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Abstract

Despite the efforts from the international community to create an unified liability regime in Private International Air Law, there are still significant hurdles to be overcome. Many essential rules from this legal regime are vague and open to interpretation. The role of judges is crucial in order to give them their intended meaning. Thus, this paper examines jurisprudence concerning carrier liability in case of death or injury of passengers. It shall also analyse the merits and shortcomings of the Montreal Convention of 1999, the most recent contribution to the unification of law in this field.

Key-words

Uniformity of law, Private International Air Law, Montreal Convention, carrier liability, death or injury of passengers.

Carrier liability in case of death or injury of passengers

Luis Castellví Laukamp[*]

Since ancient times, human beings have known of the dangers of flight. The mythologies of Greece, Crete, Persia and other lands include stories of injurious attempts by men and women to soar into the firmament.

Judge Kirby J. in *Povey v. Qantas Airways*[1]

SUMMARY: 1. Introduction.- 2. Article 17 of the Montreal Convention.- 3. Events for which the carrier is liable: what is the meaning of "accident"?.- 4. Injuries for which the carrier is liable. What is the meaning of "bodily injury"?.- 5. Conclusion.

1. Introduction

From its beginning in the 1920s, the main purpose of Private International Air Law (PIAL) has been to create uniformity of law across jurisdictions. Since aviation was "going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity"[2]. Thus, the aim of the founding fathers of this field was to erect a liability regime under which all cases would be resolved uniformly regardless of where they arose. In addition, the other purpose of PIAL was to limit the potential liability of the carrier in case of accidents. It was expected that such limitations "(...) would enable airlines to attract capital that

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[1] *Povey v. Qantas Airways*, [2003] VSCA 227, 2003 WL 23000693 (Dec. 23, 2003).

[2] Andreas Lowenfeld & Allan Mendersohn, "The United States and the Warsaw Convention", 80 *Harvard Law Review* 497, (1967) , 498.

might otherwise be scared away by the fear of a single catastrophic accident"[3]. The Warsaw Convention of 1929[4] was the result of these two concerns. During the following decades, "(...) efforts to update this legal regime have led to fragmentation rather than unification, with different nations adhering to differing versions of the Warsaw Convention and its various reformulations (...)"[5]. The last step in this path towards the unification of PIAL was the approval of the Montreal Convention of 1999[6], which replaced the Warsaw system formed by the original Warsaw Convention and all its successive versions. Both conventions regulate the liability of the airlines in case of death or injury of the passengers, and loss or damage to baggage or cargo, when they happen in international flights between Member States. This article will be focused on the carrier's liability in case of death or injury of passengers and will highlight the challenges for the future of the unification of the PIAL, taking into account the jurisprudence that has interpreted two of the most controversial terms of the conventions: "accident" and "bodily injury".

2. Article 17 of the Montreal Convention

The first paragraph of Art. 17 of the Montreal Convention regulates the liability of the airlines in case of death or bodily injury of the passengers:

[3] Ibid, 499.
[4] *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 12 October 1929 [hereinafter *Warsaw Convention*]
[5] Paul S. Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999*, Montreal, McGill University, Centre for Research in Air & Space Law, 2005, 1.
[6] *Convention for the Unification of Certain Rules for International Carriage by Air*, opened for signature on 28 May, 1999. It entered into force on November 4, 2003 [hereinafter *Montreal Convention*]

1. The carrier is liable for damage sustained in case of death or *bodily injury* of a passenger upon condition only that the *accident* which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [Emphasis added]

Thus, once it is clear that the ill-fated plane was doing an international flight between Member States, passengers who want to obtain compensation for the damages sustained must try to do so under the Convention. In other words, when the Convention is applicable passengers are not entitled to maintain an action for damages under domestic law[7]. Two things must be proven in order to achieve compensation. First of all, that which happened on-board the plane (or while embarking or disembarking) and caused the damage was an "accident". Secondly, that the passenger suffered "death" or "bodily injury". The interpretation of the term "death" is rather straightforward and has not created any jurisprudential controversy. However, the terms "accident" and "bodily injury" are far more ambiguous and have been interpreted by the courts in different ways. The next section shall examine the most important cases (most of them previous to the Montreal Convention) where these terms were interpreted. While the language of Art. 17 of the Montreal Convention "differs slightly from the language of Article 17 of the Warsaw Convention, the changes do not appear to be substantive"[8]. As a consequence, the interpretation of those terms in the context of the Warsaw Convention is fully applicable to the Montreal Convention.

