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Injuries on international flights

UNDERSTANDING THE MONTREAL CONVENTION AND VIRTUAL STRICT LIABILITY – YOU DON'T NEED AN AIRLINE CRASH TO MAKE AN ACCIDENT CLAIM

You're on an international flight. Another passenger opens the overhead bin and luggage falls out and hits you on the head, causing injury. Or, during the flight, hot soup supplied by the airline slides off the tray table and onto your lap, scalding you. Under traditional American tort law, these might sound like iffy claims to bring in court against the airline. But under the Montreal Convention (formerly known as the Warsaw Convention), both these events are accidents in international aviation, which are compensable under the law. You don't need an airline crash to make an accident claim.

The purpose of this article is to highlight a relatively unknown area of injury accident law in which the liability standard is quite lenient and favors the passenger over the airline. The damages provisions also favor the passenger. Consumer lawyers should not shy away from these cases; in fact, they should relish them. This article is not intended to be a comprehensive treatise on the Montreal Convention. If you handle one of these cases, I recommend two excellent guides: Krause, *Aviation Tort and Regulatory Law* (West 2020) and Kreindler, *Aviation Accident Law* (Lexis-Nexis 2022).

What is the Montreal Convention?

For many years, accidents in international aviation were governed by the international treaty known as the Warsaw Convention, enacted in 1929. In 2003, the Montreal Convention ("MC") went into effect. The MC is an international treaty to which the United States and most other major nations subscribe. Article 17(1) states: 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. The treaty's liability and damages standards have been termed "virtual strict liability." (*Magan v. Lufthansa German Airlines* (2d Cir. 2003) 339 F.3d 158, 161.)

The plain language of the MC in Article 21 describes a strict-liability scheme: For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

Under both the Warsaw and Montreal Conventions, an accident has been defined by the courts as an unexpected or unusual event or happening that is external to the passenger. (*Air France v. Saks* (1985) 470 U.S. 392.) The U.S. Supreme Court stated its desire that the accident standard be freely and flexibly applied in *Olympic Airways v. Husain* (2004) 540 U.S. 644, 649654.

The modern damages format of the Montreal Convention predicates carrier liability solely on the occurrence of an accident within the meaning of Article 17 of the MC. (*Wallace v. Korean Air* (2d Cir. 2000) 214 F.3d 293, 297.) The Supreme Court held in

Air France v. Saks (1985) 470 U.S. 392, 405, that such an accident is "an unexpected or unusual event or happening that is external to the passenger." In spite of its adoption of the accident trigger for liability and other operative language from the Warsaw Convention, the Montreal Convention represented "a revolutionary paradigm shift that replaced a restrictive, proairline industry regime with a treaty that favors passengers rather than airlines." (*Doe v. Etihad Airways* (6th Cir. 2017) 870 F.3d 406, 42223.)

The Warsaw and Montreal Conventions preempt state law. (*El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* (1999) 525 U.S. 155; *AcevedoReinoso v. Iberia Lineas Aereas de Espana S.A.* (1st Cir. 2006) 449 F.3d 7.)

The statute of limitations to bring an MC claim is two years. (Montreal Convention, Art. 35(1).)

Jurisdiction and venue

Subject-matter jurisdiction is based on the Montreal Convention, Article 33(1). The ultimate destination of the injured passenger controls where suits may be brought. For example, if the passenger is on a one-way ticket to China, then get ready to litigate in China. But if it's a round-trip ticket from San Francisco to China and back, then jurisdiction will lie in federal court for the Northern District of California.

Although a claim might be brought in state court, typically these cases are filed in federal court based on section 1332 of title 28 of the United States Code, in that there is complete diversity of citizenship between plaintiff and defendant, and the amount in controversy exceeds $75,000.

Venue is proper in the local federal court pursuant to section 1391c of title 28 of the United States Code because defendant airline is subject to personal jurisdiction in the district and regularly operates aircraft in airports within this district.

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Damages

There was a cap on damages under the Warsaw Convention. Under the Montreal Convention, the only way the airline can eliminate completely its exposure is if it can prove either that the accident was not the result of *any* negligence or wrongful act or omission on its part, or that it was entirely caused by a third party. (See Montreal Convention Art. 21(2).) Under the so-called Exoneration article (Article 20), a passenger's damages above the SDR level may be reduced by her own comparative negligence.

Even if there is comparative fault, the airline is strictly liable for up to 128,821 Special Drawing Rights (SDRs) under Articles 20 and 21. (Special drawing rights are supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund. SDRs are units of account for the IMF, and not a currency per se. The MC originally called for strict liability up to 100,000 SDRs. This was raised in 2019 pursuant to Article 24 to 128,821 by act of the International Civil Aviation Organization (ICAO).) In December 2022, the value of 128,821 SDRs in U.S. dollars was $171,240. This means that if your case is worth more than that, your client is basically guaranteed to recover at least the value of the SDRs, even with comparative fault. If the case is worth more than the SDRs, the plaintiff can recover full value less any reduction for comparative fault.

