

CAUTION, YOUR CIVIL LIBERTIES MAY HAVE SHIFTED DURING THE FLIGHT: JUDICIAL INTERPRETATIONS OF THE WARSAW CONVENTION

INTRODUCTION

How much authority should flight attendants have to ensure safety on a plane? How liable should an airline be for not protecting its passengers as they travel? What is the balance between safety and personal freedom?

When Dr. Neville Gibbs asked a question, he was detained because a flight attendant was “having a bad day” and did not like the way “black people” were behaving, yet the court determined that the airline could not be held liable for its employee.¹ Two men held hands on an American Airlines flight and were threatened with detention because the crew members did not approve.² An Australian man was not allowed to fly because of a political t-shirt he was wearing.³ Airlines operating international flights have absolute freedom to discriminate against their passengers based on race, language, religion, ethnicity, sexual orientation, or even clothing, because from security to arrival, passengers are barred

1. *Gibbs v. American Airlines, Inc.*, 191 F. Supp. 2d 144, 145 (D.D.C. 2002). On February 6, 1999, Dr. Gibbs, an African American, boarded a plane from Miami to Trinidad. *Id.* A flight attendant came down the aisle distributing immigration cards. *Id.* Gibbs’ companion asked the attendant how things were going, and she replied that it had been a “rough day” and “commented in an allegedly ‘derogatory’ tone of voice that the ‘black people’ on the plane were misbehaving, and that her white colleagues were asking her why the ‘black people’ were behaving that way.” *Id.*

Dr. Gibbs asked his companion and the flight attendant what they were discussing, and the flight attendant “allegedly became ‘very confrontational’ and snapped, ‘That’s exactly what I’m talking about!’ She then approached Dr. Gibbs, leaned in close to his face, and shook her finger at him while loudly repeating, ‘That is none of your business.’ Dr. Gibbs told [her] she was being rude, to which she allegedly responded in a heated voice, ‘I could put you off this plane!’”

Id. The aircraft’s purser warned Gibbs for violating 14 C.F.R. § 91.11. The Captain of the plane ordered Dr. Gibbs removed from the plane. *Id.* at 146. “The Captain never spoke to Dr. Gibbs personally, but ordered him off the plane because he felt ‘he had to back his crew.’” *Id.* at 146 n.3.

Dr. Gibbs was detained by the police in the terminal and questioned about his conduct on the plane. After Dr. Gibbs explained his version of the incident, the police decided that no criminal activity had occurred and released him. . . . Dr. Gibbs alleged common law tort and contract claims, as well as statutory discrimination claims under Section 1981 and the Federal Aviation Act, 49 U.S.C. § 41310.

Id. at 146. The court found that this cause of action was preempted. Because Dr. Gibbs did not receive a physical injury, he cannot recover under the Warsaw Convention.

2. Collins, *infra* note 106.

3. EL PAIS, *infra* note 122.

from recovering from airlines for claims of discrimination, civil rights violations, and mental injury.⁴

Since the terrorist attacks on September 11, 2001, the United States government, airports, and the airlines have drastically changed their security policies.⁵ Critics argue that the policies are racist, discriminatory, and subjective.⁶ Cases report that flight attendants on international flights dominate the air with threats, arrests, and detainment of passengers, yet when these determinations are unfounded, passengers have no means of recovery.⁷ Despite the initial decrease in flight capacity after the terrorist attacks, many Americans now choose to travel internationally.⁸ 2006 reports indicate that international travel is continuing to grow and is at record capacity.⁹

4. *El Al Israel Airlines, LTD v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999).

5. 49 U.S.C.A. § 44903 (Air Transportation Security effective August 3, 2007). The September 11, 2001, attacks led to increased security measures and a complete overhaul of the flying process.

The most visible security changes may be on the airplanes themselves . . . many planes have installed bulletproof, locked cockpit doors, securing the pilot and flight crew from the rest of the plane. There have also been attempts to install CCTV systems as a cabin monitoring system . . . The U.S. Senate last week passed a bill that includes provisions to arm pilots in the cockpit. The House of Representatives passed a similar bill allowing the creation of a firearms training program for pilots who volunteer as special deputies.

The Transportation Security Administration was created in 2001, and it initiated mandatory upgrades in baggage screening technology and procedures. Transportation Security, Airport Security Since 9/11: How Far Have We Come?, http://transportationsec.com/ar/security_airport_security_far/index.htm (last visited Sept. 2, 2007). See also *infra* notes 10–11.

6. Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes and Predicting the Future*, 58 RUTGERS L. REV. 195, 241 (2005) (arguing that fears of slippery slopes in the war on terror are justified); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19, 54 (2004); Andrew Hessick, *The Federalization of Airport Security: Privacy Implications*, 24 WHITTIER L. REV. 43, 68 (2002); Amnesty International USA, *infra* note 13.

7. *Gibbs*, 191 F. Supp. 2d 144, *supra* note 1; *infra* note 54.

8. "The U.S. Department of Commerce reports that while international arrivals to the U.S. declined 4% in 2003 to a total of 40.1 million visitors, international visitation will increase by 16% from 2002 to 2007 to 45 million international visitors." Judy L. Randall & Dr. Larry D. Gustke, Top Ten Travel and Tourism Trends, 2004 13, <http://www.rtmnet.com/Portals/1/2004TravelTrends.pdf>.

In the August preceding 9/11, the airline industry experienced what was then a record high in the number of airline passengers for a given month when 65.4 million travelers took to the air. After 9/11, that number trailed off dramatically, and it took nearly 3 years, until July 2004, for the industry to match and finally surpass the pre 9/11 levels. But the number of available seats—an industry measure of capacity—in July 2004 was just 98.3% of its August 2001 peak. By July 2005, the number of airline passengers had reached 71 million.

BUREAU OF TRANSPORTATION STATISTICS, ISSUE BRIEF 13: AIRLINE TRAVEL SINCE 9/11 (Dec. 2005), http://www.bts.gov/publications/issue_briefs/number_13/html/entire.html.

9. Airports Council International reports that airports held a record capacity of 4.4 billion passengers in 2006. Robert Evans, *World Airports Saw Record Passengers in 2006*, July 18, 2007, <http://www.reuters.com/article/environmentNews/idUSL1886076320070718?feedType=RSS&rpc=22&sp=true>.

Whether vacationing with family or traveling for a business meeting, ease, efficiency, and price make flying the most appropriate form of international travel. Some passengers are comforted by the new security measures implemented by the Department of Homeland Security, while others are now scrutinized by airport security and other passengers.¹⁰ The government has even asked the public to take a more active approach to airport security by paying extra attention to those around them and by observing the color warnings of the Homeland Security Advisory System.¹¹ The media has covered failures in past security methods for protecting travelers, and it has highlighted the success of passengers in protecting themselves.¹² Passenger, government, and air carrier activism has led to questions regarding procedural limits and legal liability of the airlines in protecting passengers.¹³

10. McDonnell, *supra* note 6 at 53. Since 9/11, the United States government has created measures to help private citizens be more aware of potential threats to their security. For example, the government implemented a color-coded threat level campaign in March 2002. The protective measures were created to

reduce vulnerability or increase response capability during a period of heightened alert. . . . It seeks to inform and facilitate decisions appropriate to different levels of government and to private citizens at home and at work The Homeland Security Advisory System shall be binding on the executive branch and suggested, although voluntary, to other levels of government and the private sector. There are five Threat Conditions, each identified by a description and corresponding color. From lowest to highest, the levels and colors are:

Low = Green;
Guarded = Blue;
Elevated = Yellow;
High = Orange;
Severe = Red.

