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Aeronautics: Warsaw Convention

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RECENT DEVELOPMENTS

AERONAUTICS: WARSAW CONVENTION—*Warsaw v. Trans World Airlines, Inc.*, 46 U.S.L.W. 2327 (E.D. Pa. 1977).

The United States District Court for the Eastern District of Pennsylvania has held that an airline passenger who suffers a hearing loss as a result of routine repressurization of an aircraft cabin during landing cannot recover from the airline under Article 17 of the Warsaw Convention, as modified by the Montreal Agreement, which established carrier liability for injuries proximately caused by some "accident" occurring on board the plane or during the process of embarkation or debarkation.

The passenger had an upper respiratory tract infection at the time of the flight in question, but was otherwise in good health. His level of hearing was essentially normal although his left ear had been operated on 13 years earlier. The passenger's left ear became blocked during the aircraft's descent for landing and he had completely lost the hearing in his left ear by the time he arrived at the air terminal. Subsequent medical treatment failed to restore his hearing and his condition was diagnosed as permanent damage to the nerve of the left inner ear. The airline was sued by the passenger under the provisions of the Warsaw Convention, as modified by the Montreal Agreement, for damages as a result of his hearing loss.

The question before the court concerned a judicial interpretation of an article of the Warsaw Convention.[1] Article 17 of the Convention provides: "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger, if the accident which caused the damage there sustained took place on board the aircraft or in the course of any operation of embarking or disembarking."[2] The Montreal Agreement[3] made no changes governing the pre-conditions for liability under Article 17. The Agreement did, however, waive the

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[1] In 1934, the United States became a party to the Warsaw Convention, a treaty subsequently signed by 107 nations, applying to "all international transportation of persons . . . performed by aircraft for hire. . . ." Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (effective for the United States Oct. 29, 1934), art. 1(1).

[2] *Id.* art. 17.

[3] Approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed. Reg. 7302 (1966). The Montreal Agreement applies to international flights which involve a location in the United States.

defenses formerly available under Article 20(1)[4] and create an absolute liability standard for injuries proximately caused by some "accident" occurring on board the aircraft, or during the embarkation or debarkation process.

After determining that the plaintiff's hearing loss was proximately caused by the routine repressurization of the cabin during descent, the court turned to the issue of whether the repressurization was an "accident" under the provisions of Article 17. It was noted by the court that a factual situation in which an injury was caused by a normal and routine flight procedure had not previously been dealt with by a federal or state court.

Although the specific question of an airline's liability for passenger injuries proximately caused by routine flight procedures was one of first impression, it had previously been determined that the Montreal Agreement imposed liability on carriers for damages resulting from circumstances beyond their control such as sabotage, hijacking and terrorist attack.[5] In *Husserl v. Swiss Air Transport Co., Ltd.*,[6] the court held that the Montreal Convention covered hijacking and that acts of persons other than the airline or the passenger were comprehended by the treaty. Liability was imposed upon the airline although identifiable independent acts caused the injury to the passenger.

A terrorist attack upon passengers waiting to complete preboarding security checks was held by the court in *Evangelinos v. Trans World Airlines, Inc.*,[7] to fall outside the coverage of Article 17. The reasoning of the *Evangelinos* court was that the use of the term "embarkation" in Article 17 is limited to a geographically and temporally circumscribed space.

The *Warsaw* court observed that the term "accident" in Article 17 had been held in *Chutter v. KLM Royal Dutch Airlines*[8] to embrace an action brought by a passenger who was injured by stepping out of an airplane while the loading ramp was being removed. The *Chutter*

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[4] Article 20(1) provided that a carrier would have as a defense that it had: "taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[5] *See* Husserl v. Swiss Air Transport Co., Ltd., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) and Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95 (W.D. Pa. 1975). *See also* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 560 (1967).

[6] 351 F. Supp. 702 (S.D.N.Y. 1972).

[7] 396 F. Supp. 95 (W.D. Pa. 1975).

[8] 132 F. Supp. 611 (S.D.N.Y. 1955).

court stated that the incident was an "accident" in that it occurred either on the airplane or in the embarkation process.

The common thread running through all of the cited cases was seen by the *Warsaw* court to be the fact that the proximate cause of each of the injuries was an "out-of-the-ordinary" unanticipated event. Whether the injury resulted from negligence, an unclassifiable occurrence causing a crash, or the intentional acts of third parties, the common characteristic was an event which in each case was not within the normal and preferred mode of operation for the flight. However, the *Warsaw* court was faced with an injury resulting from a change in cabin pressure and such repressurization is a part of the normal, anticipated and established method of procedure on a commercial airline flight. The court concluded that the routine repressurization of a jet aircraft cabin during its descent from high altitude if performed in the ususal and expected manner with no complications or external disruptions, is not within the normal interpretation given by federal courts to the term "accident" under the provisions of Article 17 of the Warsaw Convention, as modified by the Montreal Agreement.

Thus, *Warsaw v. Trans World Airlines, Inc.* has achieved two basic results. First, it has determined that an event occurring on an aircraft cannot be termed an accident if it is a normal and expected occurrence. An event must be unusual or unexpected to constitute an accident and is not an accident if it arises exlusively from the passenger's state of health. Second, it has held that an injury which results from normal, expected and necessary changes in the operation of the aircraft, when such changes were performed by the plane's crew in the usual and prudent manner, is not covered by the presently effective version of the Warsaw Convention, as amended by the Montreal Agreement.

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