Traditional tort damages may be recovered, including pain and suffering and emotional distress. However, federal courts strictly adhere to a physical-injury requirement before emotional distress may be awarded. In holding that an air carrier cannot be held liable under Article 17 for purely mental injuries unaccompanied by death, physical injury, or physical manifestation of injury, the Supreme Court left open the question whether passengers may recover under the Warsaw Convention for mental injuries that are accompanied by physical injuries. (*Eastern Airlines, Inc. v. Floyd* (1991) 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569.) Since *Floyd*, the courts have uniformly held that mental anguish caused by bodily injury is compensable. (See e.g., *Kruger v. United Airlines, Inc.* (N.D. Cal. 2007) 481 F.Supp.2d 1005.)

A notable exception to the physical-injury requirement: In an airline crash case, a district court held that: (1) passenger's physical injuries were sufficiently connected to her posttraumatic stress disorder (PTSD), and (2) PTSD itself constituted "physical manifestation of injury" under Warsaw Convention. (*In re Air Crash At Little Rock, Ark. on 6/1/1999* (E.D. Ark. 2000) 118 F. Supp. 2d 916.)

Also, bystander emotional distress, cognizable under California law, is not available in MC cases due to the physical-injury requirement. A husband's claim for emotional pain and mental anguish from seeing his wife fall from an escalator at the airport while disembarking from international flight was not cognizable under Warsaw Convention, which preempted state law. (Warsaw Convention, Art. 1 et seq., 49 U.S.C.A. § 40105 note. *MontanezBaez v. Puerto Rico Ports Authority* (D.P.R. 2007) 509 F. Supp. 2d 152.)

Examples of claims that may be brought

Almost any injury caused by an accident and external to the passenger is compensable. Examples:

Luggage falling from an overhead bin

Luggage dropped on a passenger by another passenger. (*Lee v. Air Canada*, No. 14CV10059 (SHS), 2017 WL 108058 (S.D.N.Y. Jan. 10, 2017).)

Closing a bin that has opened during flight

Passenger injured trying to close overhead bin that popped open just before landing. (*Lynn v. United Airlines, Inc.* (N.D. Ill. 2017) WL 4357387, at *1.)

Embarking/disembarking

Whether a passenger is embarking or disembarking within the meaning of Article 17 is a question of law to be decided on the facts of each case. (*Schmidkunz v. Scandinavian Airlines System* (9th Cir. 1980) 628 F.2d 1205.) Accidents occurring to passengers while they are in the general terminal area, not in the control of the carrier and free to walk about while waiting for the boarding call, are not accidents within the meaning of Article 17. (*Buonocore v. Trans World Airlines, Inc.* (2d Cir. 1990) 900 F.2d 8, 1990 WL 37228, 22 CCH Avi 17965.)

Plaintiff passenger filed suit against Defendant airline after tripping and falling while onboard the aircraft. Defendant filed a Rule 12(b)(6) dismissal, asserting that Plaintiff failed to state a claim under the Montreal Convention because Plaintiff's injury was not the result of anything unusual or abnormal with respect to the operation or condition of the aircraft. The court disagreed, stating that Plaintiff "tripped and fell as a result of a hazard in the walkway onboard the aircraft." (*Mansoor v. Air France KLM Airlines* (S.D. Cal. 2008) 2008 WL 4748166.)

An accident occurred when Plaintiff fell while disembarking on airstairs. (*Sensat v. Southwest Airlines Co.* (E.D. Mich. 2019) 363 F. Supp. 3d 815.)

However, an injury on a shuttle bus did not qualify as embarking or disembarking, and there was no MC claim. (*Brannen v. British Airways PLC* (M.D. Pa. 2017) WL 4953856, at *1.)

Spilled hot beverages

A spill of coffee has been held to constitute an accident. A woman sought recovery on account of scalding that she suffered when, on a flight from Palma de Mallorca (Spain) to Vienna (Austria), the hot coffee that had been served to her father and placed on his folding table tray tipped over for unknown reasons. Held: "[T]he concept of 'accident' at issue covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation." (Case C532/18, Niki Luftfahrt, Court of Justice of the European Union, Luxembourg, 19 December 2019.)

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I recently settled a hot-soup spill on a minor for a substantial amount. The flight attendants placed the soup on the tray, and within a minute it slipped off.