Homeland Security Presidential Directive 3, 38 WEEKLY COMP. PRES. DOC 394 (Mar. 12, 2002); available at <http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html>.

11. Remarks by Homeland Security Secretary Michael Chertoff on August 10, 2006, following alleged terrorist activities in Britain: "As always, we ask the American public to remain aware and vigilant, and report any activity that they think is suspicious to local authorities or other appropriate law enforcement agencies." Michael Chertoff, Homeland Security Secretary, August Press Conference (Aug. 10, 2006) (transcript available at http://www.tsa.gov/press/speeches/dhs_press_conference_08012006.htm).

12. Two films describe the success of passengers on flight United 93 in preventing terrorists from crashing their plane into a populated building. UNITED 93 (Universal Pictures 2006); *Flight 93* (A&E Television Networks broadcast Jan. 30, 2006); See Sean Smith & Joe Chebaton's, *A Dark Day Revisited*, NEWSWEEK, Apr. 10, 2006, at 60, available at <http://www.msnbc.msn.com/id/12112802/site/newsweek/>; See Airport Technology, Taking Pride in Passenger Protection, <http://www.airport-technology.com/features/feature563/>; See also Heather MacDonald, *What We Don't Know Can Hurt Us*, CITY JOURNAL, http://www.city-journal.org/html/14_2_what_we_dont_know.html (last visited Feb. 16, 2007).

13. Hessick, *supra* note 6 at 48. Private citizens have been subjected to limits on liquids and baggage, as well as pat downs and random security screenings, since September 2001. Amnesty International reports incidents of passengers who feel they are the target of security screenings because of their race. Amnesty International USA, *Threat and Humiliation* (2004); see also Bill McGee, *When*

In choosing to travel, passengers do not know what they might encounter when they purchase their tickets.¹⁴ There are many consequences to one's civil rights in choosing to fly "the friendly skies" over the United States.¹⁵ The consequences to one's civil rights are more drastic when choosing to fly internationally.¹⁶

The Convention for the Unification of Certain Rules Relating to International Transportation by Air,¹⁷ more commonly known as the Warsaw Convention, was drafted in 1929 and governs an international air carrier's liability for "injury and damage" to passengers and baggage.¹⁸ The Warsaw Convention is a "comprehensive international treaty governing liability of carriers in all international transportation of persons, baggage, and goods."¹⁹ The main objectives of the Warsaw Convention were to "limit an air carrier's liability in the event of disasters," to "achieve uniformity in documentation for transportation," "to avoid conflict of law problems," and to "facilitate international travel."²⁰

Does Airline Security Go Too Far?, USA TODAY, http://www.usatoday.com/travel/columnist/mcgee/2004-05-11-mcgee_x.htm (last visited Sept. 9, 2007) (discussing the Computer Assisted Passenger Prescreening System (CAPPS II) and the Registered Traveler Pilot Program (RTPP)).

14. Many passengers do not anticipate the scrutiny they may face because of their social, religious or cultural traditions. CNN.com, Airline Checks Claim of "Muslim While Flying" Discrimination, <http://www.cnn.com/2006/US/11/21/passengers.removed/index.html> (last visited Sept. 9, 2007).

15. See Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2152 (2006); see also Airlines just don't get it yet, Apr. 2, 2007, <http://www.msnbc.msn.com/id/17905401/>.

16. See *Tseng*, 525 U.S. 155 (1999) (discussing a passenger who was subjected to subjective security searches and was barred from suing under domestic laws because of complete preemption of the Warsaw Convention).

17. 49 Stat. 3000 (Oct. 12, 1929) [hereinafter the "Warsaw Convention"].

18. *Id.* The Warsaw Convention is divided into five chapters. Articles 1 and 2 in chapter one explain that the Convention governs international transportation between two contracting parties. Chapter two includes Articles 3 through 16, which explain the requirements of the transportation documents. Chapter three explains the liability of the carrier. Article 17 states that:

the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. Article 18 expresses the air carrier's liability for baggage. Articles 19 through 30 further explain liability of the air carrier. Chapter four, Article 31, expresses the provisions of combined transportation. Chapter five, Articles 32–41, expresses the final general provisions and application of the Convention. *Id.*

19. *Carey v. United Airlines*, 255 F.3d 1044, 1047 (9th Cir. 2001). The Convention "arose out of a perceived need to provide a fledgling industry with a uniform set of rules that would govern accidents" and provide stability. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315–16 (1st Cir. 1995). The United States acceded to the Warsaw Convention on October 29, 1934. Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. U. INT'L L. REV. 891, 892 (2001).

20. *Id.* at 892.

While many aspects of the Convention have been modified throughout the years to adapt to modern air travel,²¹ Article 17, which states the standard of liability for claims under the Convention, remains unchanged.²² This Note examines the history and development of Articles 17 and 24 of the Warsaw Convention as they relate to air carrier liability for injuries in international travel. This Note analyzes the evolution and interpretation of Articles 17 and 24, and the Convention's jurisdiction over all international air travel claims resulting in "injury."

This Note suggests that courts, especially the United States Supreme Court, have interpreted and applied Article 17 inappropriately by limiting its scope to only physical injuries. Further, this Note submits that the Court erred by expanding the exclusivity clause of Article 24, thereby preventing domestic laws from providing relief for incidents not fitting the definition of "injury" or for incidents that do not take place on board but take place within the broad range of "embarking" and "disembarking."

Currently, the Supreme Court allows air carrier agents to police international flights with unlimited authority free from suit, because courts have narrowly construed accidents and injuries to protect air carriers from liability and deny relief to citizens for legitimate non-physical injuries.

This Note asserts that the Convention should be amended to allow air carrier liability for damages resulting from willful employee misconduct, including civil rights violations, mental injuries, and emotional distress. This Note recommends that the United States maintain the Convention, but also call for a new protocol at an international conference, as done in the past, to modify liability definitions to appropriately provide comprehensive coverage for international air travel. Alternatively, Congress should legislate greater protection for its citizens by providing multiple means of recovery against air carriers.

HISTORY

The Warsaw Convention established a uniform set of rules for international air travel. It was the result of global conferences held in Paris in 1925 and 1929 addressing international conflicts that resulted from

21. *Id.* at 893. At the time, the Warsaw Convention was quite forward-thinking in its effort to promote uniformity and ensure stability to the airlines. Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967). Liability limits have been raised and modified with The Hague Protocols and Montreal Protocols. See Int'l Air Transp. Ass'n, 8 THE LIABILITY REPORTER (Feb. 2005), available at <http://www.iata.org/NR/rdonlyres/2EE7CD58-1C6B-429F-9431-EAFDDFAEA0AB/0/2005LiabilityReporter.pdf>.

22. Weigand, *supra* note 19, at 893.

varying forms of travel documents and questions regarding forum and conflict of laws, because international travel crosses jurisdictions.²³ Air travel, especially international air travel, was in its infancy.²⁴ At the 1929 conference, the Comité International Technique d'Experts Juridiques Aériens (CITEJA), presented a draft of the Warsaw Convention, which created a fault-based liability scheme with a monetary limit on a passenger's recovery in case of accident resulting in injury.²⁵

The Convention sought uniformity among the various customs and legal systems of international travelers²⁶ by limiting carriers' liability in case of accident.²⁷ The liability scheme allowed a passenger to recover damages for any injury or death if "(a) the claimant was a passenger of an international flight;²⁸ (b) the claimant suffered an 'accident';²⁹ (c) the accident occurred aboard the international flight or in the course of embarking or disembarking the international flight;³⁰ and (d) the accident caused the passenger to suffer 'death or wounding'"³¹

23. Lowenfeld & Mendelsohn, *supra* note 21, at 498–99.

24. Weingard, *supra* note 19, at 899. Air travel was not accessible for all classes of people. Today, because of the development of newer technologies which allow for larger capacity seating and more fuel efficiency, routes have established competitive fares which allow all classes of people to travel.

