There are possible domestic actions, though Skinner poured scorn on the idea of suing in Russia "because it's absolute nonsense to think we could have a realistic chance of success."<sup>[5]</sup> There is some precedent, albeit an unsuccessful one, to sue Ukraine over the destruction of Siberia Airlines Flight 1812 in 2001 over its territory. In that case, the families of four Israeli victims instigated civil proceedings, with the Ukrainian Court of First Instance, and the Kiev Appeals Court dismissing the claims in January and August 2007 respectively.

From the moment MH17 perished, legal matters became political avenues by other means. Compensation for wrongful loss of life, and grounds for the violation of civil aviation rules are valid grounds to make claims. Political will, however, is quite something else.

A white paper published by the Public International Law & Policy Group and the VU University of Amsterdam canvasses the options extensively, reminding us about the range of possible options regarding civil and criminal remedies in such aviation calamities.<sup>[6]</sup>

Selecting Russia and Putin in this ignores other agents of responsibility, be it in the realm of civil or criminal liability. There are simply too many actors – Ukraine, the aircraft operators themselves, to name some obvious ones – to ignore.

*Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: [bkampmark@gmail.com](mailto:bkampmark@gmail.com)*

Notes:

[1] <http://www.abc.net.au/news/2016-05-17/nsw-mh17-families-of-victims-describe-their-loss-to-court/7420794>

[2] <http://talkingpointsmemo.com/news/putin-ukraine-malaysian-plane-crash>

[3] <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>

[4] <https://theconversation.com/explainer-international-law-and-flight-mh17-29416>

[5] <http://www.news.com.au/travel/travel-updates/incidents/10m-sought-for-each-mh17-passenger/news-story/e78e08440480deff167182885ccc15cb>

[6] [http://www.vu.nl/nl/Images/Legal\\_Remedies\\_for\\_Downing\\_Flight\\_MH17\\_tcm289-747125.pdf](http://www.vu.nl/nl/Images/Legal_Remedies_for_Downing_Flight_MH17_tcm289-747125.pdf)

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