Failure to prevent injury/illness or to render medical aid

In a leading Supreme Court case, a passenger's death from an apparent asthma attack during flight was caused by flight attendant's refusal to move passenger to another seat farther away from the smoking section of airplane, despite three increasingly desperate requests from passenger's wife, and thus airline was liable for passenger's death under the Warsaw Convention; passenger explicitly complained that smoke was affecting his breathing just hours before his death, complained to his wife about level of cigarette smoke on plane, and relied extensively on his inhaler for support, and there was no evidence that passenger ate any foods he was allergic to while on flight. The court found that the unexpected and unusual rejection of plaintiff's explicit and repeated requests for assistance constituted an "event" or "happening" and rejected defendant's position that inaction could constitute an accident. (*Olympic Airways v. Husain* (2004) 540 U.S. 644, 124 S. Ct. 1221.)

Other cases have held that failure to render adequate assistance to ill passengers constitutes an accident. (*Gupta v. Austrian Airlines* (N.D. Ill. 2002) 211 F.Supp.2d 1078, 1083 [failure to properly aid victim of heart attack]; *Fulop v. Malev Hungarian Airlines* (S.D. N.Y. 2001) 175 F.Supp.2d 651,663 [heart attack, failure to divert plane].)

In 2007, I resolved a case in which a passenger had a stroke on an overseas flight. There was no doctor on board, and no doctor available to call on the radio. Under the airline's own protocols, the next step was to divert the plane to the nearest major airport, which in this case was Anchorage, 1.5 hours away. Instead, the airline traveled an additional nine hours to China, where the passenger was, by then, comatose, a condition he remained in for years and never recovered. The airline's insurance carrier paid a very large settlement.

Carts

Plaintiff struck by beverage cart was an accident under the MC. (*Abba v. British Airways PLC* (N.D. Ill. 2019) 2019 WL 1354300.)

Assaults by fellow passengers

An assault by a fellow passenger may or may not amount to an accident. The Court found that an assault by a fellow passenger would not constitute an Article 17 accident absent some causal role of airline personnel. The appellate court remanded for a factual determination relating to the service of alcohol to determine whether or not the airline's conduct was an Article 17 accident. (*Langadinos v. American Airlines, Inc*. (1st Cir. 2000) 199 F.3d 68. See also, *Wallace v. Korean Air* (2d Cir. 2000) 214 F.3d 293.)

Failure to provide a wheelchair

A request for a wheelchair for an elderly plaintiff was not fulfilled. Plaintiffs took an escalator up, at which time the elderly Plaintiff fell backwards. The Court held that Plaintiff airline service company, as agent of Defendant airline and Defendant airline, both fell within the definition of carrier, and, therefore the Warsaw Convention applied to these entities. The court could not make a determination as to whether Plaintiffs were disembarking for purposes of the Warsaw Convention and remanded the case to the trial court for further proceedings. (*Bowe v. Worldwide Flight Services, Inc.* (Fla. 3d DCA 2008) 979 So. 2d 423.)

Cases where no accident was found

One prominent example of a case that will not fly, so to speak, is deep-vein thrombosis (DVT), also called "economy class syndrome." Courts have refused to allow DVT cases because the injury is solely internal, not external to the passenger. (*Miller v. Continental Airlines*, 260 F. Supp. 2d 931, Prod. Liab. Rep. (CCH) P 16709 (N.D. Cal. 2003); *In re Deep Vein Thrombosis Litigation*, 2006 WL 2547459 (N.D. Cal. 2006), aff'd, 535 F.3d 952 (9th Cir. 2008).)

At least one court denied MSJ on a DVT claim: Genuine issue of material fact as to the existence of an airline industry custom to warn passengers on international flights of the risk of developing Deep Venous Thrombosis Syndrome (DVT), a type of blood clotting, precluded summary judgment in action by airline passenger against airline, seeking to recover damages under the Warsaw Convention for injuries allegedly sustained by passenger when he suffered a stroke after developing DVT on an international flight. (49 U.S.C.A. 40105. *Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002), rev'd and remanded, 379 F.3d 177 (5th Cir. 2004).)

Where a passenger admittedly spilled hot coffee on himself, the airline was exonerated. Practice tip: The court noted that the passenger had failed to allege the coffee was too hot until motion practice was underway. That might have saved the case. (*Medina v. American Airlines, Inc*. (S.D. Fla. 2006) 2006 WL 3663692.)

Turbulence: Genuine issue of material fact regarding degree of turbulence, and whether passenger's injury, sustained when he bumped his head on the cabin ceiling after the aircraft encountered turbulence, was "accident" within meaning of Warsaw Convention, precluded summary judgment in action against airline. (*Magan v. Lufthansa German Airlines* (2d Cir. 2003) 339 F.3d 158.)

Conclusion

If you are presented with a serious injury case that falls under the Montreal Convention, run, don't walk, to sign it up. These cases have lenient liability and damages standards, and the carrier is almost always backed by commercial insurance. If you would like a sample federal court complaint or discovery, please contact me at cgeerhart@gmail.com and I will be glad to share same.

Chuck Geerhart is a founding partner of Paoli & Geerhart, *was admitted to the California bar in 1989, and is a graduate of Cornell University and the UCLA Law School.*