25. Weigand, *supra* note 19, at 897–98:

The Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third parties must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory.

Id.

26. Lowenfeld & Mendelsohn *supra* note 21, at 498. *See also* Weigand, *supra* note 19, at 898 ("Under common law, the carrier is subjected to a heightened duty of care Under the civil law system, a carrier's duty to passengers is a strict contractual duty to safely transport.").

27. One of the main concerns of the Warsaw Convention was the fear of bankruptcy of air carriers in case of a crash. Lowenfeld & Mendelsohn, *supra* note 21, at 499.

28. International flights are a single operation, including layovers during the international journey. A Denver—to—Chicago flight qualified as international transportation under the Warsaw Convention because: the purpose of the plaintiff's layover in Denver was to make a connection after a flight from London; the tickets were sold by the same travel agent; and the parties had knowledge of the trip as a single operation. *Robertson v. American Airlines, Inc.*, 401 F.3d 499, 501–02 (D.C. Cir. 2005).

29. The holding in *Saks* defined an accident as an "unexpected or unusual event that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985).

30. American case law has strained to determine what constitutes an accident that takes place "in the course of any operation" or "embarking" or "disembarking." The courts have not been uniform in construing "in the course of . . . embarking and disembarking" as used in Article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting. 1 AVIATION TORT AND REG. LAW § 11:25. There are three factors which are relevant in determining liability under Article 17 within the scope of "embarking" or "disembarking": (1) location of the accident; (2) the activity in which the injured person was engaging; and (3) the control by defendant of such injured person at the location and during the activity taking place at the time of the accident alleged to be in the course of any of the operations of embarking, and bear significantly

Air carriers benefited from the Warsaw Convention because their liability was limited to approximately \$8,300 United States dollars at the time.³² The only concessions the Convention gave to passengers were Articles 23 and 20.³³ Article 23 rendered null and void any additional provision tending to relieve the carrier of liability or to fix a limit lower than the one provided in its text. “Article 20 shifted the burden of proof to the carrier, who was required to show that it had taken all necessary measures to avoid damages.”³⁴

The Convention entered into force in February 1933.³⁵ The United States was only an observer at the Warsaw Conference,³⁶ but in 1933, the Commerce Department requested that the Secretary of State recommend that the United States join it, because it favored air carriers with low liability limits and it created market uniformity.³⁷ In support of the Convention, Secretary of State, Cordell Hull, recommended in 1934:

upon the tests of activity and location. *Evangelinos v. Trans World Airlines*, 550 F.2d 152, 157 (3d Cir. 1977).

31. The Court concluded that Article 17 allowed recovery “when an accident has caused a passenger to suffer death, physical injury, or physical manifestation of injury.” *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

32. The Warsaw Convention was written in French, and it used French currency in determining the liability limit. The limit was 125,000 “Poincare francs,” which was low even in 1929, so airlines could flourish and to prevent bankruptcy in case of a single catastrophic accident. Lowenfeld & Mendelsohn, *supra* note 21, at 499–500.

33. “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.” *Supra* note 17.

34.

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Id. This standard shifted the burden of proof to the air carrier, which was seen as a balance to the low liability limit. Because passengers would be limited in recovery, they would have a concession for not having the burden to prove the fault of the air carrier, unless the carrier could demonstrate that all reasonable steps were taken. Lowenfeld & Mendelsohn, *supra* note 21, at 500.

35. According to Article 37, the Warsaw Convention would become effective ninety days after ratification by five of the High Contracting Parties; Spain, Brazil, Yugoslavia, and Romania signed initially, followed by France, Poland, and Latvia all on November 15, 1932, and the Convention entered into force on February 13, 1933. Great Britain and Italy ratified it on the following day, and by the end of 1933 twelve countries were members. Lowenfeld & Mendelsohn, *supra* note 21, at 501–02.

36. *Id.* at 502.

37. In November of 1933, the Commerce Department wrote to the Secretary of State:

The Aeronautics Branch has made a study of the Treaty drafted and approved at Warsaw and has contacted a number of air transportation operators on the subject. All United States

[T]he principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but . . . it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.³⁸

The United States “deposited its instrument of adherence” to the Warsaw Convention on July 31, 1934, and President Franklin D. Roosevelt proclaimed it ninety days later.³⁹

THE PROTOCOLS

The Warsaw Convention was not perfect. Around the world, critics immediately debated the merits of the low liability limit benefiting the air carriers.⁴⁰ A diplomatic conference commenced at The Hague in September of 1955 to discuss amending the Convention.⁴¹ Arguments were made to raise the carrier liability limit in Article 22 and to modify the willful misconduct standard in Article 25.⁴² The United States sought to increase the limit on carrier’s ordinary negligence liability to \$25,000, but settled for \$16,600.⁴³ The United States did not originally sign The Hague Protocol but did so on June 28, 1956.⁴⁴

operators conducting international air transport services strongly favor adherence to the Convention by the United States The Aeronautical Chamber of Commerce of America, the Trade Association Organization representing ninety percent of all United States transport operators and one hundred percent of those operating internationally, strong favors participation in the Convention. No airline operating at the present time has indicated opposition to adherence to the Convention by the United States.

Id. at 502.

38. *Id.* at 499–500.

39. *Id.* at 502. The State Department transmitted approval to the President, who then submitted the Treaty to the Senate. The Senate consented without debate on June 15, 1934. *Id.*

40. Conferences regarding the Warsaw Convention “were held in Cairo in 1946, Madrid in 1951, Paris in 1952, and Rio de Janeiro in 1933.” *Id.* at 502. In Rio de Janeiro, it was recommended the liability be raised to a \$13,000 limit. *Id.* at 505.

41. *Id.* at 504–05.

42. Negotiations at The Hague clarified the Convention, and the participants agreed that the carrier would be subjected to unlimited liability if the plaintiff could prove “that the damage resulted from an act of omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.” *Id.* at 505.

43. The United States proposed various amendments to the Convention, including the addition of legal fees to the award. By a vote of 22–14, The Hague Protocol created the \$16,600 ordinary

The 1955 Hague Protocol did not solve all of the Convention's perceived problems, nor did it end the liability limit debate even after doubling the amount.⁴⁵ After the Hague Protocol, conventions occurred in Guadalajara in 1961, Montreal in 1966, Guatemala City in 1971, and again Montreal in both 1975 and 1999.⁴⁶

negligence limit, doubling the amount agreed upon at Warsaw. *Id.* at 506–07.

44. *Id.* at 516. A lower liability limit than the United States had wanted, combined with the United States' reluctance to have a treaty affect private claims in the United States, caused the U.S. delegation to wait to sign the Protocol. The U.S. Ambassador to Poland finally did so in 1956. *Id.* at 511–12.

45. See Weigand, *supra* note 19, at 904–05. Five more conventions were held and many of the contracting states considered implications of the Convention in their domestic laws. *Id.* at 902–03.