3. Events for which the carrier is liable: what is the meaning of "accident"?

[7] The principle of exclusivity of the remedy provided by the Convention was held in two landmark cases in the U.K. and the U.S.: *Sidhu v. British Airways*. 2 Lloyd's Law Rep. 76 (1997) and *El Al Israel Airlines, Ltd. v. Tseng*, 525 US 155 (1999).

[8] Thomas J. Whalen, "The New Warsaw Convention: The Montreal Convention", 25 *Air & Space Law* 12, (2000) , 17.

Art. 17 provides no definition of the word "accident" and has therefore caused tremendous problems for the courts. The seminal case on the issue is the U.S. Supreme Court decision of *Air France v. Saks*[9]. This case involved a passenger who, while the plane was descending to land in Los Angeles on a trip from Paris, felt severe pressure and pain in her left ear. Actually, the pain continued after the landing. Shortly thereafter, she consulted a doctor, who concluded that she had become permanently deaf in her left ear. She then filed suit in a California state court, alleging that her hearing loss was caused by negligent maintenance and operation of the pressurization system.

The depressurization was completely routine and no other passenger suffered any injury. Had Valerie Saks suffered an "accident"? Could she recover under the Warsaw Convention? In this landmark case, the U.S. Supreme Court defined the term "accident" as an "unexpected or unusual event or happening that is external to the passenger". Thus, a pre-existing condition or sensitivity of the passenger aggravated by usual, normal and expected flight operations would not qualify as an accident. Therefore, Valerie Saks could not obtain compensation for her injury. However, the Court also added that the term "accident" should be "flexibly applied" after an assessment of all the circumstances surrounding a passenger's injuries. As will be showed below, this dictum opened the Pandora's Box for controversial interpretations from other courts.

The definition of the term "accident" made by Justice O'Connor in *Saks* has been endlessly cited since 1985. The U.S Supreme Court's most recent case where this definition was quoted is *Olympic Airways v. Husain*[10]. Abid Hanson was allergic to second-hand smoke. On an Olympic Airways flight, he and his wife, Rubina Husain, sat in non-smoking seats. However, because the seats were close to the smoking section,

[9] *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338 (1985).
[10] *Olympic Airways v. Husain*, 541 U.S. 1007, 157 L. Ed. 2d 1146, 124 S. Ct. 1221 (2004).

Mrs. Husain requested she and her husband be moved. Despite the fact that in the plane there were empty non-smoking seats, her request was denied twice, even after the smoke began bothering Hanson, who died later on board the aircraft. Mrs. Husain filed suit in California federal district court in order to seek damages under Article 17 of the Warsaw Convention.

If a passenger's pre-existing medical condition like asthma is aggravated by exposure to normal airplane conditions, is this an "accident" for which the airline is responsible? Olympic Airways admitted that the cigarette smoke caused the death but affirmed that no "accident" took place because the flight attendant who refused to reseat Mr. Husain simply did not act. However, the Court made a "flexible interpretation" of the term "accident". In its view, the flight attendant's refusal to reseat Husain was a link in the causal chain leading to his death and the attendant's rejection of an explicit request for assistance could be deemed an "unusual or unexpected event or happening external to the passenger" (*Saks*). Thus, the airline should be liable for the death of Mr. Hanson.

It is difficult to understand how mere inaction can constitute an accident. However, the flexibility recommended by *Saks* was taken even further by the U.S. Second Circuit in *Wallace v. Korean Airlines*[11]. Brandi Wallace was sexually fondled by a fellow passenger while sleeping on a Korean Airlines international flight. She sued the airline to recover for the assault. In its judgment, the court, recognizing the flexibility called for by *Saks*, considered that the assault was "an unexpected or unusual event or happening that was external to the passenger". As such, it constituted an "accident" for purposes of Art. 17 of the Warsaw Convention and Wallace could achieve compensation for her damages.

[11] *Wallace v. Korean Airlines*, 214 F.3rd 293 (2nd Cir. 2000).

Husain decision is highly arguable, but *Wallace* is completely unacceptable and contrary to common sense. A sexual assault can by no means be considered an "accident". This kind of decision is certainly excessive because it risks "subjecting airlines to liability for any incident that occurs during flight"[12]. This is at odds with one of the main goals of the Warsaw Convention of 1929, which was, apart from providing a uniform system of liability for international air disasters, to foster the growth of the infant airline industry by limiting the liability of the airlines[13].