46. The Guadalajara Convention was supplementary to the Warsaw Convention. *Id.* at 903 n.60. The Montreal Convention in 1966 was an interim decision to raise the liability limits. *Id.* at 902–03. The Guatemala City Protocols of 1971 sought to amend the Warsaw Convention with:

(a) an increase in the liability limits to approximately \$100,000; (b) absolute liability for injury or death up to the \$100,000 limit which could not be overcome by a showing of willful misconduct;

(c) recovery of litigation costs including attorneys' fees, if allowed for by the national law and if the air carrier refused to settle a claim within six months of receiving notice; (d) jurisdiction where the passenger was domiciled or had a permanent residence, if the carrier had a place of business there; and (e) authority by any country to create a supplemental compensation plan funded by passenger contributions in amounts exceeding the absolute limit of \$100,000.

Id. at 905–06 (internal footnotes and citations omitted).

The Montreal Protocols in 1975 replaced the French franc with Special Drawing Rights (SDR). *Id.* at 906 n.81 and accompanying text. The SDR was created by the International Monetary Fund and was based on the hard currencies of the United States, Germany, the United Kingdom, Japan, and France. *Id.* n.81. The Montreal Protocols of 1975 amended "Article 25's 'willful misconduct' term to an 'act or omission' of the carrier or its agents committed 'with intent to cause damage or recklessly and with knowledge that damage would result' as the proof needed to escape the liability limit." *Id.* at 906. The Protocols clarified Article 24 by precluding passengers from bringing claims under local laws when they could not establish air carrier liability under the Convention. *Id.* at 906–07. The Montreal Protocols of 1999 initiated unlimited liability. *Id.* at 909. The Warsaw Convention limited carrier liability to approximately \$8,300 in case of death or injury to passengers. *Id.* at 902. The Montreal Protocols of 1999 introduced a two-tier liability system. *Id.* at 908. The first tier included strict liability of up to \$100,000 SDRs (which at the time was approximately \$135,000 U.S. dollars) irrespective of the carrier's fault. *Id.* at 908–09. The second tier is based on principles of fault of a carrier and has no limit of liability. *Id.* at 909.

The Montreal Convention also includes the following new elements:

- (1) In cases of aircraft accidents, air carriers are called upon to provide advance payments without delay to assist entitled persons in meeting immediate economic needs with the amount of this initial payment subject to natural law and deductible from the final settlement;
- (2) The air carriers must submit proof of insurance, thereby ensuring the availability of financial resources in cases of automatic payments or litigation;
- (3) Legal action for damages resulting from the death or injury of a passenger may be filed in the country where, at the time of the accident, the passenger had his or her principal and permanent residence, subject to certain conditions;
- (4) Facilitation in the recovery of damages without the need for lengthy litigation; and
- (5) Simplification and modernization of documentation related to passengers, baggage, and cargo.

The International Aviation Transit Association initiated efforts to raise the monetary limits under the Warsaw Convention at the Montreal Convention of 1999.⁴⁷ The Montreal Protocols of 1999 created a liability scheme which raised the monetary limit to 100,000 Special Drawing Rights⁴⁸ and eliminated the willful misconduct component of Article 25.⁴⁹ The Montreal Protocols of 1999 became locally operative on November 4, 2003, ratified by sixty-two parties.⁵⁰ Although the United States ratified the Montreal Protocols, it exempted itself from Article 57.⁵¹

ARTICLE 17

The debate since the inception of the Warsaw Convention surrounds the low liability monetary limits, the difficulty of meeting the willful misconduct standard, and confusion about the application of domestic laws.⁵² With the exception of the Guatemala City Protocol in 1971, Article 17 has not been the focus of controversy or major discussion at any convention.⁵³ However, American courts and courts abroad have struggled to interpret and understand Article 17 because of the vagueness of the terms “accident” and “injury.”⁵⁴

The United States Supreme Court’s struggles in determining Article 17’s applicability have focused on defining “accident,”⁵⁵ “injury,”⁵⁶ and

J. C. Batra, *Modernization of the Warsaw System—Montreal 1999*, 65 J. AIR L. & COM. 429, 441–42 (2000).

47. Weigand, *supra* note 19, at 907.

48. *Id.* at 908; *see also supra* note 46.

49. *Id.* at 907. *See also* Batra, *supra* note 46, at 438.

50. Int’l Air Transp. Ass’n, *supra* note 21, at 5. The United States signed the Protocol on May 28, 1999, ratified it on September 5, 2003, and began enforcing it on November 4, 2003. *Id.* at App. A.

The instrument of ratification of the United States contains the following declaration: “Pursuant to Article 57 of the Convention, the United States of America declares that the Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes in respect to the functions and duties of the United States of America as a sovereign State.

Id. at n.6.

51. *Id.* at App. A.

52. Weigand, *supra* note 19, at 910.

53. *Id.*

54. *See* Zicherman v. Korean Air Lines Co., LTD., 516 U.S. 217, 222–23 (1996); Wallace v. Korean Air Lines Co., Ltd., 214 F.3d 293, 297 (2d Cir. 2000); Langadinos v. American Airlines, Inc., 199 F.3d 68, 70–71 (1st Cir. 2000); Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1518–19 (11th Cir. 1997); Potter v. Delta Air Lines, Inc., 98 F.3d 881, 883 (5th Cir. 1996); Lahey v. Singapore Airlines, Ltd., 115 F. Supp. 2d 464, 466 (S.D.N.Y. 2000).

55. Lowenfeld, *supra* note 21. The Supreme Court defined an “accident” as “an unexpected or unusual event or happening that is external to the passenger,” and further held that an “accident” cannot result from “the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft.” *Saks*, 470 U.S. at 405–06.

“willful misconduct” as referenced in Article 25.⁵⁷ Lower courts and courts throughout the world have also struggled to determine carrier liability when a clear accident or physical manifestation of an injury does not exist, but when there is clear airline misconduct.⁵⁸ In 1999, the United States Supreme Court considered Article 17, its application in Article 25, and the uniform applicability of the Warsaw Convention in *Tseng v. El Al Israel Airlines*.⁵⁹

Article 17 provides that air carriers are liable to their passengers in case of death or injury as a result of an accident that took place on the aircraft or while in the course of embarking or disembarking.⁶⁰ A cause of action brought under Article 17 requires the application of Article 24, which limits Article 17’s scope.⁶¹ The United States Supreme Court has considered Article 17 on seven occasions in order to fill the gaps in the Convention as drafted.⁶²

ARTICLE 17: DEFINING INJURY AND ACCIDENT

The United States Supreme Court first interpreted Article 17 in 1985, in *Air France v. Saks*.⁶³ *Saks* held that in order for an air carrier to be liable for damages, the injury suffered by the passenger must result from an “unexpected or unusual event which is external” to the passenger.⁶⁴ The

56. See *Floyd*, 499 U.S. 530. The Supreme Court held that Article 17 does not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of the injury. *Id.* at 534, 552.

57. *Prescod v. AMR, Inc.*, 383 F.3d 861, 870 (9th Cir. 2004). The act was intentionally done and was an unreasonable character in disregard of a risk known or so obvious that it must have been taken aware of which resulted in harm; it therefore, it was willful misconduct. *Id.*

58. *Potgieter v. British Airways*, 2005 (3) SA 133 (C) (S.Afr.).

59.

The Convention signatories, in the treaty’s preamble, specifically ‘recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier’ . . . [g]iven the Convention’s comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.

Tseng, 525 U.S. at 672.

60. Warsaw Convention, *supra* note 17.

61. Loryn B. Zerner, Note, *Tseng v. El Al Israel Airlines and Article 25 of the Warsaw Convention: A Cloud Left Uncharted*, 14 AM. U. INT’L L. REV. 1245, 1250 (1999) (discussing Article 17’s implications for Article 24 and how it was modified by the Montreal Protocols).

62. *Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004); *supra* notes 4, 29, 31, 54. See also *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 118 (1998); *Chan v. Korean Air Lines Co., Ltd.*, 490 U.S. 122, 126 (1989).

63. *Saks*, 470 U.S. 392.

64. *Id.* at 405.

Court defined “accident” and clarified that an incident must occur in order to cause the injury and the incident must be unexpected, but the Court failed to address which types of injuries would be actionable under the Convention.⁶⁵

In 1991, the United States Supreme Court defined “injury” under Article 17 to limit air carriers’ liability to an injury with a physical manifestation in *Eastern Airlines v. Floyd*.⁶⁶ In *Floyd*,⁶⁷ the Supreme Court considered the documentary records of the Warsaw Convention along with court commentators to conclude that the Convention did not consider liability for psychic injury or a broad interpretation of “*lésion corporelle*.”⁶⁸ The Court noted the French term’s English translation and the drafters’ intentions, due to the fact that most were from civil law countries.⁶⁹ The Court concluded that Article 17 did not allow recovery “when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.”⁷⁰ The Court did not make a determination about a passenger’s ability to recover for mental injuries accompanying physical injuries.⁷¹

We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries. . . . For example, lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers.

Husain, 540 U.S. at 405.

65. *Id.* at 406.

66. Justice Marshall held in *Floyd* that Article 17 does not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of the injury. *Infra* note 67.

67. 499 U.S. 530, 552 (1991).

68. *Id.* at 539. “*Lesion corporelle*” was translated to “bodily injury” and was determined to not include physical manifestations of psychic injuries. *Id.* at 536–37. The Court relied heavily on *Saks*, 470 U.S. 392:

When interpreting a treaty, we begin ‘with the text of the treaty and the context in which the written words are used’. . . . [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.’

Floyd, 499 U.S. at 534–35.

69. *Id.* at 537.

[T]he unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.

Id. at 544–45.

70. *Id.* at 552.

71. *Id.* at 552–53. *See also id.* at 548 n.12 (“At the Hague Conference, the signatories were

The United States Supreme Court most recently decided a case interpreting Article 17 of the Warsaw Convention in February 2004 in *Olympic Airways v. Husain*.⁷² A flight attendant refused three times to move an asthmatic passenger further away from the smoking section, even though the plaintiff knew before boarding that smoking was permitted on the flight.⁷³ Yet, he chose to board the aircraft and remain in his seat.⁷⁴ He was informed that he was free to request another passenger to switch seats with him, as a seat change was not to be effected by the Olympic flight attendant.⁷⁵ However, the lower court found that the flight attendant's failure to move the passenger to a different non-smoking seat further away from the smoking section of the aircraft violated the carrier's procedures and industry standards, constituted an "accident," and also demonstrated the carrier's willful misconduct, which allowed for higher monetary recovery.⁷⁶ The Supreme Court held that this conduct constituted an "accident" within the meaning of Article 17 of the Warsaw Convention.⁷⁷ It concluded that the flight attendant's failure to act was an unexpected or unusual event and held in plaintiff's favor.⁷⁸

The Supreme Court held that the "accident" definition should be flexibly applied after assessing all circumstances surrounding a passenger's injuries. However, the Court did not expand its definition of "injury" noting that the flexibility standard was only with regard to "accident" and not "injury" itself.⁷⁹ Relying on *Saks*, the Court determined that at a minimum, an accident can be an "event" or "happening," and that inaction can constitute an "accident."⁸⁰ The Court explained that liability

presented with a proposal to amend Article 17 to cover purely mental injuries. The Greek delegation proposed adding the word 'mental' to Article 17 because it was not clear whether Article 17 allowed recovery for such injury"). The Court did not consider this intention because it said it could not "infer much from that fact." *Id.*

72. 540 U.S. 644 (2004).

73. *Id.*

74. *See id.* at 647.

75. *Id.* at 647–48; Justice Scalia's dissent, joined by Justice O'Connor, stressed *Husain's* departure from decisions throughout the world. "Two of our sister signatories have concluded that [inaction] cannot [be an accident]. In *Deep Vein Thrombosis and Air Travel Group Litigation*, [2004] Q.B. 234, *England's Court of Appeal* . . . and the appellate division of the Supreme Court of Victoria, Australia," in *Qantas Ltd. v. Povey*, [2003] VSCA 227, 2003 WL 23000692, agreed that "inaction itself [cannot] ever be properly described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident." *Id.* at 658–59.

76. *Husain*, 540 U.S. at 648–49.

77. *Id.* at 657.

78. The district court held that the flight attendant's failure to re-seat the passenger was not expected or usual, and the Ninth Circuit Court of Appeals agreed. *Id.* at 648.

79. *Id.* at 657.

80. *Id.* at 656.

imposed due to an “accident” under Article 17 implicates Article 25 and “these provisions read together tend to show that inaction can give rise to liability.”⁸¹ Moreover, Article 20(1) clarifies that the “due care” defense is unavailable when a carrier has *failed* to take “all necessary measures to avoid the damage.”⁸² Although *Husain* leaves the passenger who is injured without a physical manifestation with no relief, the Court did liberalize the application of “accident,” which will create greater possibilities to recover for those with physical injuries.

OTHER COURTS’ ARTICLE 17 INTERPRETATIONS

Lower courts have recently struggled with interpreting Article 17, and although the Supreme Court has done so, questions still remain about its scope.⁸³ In *Ehrlich v. American Airlines*,⁸⁴ the Second Circuit reexamined the issue of psychic and mental injuries in light of the Montreal Protocols of 1999.⁸⁵ It determined that Article 17 claims for mental injuries would only be allowed recovery if they were caused by bodily injuries.⁸⁶

81. *Id.* at 657.

82. *Id.* The Montreal Protocol to Amend the Warsaw Convention amends Article 25 by replacing “willful misconduct” with the language “done with intent to cause damage or recklessly and with knowledge that damage would probably result, as long as the airline’s employee or agent was acting within the scope of employment”. The Protocol entered into force after the events of *Husain*; therefore, the Protocol was not considered in that case.

83. The *Ehrlich* Court and other courts have struggled with Article 17. *Infra* note 84. In *Prescod*, 383 F.3d 861, personnel took Ms. Neischer’s carry-on bag containing her medication, the later mishandling of which led to her death. The court held that the seizure of the carry-on bag was an “accident” under Article 17, *id.* at 868, and constituted “willful misconduct” under Article 25. *Id.* at 870. The willful misconduct determination is based on a subjective standard and can be satisfied through circumstantial evidence. *Id.* “Neischer was repeatedly promised action that was or should have been within the defendants’ power to deliver”. . . . The act was intentionally done and was of “an unreasonable character in disregard of a risk known or so obvious that it must have been taken aware of it,” which resulted in harm. Therefore, it was willful misconduct. *Id.* at 870.

84. 360 F.3d 366, 391 (2d Cir. 2004).

85. *Id.* While plaintiffs argued that several delegates to the Montreal Conference discussed expanding the carrier’s liability to include mental injuries, the delegates ultimately approved “a liability provision in the new Montreal Convention that provides, much like Article 17 of the Warsaw Convention, that a ‘carrier is liable for damage sustained in case of death or bodily injury.’” *Id.* Accordingly, the Court of Appeals held that the delegates’ comments at the Montreal Conference in May 1999 were not entitled to any dispositive weight. *Id.* at 373.