In my opinion, the most suitable interpretation of the term "accident" was made by the U.S. district court for the district of Puerto Rico in *García Ramos v. Transmeridian Airlines*[14]. A passenger was injured when an unidentified male passenger in the window seat attempted to exit the row and fell into her fracturing her arm. Following *Saks*, the court admitted that the damage had been caused by an "unusual or unexpected event external to the passenger". Nevertheless, the court disagreed with *Wallace* and found that because the accident was not caused by an abnormality in the aircraft's operation, the claim could not proceed. The notion that the accident must relate to the aircraft's operation comes from a treatise of Professor Goedhuis[15], the reporter of the drafting of the Warsaw Convention. To my mind, this is the most compatible interpretation with both the text and the purposes of the Convention. However, as has been illustrated with the cases of *Husain* and *Wallace*, other courts have proposed a wider interpretation of the term "accident". What is clear is that the plain text of the Montreal Convention "(...) provides no answer to the question of whether the accident has to be related to the inherent risks of aviation or if any accident

[12] Dempsey & Milde, supra note 5, 212.
[13] *Trans World Airlines v. Franklin Mint Corporation*, 466 U.S. 243 (1984).
[14] *García Ramos v. Transmeridian Airlines*, 385 F. Supp. 2nd 137 (D.P.R. 2005).
[15] Daniel Goedhuis, *National Air Legislations and the Warsaw Convention*, The Hague, Martinus Nijhoff, 1937, 200.

triggers the carrier's liability"[16]. The jurisprudence will therefore continue to be of major relevance.

4. Injuries for which the carrier is liable. What is the meaning of "bodily injury"?

A) **Mental anguish unaccompanied by physical injury**

The main controversy on this issue has been whether the Convention allows recovery for mental injury caused by an accident or not. The landmark case is *Eastern Airlines v. Floyd*[17]. On a trip from Miami to the Bahamas, shortly after takeoff the plane lost power in all three engines and began a sharp descend. The flight crew told the passengers that there was no alternative but to ditch the plane in the ocean. Fortunately, the pilots managed to restart the engines and land back at Miami. The passengers filed separate complaints seeking damages solely for mental distress arising out of the incident.

After interpreting the text, the *travaux préparatoires* and the purposes of the Warsaw Convention, the U.S. Supreme Court found that there is no evidence supporting the thesis that "bodily injury" embraces emotional injuries. Thus, the Court decided that carriers could not be held liable under Article 17 for mental injuries that did not accompany bodily injuries. However, the Supreme Court "express[ed] no view as to whether passengers [could] recover for mental injuries that [were] accompanied by

[16] Irene Larsen, *Regime of Liability in Private International Air Law – with Focus on the Warsaw System and the Montreal Convention of 28 May 1999*, available at http://www.rettid.dk/artikler/speciale-20020002.pdf (last visited 18th January 2009), 23.
[17] *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991).

physical injuries". This dictum left the door ajar for claims in cases where both types of damages were suffered.

In this extremely important judgment, the U.S. Supreme Court did not embrace the Israeli Supreme Court's expansive reading of Article 17, in a case[18] involving the hijacking of an Air France plane en route from Israel to Paris whose passengers were subjected to great emotional distress for several days before they were rescued by Israeli commandos. In its judgment, the Court held that *"il est souhaitable, du point de vue de ladite politique jurisprudentielle, d'interpréter extensivement l'article 17 de la Convention, de sorte qu'il permette d'allouer une indemnisation, également pour le seul préjudice psychique"*. However, this broad interpretation was expressly rejected by the U.S Supreme Court in *Floyd* and has not been embraced by any other court. Mental harm (like shock, anxiety, fear, distress, grief or other emotional disturbances) unaccompanied by physical harm is not recoverable.

B) **Mental anguish accompanied by physical injury**

1- Mental anguish caused by physical injury

Some cases have dealt with mental anguish caused by physical injury resulting from an accident. In *Ehrlich v. American Airlines*[19], passengers were evacuated from the plane after landing and had to jump approximately six to eight feet to the ground. The Ehrlichs alleged they had suffered not only bodily injury, but also emotional injury such as fear of flight, nightmares and trouble sleeping. In addition, in *Jack v. Trans World*

[18] *Air France v. Teichner*, 39 Revue Française de Droit Aerien 232, 23 Eur. Tr. L. 87 (Israel 1984).
[19] *Ehrlich v. American Airlines*, 360 F.3rd 366 (2nd Cir. 2004).