86. *Id.* at 400. (“The government’s interpretation of Article 17 is faithful to the Warsaw Convention’s text, negotiating history, purposes, and the judicial decision of sister Convention signatories; as such, we ascribe ‘great weight’ to the government’s views concerning the meaning of that provision.”) Lower courts are also defining Article 17 terms that the Supreme Court has not addressed, but they give greater weight to the interpretations that the government, as a signatory, gave to the Convention than to higher court’s interpretations.

A California district court further examined Article 17's test for allowance of mental injuries in *In re Crash at Tapei*.⁸⁷ The court concluded that plaintiffs could only recover for psychological injuries that are *caused* by bodily injury, and even a development of post-traumatic stress disorder did not per se qualify for recovery even though the disorder has physical effects.⁸⁸

Lower courts have considered the applicability of injuries that did not take place *on board* an aircraft but rather during *embarkation*.⁸⁹ In *Hansen v. Delta Air Lines*,⁹⁰ a Delta employee reported that Ms. Hansen said "bomb," which led to her arrest at the boarding gate in Chicago en route to Manchester, England.⁹¹ She and her husband had received their boarding passes, cooperated with all requests and questions of Delta employees, and proceeded through security.⁹² When she and her husband reached the boarding line for their flight, they were arrested and transported to a Chicago Police station, where the police searched, photographed, handcuffed, and jailed Ms. Hansen.⁹³

Ms. Hansen filed a claim against Delta for false imprisonment, malicious prosecution, and intentional infliction of emotional distress.⁹⁴ Delta sought to dismiss her claims because emotional injuries are not recoverable under Article 17 of the Warsaw Convention.⁹⁵ The district court considered whether plaintiff was in the "course of embarking" at the time of the incident by analyzing the following three factors: (1) the

87. 2004 WL 1234131 (C.D. Cal. Feb. 6, 2004) rev'd on other grounds, 153 Fed. App'x. 993 (9th Cir. 2005).

88. Specifically, the Court concluded:

(1) plaintiffs may not recover in cases where the only injury suffered is a psychological injury; (2) plaintiffs may not recover for psychological injuries that accompany, but are not caused by bodily injury; (3) plaintiffs may recover for mental or psychological injuries caused by physical injuries suffered in an air crash; (4) plaintiffs may not recover for physical manifestations of psychological injuries unless the underlying psychological injury was caused by a bodily injury; and (5) a diagnosis of Post Traumatic Stress Disorder (PTSD), without more, does not satisfy the bodily injury requirement of Article 17. Plaintiffs may recover for PTSD that resulted from a bodily injury, including an actual physical injury to the brain. However, plaintiffs may not recover for PTSD that resulted from the stress of the accident, even if the PTSD, in turn, resulted in physical changes to the brain or other physical manifestations.

Id.

89. *See Hansen v. Delta Air Lines*, 2004 WL 524686 (N.D. Ill. Mar. 17, 2004).

90. 2004 WL 524686 (N.D. Ill. Mar. 17, 2004).

91. *Id.* at *1.

92. *Id.*

93. *Id.*

94. *Id.* at *2.

95. *Id.* at *5. Article 17, as defined by *Floyd*, clarified by *Ehrlich*, and stated in *In Re Tapei*, does not allow for recovery of emotional injuries.

passenger's location at the time of the injury; (2) the passenger's activity at the time of the injury; and (3) the degree of control the airline was exercising over the passenger when the injury occurred.⁹⁶

The court could not determine whether or not Ms. Hansen was "embarking" because the facts lacked specificity with respect to the plaintiff's distance from the gate, her proximity to the Delta controlled gate area, and her actions at the time of her arrest with relation only to the act of boarding.⁹⁷ Such expansive readings of "embarking" and "disembarking" have consequences for "injury," because being arrested while in the gate area has physical characteristics not necessarily implicated while sitting on a plane. The court failed to further inquire as to Ms. Hansen's "injury," but the circumstances clearly indicate that the applicability can be expansive while the burden is overwhelmingly high on the part of the passenger to prove that he or she was injured, that he or she was not within the scope of the Convention, and that the air carrier acted with willful misconduct.⁹⁸ Further, the expansion to events that occur outside or during security checkpoints creates a scope far outside passenger expectations. The Warsaw Convention extends to the first location of embarkation, including domestic flights when a passenger's final destination is international, until final arrival through security.⁹⁹

Courts in jurisdictions throughout the world have faced similar problems surrounding Article 17.¹⁰⁰ In *Morris v. KLM Royal Dutch Airlines*, a 15-year old girl awoke during the flight to find a male passenger caressing her thigh.¹⁰¹ She sought recovery for clinical depression which was a result of the incident by the male passenger, but the House of Lords in Britain rejected the claim because there was no "physical injury" even though the passenger touched her.¹⁰²

In *Potgieter v. British Airways*,¹⁰³ a gay man brought a claim against British Airways in South Africa alleging that he was "humiliated and

96. The factors used to determine "embarking" were set out in *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975); see also *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 617-18 (7th Cir. 1989).

97. *Hansen*, 2004 WL 524686 at *5.

98. *Id.* The Convention was intended to give the benefit of the proof standards to the passenger and force the air carrier to defend itself, but the case here demonstrates that when the facts are in dispute the passenger is not given the benefit because the air carrier can prove exclusivity more expansively while the passenger has a very narrow construction of injury to demonstrate. See Lowenfeld & Mendelsohn, *supra* note 27.

99. *Supra* note 28.

100. *Morris v. KLM Royal Dutch Airlines* (2002) Q.B. 100.

101. *Id.*

102. *Id.*

103. 2005 (3) SA 133 (c) (S. Afr.).

degraded” and his “dignity was severely impaired” when a flight attendant approached him and his partner, demanding that they “not kiss each other as doing so was offensive to other passengers on the flight.”¹⁰⁴ The Court held that the Warsaw Convention was the sole basis upon which the plaintiff could seek relief. However, because the air carrier was not liable for any conduct not resulting in a physical injury, he did not state a recognized “injury” under the Warsaw Convention.¹⁰⁵

ARTICLE 24: EXCLUSIVITY OF THE WARSAW CONVENTION

Article 17 interpretation leaves the passengers such as Potgeiger or Hansen, whose civil rights have been violated, resulting in emotional or psychic injuries, without a cause of action.¹⁰⁶ U.S. domestic laws provide no form of relief, as stated by the Supreme Court in *Tseng v. El Al Israel*.¹⁰⁷ Further, a passenger on a domestic flight is protected by the Convention only if the airplane’s eventual destination is international.¹⁰⁸

104. Plaintiff and his partner allegedly hugged and kissed each other “in a normal way and manner which anyone would have accepted had such a kiss and embrace been between two heterosexual people.” Potgieter, (3) SA 133.

105.

Plaintiff’s main cause of action relied on defendant’s breach of contract and an alternative cause of action was based on the *actio iniuriarum*. Defendant filed an exception to plaintiff’s claim which was based upon the proposition that the Warsaw Convention provided the exclusive cause of action and sole remedy for a passenger who claims for loss, injury and damages sustained in the course, or arising out, of his international carriage. The High Court of South Africa agreed with defendant and held that because plaintiff’s main and alternative causes of action were not based on the Warsaw Convention, they could not be sustained in law. In addition, because plaintiff did not allege death, wounding or other bodily injury suffered by him as a result of an accident, the defendant could not be liable in terms of Article 17 of the Warsaw Convention.

Id.

106. A similar incident to Potgeiter occurred on an American Airlines flight from Paris to New York City. Gay males were labeled “offensive” and were prohibited from actions which are generally accepted for heterosexual couples. The flight attendant’s instructions and threats of prosecution potentially injured the couple. Lauren Collins, *Air Kiss*, THE NEW YORKER, Sept. 25, 2006, at 66.

107. 525 U.S. 155 (1999). The Supreme Court quashed the viability of a state law claim for personal injuries when the Convention foreclosed recovery. *Id.* at 176. The plaintiff, Tsui Yuan Tseng, was traveling from New York to Tel Aviv. *Id.* at 160. The security guard classified her as high risk and subjected her to a security search. *Id.* at 163. Tseng sued in New York state court citing significant personal injury in the course of the search and seizure of her person and belongings. *Id.* at 164. El Al Israel Airlines argued that Tseng’s action came within the purview of the Warsaw Convention and she could not sue under state law. *Id.* at 168–70. The Second Circuit heard the appeal and concluded that Tseng was entitled to pursue her state law injury claim because her injuries were not the result of an accident as defined in Article 17, and then Tseng appealed to the Supreme Court. *See Zerner, supra* note 61, at 1263–65.

108. *Robertson*, 401 F.3d 499.

The Supreme Court in *Tseng* analyzed Article 24's exclusivity clause.¹⁰⁹ The Court considered the Convention in light of its drafting history. It concluded that the Convention is the exhaustive remedy for injuries on international flights, due to the goal of creating uniformity in international travel laws.¹¹⁰ The Court held that Article 24 created an exclusive cause of action for air carrier liability. It rejected the plaintiff's argument that when a passenger's personal injury suit does not satisfy the liability conditions of Article 17, this passenger is able to pursue them under local law.¹¹¹

Based on *Tseng*, any incident that harms a passenger while aboard, embarking, or disembarking an international flight will be governed by the Warsaw Convention and the various protocols.¹¹² Air carrier liability is limited not only by the monetary limit, but more importantly, by the courts' interpretation of "injury." Though passengers are entitled to monetary relief from physical injuries, no interpretations or amendments protect citizens suffering injuries from an air carrier's willful misconduct resulting in mental injury.¹¹³ The result allows discrimination, racial profiling and harm to passenger civil rights, and other incidents causing passengers mental injuries and emotional distress.¹¹⁴

109. Zerner, *supra* note 61, at 1265.

Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty. . . . We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure. . . . The cardinal purpose of the Warsaw Convention . . . is to achieve uniformity of rules governing claims arising from international air transportation. . . . The Convention signatories, in the treaty's preamble, specifically recognized the advantage of regulating in a uniform manner the conditions of the liability of the carrier . . . [g]iven the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.

Tseng, 525 U.S. at 168–69 (internal quotations omitted). *See also Zicherman*, 516 U.S. at 230.

110. *See* Zerner, *supra* note 61, at 1267.

Looking to the Convention's text, negotiating and drafting history, contracting states' post ratification understanding of the Convention, and scholarly commentary, the Court in *Zicherman* determined that Warsaw drafters intended to resolve *whether there is liability*, but to leave to domestic law . . . determination of the compensatory damages available to the suitor.

Tseng, 516 U.S. at 170.

111. Zerner, *supra* note 61, at 1266. *Tseng* has been used extensively in lower court decisions since the ruling. *See, e.g.,* Magan v. Lufthansa German Airlines, 339 F.3d 158, 161 (2d Cir. 2003) ("A passenger whose injuries fall within the scope of the Warsaw Convention, is either entitled to recovery under the Convention or not at all.").

112. *Tseng*, 525 U.S. at 169.

113. *Supra* note 46.

114. Emotional injuries have been limited to those which have a physical manifestation as indicated in the decisions in *Floyd*, *Ehrlich*, and *In re Taipei*. *Supra* note 16.

CONSEQUENCES OF THE INTERPRETATIONS

There is a disconnect in the Supreme Court's interpretations of the purpose and scope of the Warsaw Convention.¹¹⁵ While the Court has concluded that the intentions behind the Convention are open to interpretation because it is a treaty, the Court has chosen mutually exclusive interpretations.¹¹⁶ The Court has determined that the Warsaw Convention was intended to be a widespread and sweeping treaty governing all injuries on international flights.¹¹⁷ However, the Court has also determined that the Convention does not govern all injuries suffered on international travel, because it is only supposed to address injuries with physical manifestations.¹¹⁸ Yet, with lower courts' broad interpretations of "embarking" and "disembarking" to include incidents not physically in the aircraft and to extend as far as security screenings,¹¹⁹ the United States courts have created complete exclusivity of the Convention¹²⁰ without exceptions for the new invasive post 9/11 security tactics.¹²¹ The Court has

115. The Supreme Court held in *Tseng* that "the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention," *id.* at 176, because the Warsaw Convention was created to unify the laws governing international air travel. However, the Court previously held in *Saks* that the Convention could not be stretched to cover injuries that are not caused by accidents. *Id.* If the Convention was drafted specifically to cover injuries caused by accidents, it cannot possibly account for all misconduct by airline employees, including racial profiling and discrimination. *See supra* note 58.

116. Whenever possible, interpretations of a treaty that produce anomalous or illogical results should be avoided. *See Tseng*, 525 U.S. at 157.

117. *Id.* at 176.

118. *Id.*

119. *Id.* "Embarking" and "disembarking" are determined in view of the total circumstances surrounding the incident in question with particular emphasis on location, activity, control, and immediacy of the flight. "Embarking" is not limited to the time after the ticket has been collected and honored for travel and the passenger have passed through the gate check where the boarding stub is given as suggested in *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255, 1260 (11th Cir. 2002). *See also* *Kalantar v. Lufthansa German Airlines*, 276 F. Supp. 2d 5 (D.D.C. 2003) (holding that a passenger who was at the ticket counter but had not received a boarding pass and was released to a public area had not embarked).

120. The Warsaw Convention extends in scope to all "'passenger injuries occurring on board the aircraft or in the course of any of the operations of embarking and disembarking'— even if the claim is not actionable under the treaty." *Singh v. N. Am. Airlines*, 426 F. Supp. 2d 38, 45–46 (E.D.N.Y. 2006). "The Convention is preemptive: a carrier is not subject to liability under local law for passenger injuries 'covered up' by the Convention, that is, 'all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking.'" *Acevedo-Reinoso v. Iberia Lineas Aereas de Espana S.A.*, 449 F.3d 7, 11 (1st Cir. 2006). Claims of state law are preempted by the Warsaw Convention because the treaty precludes passengers from bringing actions under local law when they cannot establish carrier liability under the framework of the treaty. *Adegbuji v. Cont'l Airlines, Inc.*, 2005 WL 2972830 at *2 (D.N.J. 2005).

121. "In the wake of the tragic events of September 11, 2001, Congress enacted the Aviation and Transportation Security Act, Pub. L. No. 107-71, 2002 U.S.C.C.A.N. (115 Stat.) 597 (2001),

given a license to flight attendants, crew, and airline personnel to become judges within their international flight jurisdiction.

We do not know the array of incidents that have caused injuries for passengers because the courts have shut the door on air carrier liability. The process of judicial review cannot be relied upon to advance rights, because so many of the cases are dismissed or not brought because of the limited definition of Article 17 and the expansion of Article 24.