Airlines[20] the plane experienced an aborted takeoff, crash and fire that completely destroyed the aircraft. Fortunately, all passengers survived, but some suffered minor physical injuries and many were traumatized by the accident. The interpretation of the courts in these kinds of cases has been that only emotional distress flowing from the bodily injury (but not from the accident) is recoverable. For instance, a passenger may recover for fear related to his broken leg, but not for fear related to the plane crash. This interpretation remains consistent with both the purposes of the Warsaw Convention and *Floyd*.

2- Physical injury caused by mental anguish

Finally, there have also been cases where emotional distress has been the causal link between the accident and the bodily injury. *King v. Bristow*[21] involved a passenger on board a helicopter that took off from a floating platform in the North Sea in poor weather. During the flight, the helicopter's two engines failed and it landed on the helideck amidst smoke and panic. Mr. King was able to disembark without suffering any physical injury but developed post-traumatic stress disorder (PTSD) and, as a result, suffered an ulcer disease.

The House of Lords held that if the passenger can prove via qualified expert evidence that the condition complained of (in this case, the PTSD) has caused an adverse physical symptom (as the ulcer in Mr King's case), or that the psychological condition was the direct expression of physical changes to the structure of the brain caused by the accident, he will have a claim under the Convention.

[20] *Jack v. Trans World Airlines*, Inc., 854 F. Supp. 654 (N.D.Cal.1994)
[21] *King v. Bristow Helicopters LTD*, [2002] UKHL7.

Nonetheless, this judgement may have opened the Pandora's Box of liability for any case so long as there are any physical manifestations of mental injuries like weight loss, sleeplessness, or physical changes in the brain resulting from PTSD. These kinds of injuries should not be compensable under the Convention[22]. Otherwise, "(...) a passenger frightened by air turbulence could recover on the basis of his increased heart rate"[23]. The rule from *Floyd* that passengers cannot recover under Art. 17 of the Convention for purely psychological injuries "(...) would thus be converted into an easily satisfied pleading formality"[24].

5. Conclusion

As time passes, we will see if the courts interpret these legal terms in a uniform way consistent with the Montreal Convention's main purpose. In any case, it appears that while doing so they will have to overcome two significant hurdles.

As mentioned[25], the Montreal Convention is intended to be uniform and exclusive. This means that when it applies, passengers will have to prove that they suffered an "accident" that caused them a "bodily injury". If they fail to do so they will not be entitled to recover anything under the Montreal Convention. Thus, they will not be able to obtain any compensation at all. Courts cannot provide a remedy according to domestic rules because this would undermine the Convention's purpose of having uniformity of law. However, the principle of exclusivity of the remedy will imply that passengers who have suffered damage will not always be able to recover. This is contrary to the principle, present in most Member States, that where there is a wrong

[22] This was the judgement of the U.S. Court of Appeals for the Eighth Circuit in *Lloyd v. American Airlines*, 291 F.3rd 503 (8th Cir. 2002).
[23] *Alvarez v. American Airlines, Inc.*, 2000 WL 145746 (S.D.N.Y., Feb 08, 2000).
[24] *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001).
[25] See supra note 7.

there must be a remedy. Thus, it is likely that courts will try to interpret broadly the terms "accident" and "bodily injury" (as happened for example in *Husain* and *Wallace*) in order to leave no passenger without a remedy. This may put the Convention's purpose of uniformity of law in jeopardy.

Secondly, the Warsaw Convention was drafted in French[26] and was authentic only in this language. This helped to attain a uniform interpretation of the law because when a legal term was not clear the courts worldwide had to consider the French version of the Warsaw Convention. However, the last paragraph of the Montreal Convention states that it was done "in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic". Despite the fact that this is a politically correct option that may "satisfy national and language pride"[27], as English was the working text during the drafting of the Convention and is also the most important language in international aviation, it would have been much better to choose the English text as the only official version in order to facilitate the principal goal of the Convention: uniformity of law across jurisdictions. The future will probably show that having six "equally authentic" texts is completely inefficient. However, it may also provide "fertile hunting-grounds for polyglot lawyers"[28], which is certainly not that bad for our profession.

[26] The *Warsaw Convention*, supra note 4, states that in its Art. 36.
[27] Bin Cheng, "The Labyrinth of the Law of International Carriage by Air – Has the Montreal Convention of 1999 Slain the Minotaur?" 50 *Zeitschrift für Luft- und Weltraumrecht* 155, (2001), 172.
[28] Ibid.