Freedoms are defended in the courts, but when there are no freedoms to be had on international flights the courts give legitimacy to invasive procedures, morality judgments, and discrimination by air carriers. Recent news stories clearly illustrate outrageous conduct by air carrier personnel in the interest of airline security.¹²² In Spain, airline personnel demanded that a law professor allow his carry-on baggage to be searched by fellow passengers because those fellow passengers were uncomfortable because “he looked like a terrorist.”¹²³ In Australia, a man was prevented from flying because he was wearing a shirt that said, “George Bush is a terrorist.”¹²⁴ In the United States, two gay men were told by a flight attendant that their behavior, described to be “kissing,” was disturbing to other passengers and creating a security risk.¹²⁵ The crew, including the pilot, threatened the men with prosecution.¹²⁶

The Warsaw Convention, as currently interpreted, provides passengers with no means of recovery for these incidents. Although these passengers perhaps have domestic law claims ranging from Equal Protection, intentional infliction of emotional distress, and negligent infliction of emotional distress to invasion of privacy, these injuries are not sufficient to allow for recovery. At the same time, the Convention is their only means of recovery due to Article 24’s exclusivity clause because the incidents took place within the scope of international travel.

enhancing security measures at the nation’s airports, including the eventual federalization of the passenger screening function. . . . [A]irport security and passenger screening are . . . wholly independent of the Warsaw Convention.” *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 939 n.3 (9th Cir. 2001).

122. *Australian Prohibited from Being a Passenger for Wearing a Shirt Accusing Bush of Being a Terrorist*, EL PAIS (Spain), http://www.elpais.com/articulo/gente/aerolinea/australiana/prohibe/volar/pasajero/vestido/camiseta/acusa/Bush/terrorista/elpepugen/20070122elpepage_2/Tes (last visited Sept. 19, 2007). Jessica Bernstein-Wax, *Man Forced Off Plane By Fellow Passengers*, THE SEATTLE TIMES, Sept. 29, 2006, at A9, available at http://seattletimes.nwsourc.com/html/nationworld/2003280615_passenger29.html. NBC, *Passenger Awarded \$400,000 in Racial Profiling Case*, <http://www.nbc6.net/news/10754704/detail.html> (last visited Aug. 31, 2007).

123. Bernstein-Wax, *supra* note 122.

124. EL PAIS, *supra* note 122.

125. Collins, *supra* note 106.

126. *Id.*

Courts will not be able to hear cases which could cause legitimate harm to individuals. While the Federal Rules of Civil Procedure and constitutional doctrines such as standing, mootness, and ripeness can relieve strain on the courts, citizens who suffer non-physical damage under the Convention will not be allowed to have their day in court. Air carriers have an important role in providing security for passengers on international travel; however, actions under the guise of security measures should not permit their outrageous conduct.

CHANGES NECESSARY TO PROTECT PASSENGERS

The United States Supreme Court has expanded the Convention's scope and limited its liability so that passengers who suffer very real injuries such as psychic episodes,¹²⁷ search and seizure violations,¹²⁸ and civil rights violations¹²⁹ are left with no forum for justice. Judicial activism is not the answer to the Convention's problems: Congress must change the Convention's applicability.

The Warsaw Convention is a validly ratified international treaty, so it is equivalent to a federal statute.¹³⁰ When a conflict arises between a treaty and a congressional statute, the one later enacted is controlling.¹³¹ Therefore, Congress should override the Warsaw Convention by enacting a new statute, which would conflict with the Convention.¹³²

The Convention, which was intended to protect air carriers from catastrophes, is now protecting air carriers from all liability, including its crew's willful misconduct.¹³³ The Court allows flight attendants to determine appropriate measures, short of physical injury, to regulate passengers on international flights.¹³⁴ Domestic laws provide no relief to passengers,¹³⁵ and therefore, changes are needed to the Convention.

127. *Morris*, *supra* note 100 (A 15-year old girl awoke during the flight to find a male passenger caressing her thigh. She sought recovery for clinical depression resulting from the incident, but the House of Lords rejected the claim because there was no "physical injury.").

128. *Bernstein-Wax*, *supra* note 122 (A Spanish law professor on a trip from Germany to Spain was forced to have his bags searched when it was demanded by airline personnel because his appearance was "suspicious" and he "looked like a terrorist.").

129. United States domestic laws have provided relief for those who have suffered harm due to civil rights violations including racial profiling. *NBC*, *supra* note 122.

130. U.S. CONST. art. II, § 3; *See also* LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (Foundation Press 1988).

131. *Id.* "The last expression of the sovereign will must control."

132. *Id.*

133. *Supra* notes 1, 58, 122.

134. *Supra* note 58.

135. The Warsaw Convention extends in scope to all passenger "injuries" occurring onboard the

The United States sought to protect consumers when it pushed for higher liability limits.¹³⁶ If Congress does not create a new statute resulting in conflict of applicability, it should again move for changes in the Convention. In order to preserve passengers' rights, the Convention should allow for domestic law recovery for passengers who have suffered injuries without a clear physical component. Further, the Convention should explicitly provide for recovery when flight attendants willfully violate passengers' rights by discriminating against them because of sex, gender, sexual orientation, race, class, religion, or creed to prevent incidents such as those which gave rise to *Potgeiger*.¹³⁷

If a new protocol regarding civil rights is deemed outside the scope of the Convention due to the intention of limiting relief to physical injuries,¹³⁸ then the exclusivity clause of the Convention must be reinterpreted, along with the definitions of "embarking" and "disembarking," to allow for domestic law claims to be filed and to protect passengers from the air carriers.

The United States has a strong interest in protecting its passengers domestically, but due to the nature of the Convention to create uniformity and avoid conflict of law problems, the United States should protect its citizens when flying abroad. With airlines without any flights originating or terminating in the United States, Americans will be on flights where the United States court system will lack jurisdiction. Therefore, the United States should not reject the Convention altogether but should modify its position regarding the Convention's applicability.¹³⁹ The Warsaw Convention creates many benefits for passengers as well as air carriers, and while there are problems with Articles 17 and 24, some of the provisions, including recovery for lost baggage, have provided the best possible means of recovery.

aircraft or in the course of any of the operations of embarking and disembarking, even if the claim is not actionable under the treaty. *Singh v. N. Am. Airlines*, 426 F. Supp. 2d 38. (E.D.N.Y. 2006).

136. *Supra* notes 43–44.

137. Article 24 now allows recovery without limitation when it is due to the willful misconduct of the air carrier. *Supra* note 61. However, the proposed protocol would allow for recovery to include the willful misconduct of discrimination resulting in emotional injuries.

138. The Court in *Floyd* determined that the Convention was only intended to allow recovery for physical manifestations of injuries. *Supra* note 31.

139. The Japanese have initiated a proposal which would allow for absolute unlimited liability in international air travel on the theory that it will increase settlements and lower litigation. Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437 (1996); see also Jonathan L. Neville, *The International Air Transportation Association's Attempt to Modify International Air Disaster Liability: An Admirable Effort with an Impossible Goal*, 27 GA. J. INT'L & COMP. L. 571 (1999) (suggesting that the United States should modify its position on the treaty if not reject it altogether).

CONCLUSION

The Convention was created during international air travel's infancy, when air carriers needed protection from bankruptcy in case of a crash or other disaster. The modern era of flight has changed the need for the Convention altogether. Large companies and their alliances do not need liability protection to the extent provided by the Supreme Court.

The United States, for its part in protecting citizens by raising liability limits, should not simply write off the Convention as has been suggested by some scholars. In order to protect its own citizens to the best extent possible, the United States should call for a new protocol to the Convention to ensure protection and allow for passengers to rightfully recover for real injuries suffered. Congress could also take the initiative to override the Convention's applicability by enacting new legislation. The role of international travel in modern society will not decrease, and with the modernization of airports, aircraft, and security measures, law must be modernized in order to best protect citizens' rights.

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