Mental Distress for Airline Lawyers: The Sixth Circuit's Decision in *Doe v. Etihad*

By David M. Krueger

In *Doe v. Etihad Airways, P.J.S.C.*, the U.S. Court of Appeals for the Sixth Circuit radically altered the scope of an air carrier's liability under the Montreal Convention, the international treaty controlling an air carrier's liability to passengers for damage to persons or property during international flight.[1]

Prior to *Etihad*, courts almost universally held that a passenger who suffers bodily injury as a result of an accident is entitled to physical damages, but is only eligible for emotional damages to the extent any such damages are attributable to the bodily injury sustained. The Sixth Circuit in *Etihad*, however, concluded that passengers may be able to recover for emotional damages that are completely divorced from any bodily injury sustained. In doing so, *Etihad* departs from nearly a century of jurisprudence on this issue, both domestically and internationally (given the Montreal Convention's interpretation by courts in foreign signatory jurisdictions). As discussed below, *Etihad* significantly increases air carriers' potential liability for claims in the Sixth Circuit, and sets a dangerous precedent for litigating cases in other circuits that have not directly decided the scope and limits of compensable injuries under the Montreal Convention.

The Case of Jane Doe

In *Etihad*, the plaintiff, Jane Doe, was returning from Abu Dhabi to Chicago aboard a flight operated by Etihad Airways (Etihad). After reaching inside the seatback pocket in front of her, she pricked her finger on a hypodermic needle that was hidden in the pocket, drawing blood. Doe was given a Band-Aid for her finger and was tested multiple times for possible exposure to disease, all of which came back negative. Doe sued Etihad, claiming damages both for the physical injury (the needle prick) and for "mental distress" owing to her possible exposure to various diseases. Her husband, John Doe, claimed loss of consortium.

Article 17(1) of the Montreal Convention provides that an air carrier "is liable for damages 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."[2] The district court granted summary judgment in favor of Etihad, holding that Doe's emotional distress was not caused by the bodily injury sustained—i.e., the physical wound itself. Instead, the district court concluded that the emotional distress damage was caused by the needle and separate from the physical injury, and therefore was not compensable under Article 17(1).

The Sixth Circuit reversed the district court's order, holding that under Article 17(1) of the Montreal Convention, emotional or mental damages are recoverable "so long as they are traceable to the *accident*, regardless of whether they are caused directly by the bodily *injury*."[3] The court held that because Doe's alleged mental distress arose from the accident itself (i.e., pricking her finger on the needle), she could recover for emotional distress damages, even if the mental distress was unrelated to the nominal physical injury she received.

Why Does This Matter?

The Sixth Circuit's decision in *Etihad* represents a radical expansion of air carriers' potential liability under the Montreal Convention. Under Article 17 of the Warsaw Convention, the predecessor to the Montreal Convention, a carrier is "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."[4] Under the Warsaw Convention, an air carrier's liability for emotional damages was limited to damages *resulting from* a bodily injury, and a passenger could not recover for emotional damages unconnected with the actual injury.[5]

As a classic example of this liability limitation, assume a crash landing (an accident) occurs. In the process, a passenger pinches his finger in the tray table of his seat, but is otherwise unharmed. The passenger then sues the carrier both for his physical injury (the pinched finger) and emotional distress, claiming the crash landing has led to a fear of flying. Under the Warsaw Convention, and even after adoption of the Montreal Convention, nearly every district, circuit,

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and foreign court would reach the same conclusion: the passenger could recover damages (if any) for his pinched finger and any emotional damages *resulting from* his pinched finger.[6] But the passenger could not recover emotional damages for the new supposed fear of flight, which was the result of the crash landing and unconnected to the bodily injury.

Under *Etihad*, however, the Sixth Circuit held that the air carrier *would* be liable for emotional damages unconnected with the bodily injury, even using the "pinched finger" example to prove its point.[7]

Implications for Airline Accident Litigation

The first implication is obvious: there will be more lawsuits against, and increased potential liability for, air carriers. Post-*Etihad*, any passenger may state a claim for any type of emotional distress resulting from an accident, so long as there is some nominal type of bodily injury (even just a pinched finger). Article 17 does not permit recovery of purely psychic injuries, and requires that there be some bodily injury.[8] The Sixth Circuit attempted to leave intact Article 17(1)'s requirement that there be *some* type of bodily injury before unrelated emotional damages are compensable. But even if an accident does not result in any real injury, future litigants are likely to raise specious claims of pinched fingers, being sore, or other types of nominal injuries as a means to satisfy the "bodily injury" requirement and seek broader emotional damages arising from the accident.

Second, and relatedly, plaintiffs' attorneys will undoubtedly rely on *Etihad* to try and expand the scope of potential damages, as *Etihad* opens the door for "tag-along" claims of emotional damages completely unrelated to the bodily injury. This not only increases potential exposure for air carriers, but may also undermine carriers' efforts to contest suspect claims of emotional damages based on alleged conditions that may have existed before the accident giving rise to the claim.

Returning to the "pinched finger" example, *Etihad* apparently endorses the conclusion that emotional damages for fear of flying are compensable even if completely independent of the accident and accompanying bodily injury. It is conservatively estimated that over 20 million Americans have a preexisting fear of flying.[9] Absent medical evidence to the contrary, air carriers are put in a difficult position to rebut a plaintiff's claim that an accident caused his or her nascent fear or anxiety of flying. Indeed, even if a plaintiff admits to having a preexisting fear of flying, aggravation of a preexisting condition may be compensable under Article 17.[10] This will create new challenges in determining how, and to what extent, purely psychic injuries may have been aggravated—given that these claimed injuries are completely divorced from the actual bodily injury the passenger incurred.

Under *Etihad*, claimed psychic injuries may not even need to be as specific as fear of flying, and would ostensibly make broad and generic claims of general anxiety compensable under Article 17. Imagine that a passenger has anxiety as a result of turbulence. While unfortunate, such anxiety is not compensable under Article 17. Under *Etihad*, however, if the passenger bumps his or her knee during the turbulence, that anxiety is compensable. This seems contrary to the Montreal Convention's fundamental proposition that, in exchange for strict liability, air carriers would be provided with uniformity and predictability for resolving claims of damage. Given the generally low bar to establish a claim of "bodily injury" (discussed below), "[s]uch a construction would improperly encourage artful pleading and would therefore 'scarcely advance the predictability that adherence to the treaty has achieved worldwide.'"[11]

Air carriers defending claims subject to the Montreal Convention must be prepared to address *Etihad*. While the Sixth Circuit claimed to have applied a "plain meaning" interpretation of Article 17(1), and attempted to distinguish nearly 20 years of precedent under the Montreal Convention, there are compelling grounds upon which the reasoning in *Etihad* can be criticized, and why other courts should not adopt its reasoning. Most notably, the court's decision hinges on its interpretation of the phrase "in case of" as used in Article 17(1), which the court concludes "is *conditional*, not *causal*."[12]

The court uses the common expression "in case of emergency" as a parallel to its interpretation of Article 17(1), concluding that "[t]o say *in case of X, do Y* is to say 'if X happens, then do Y'—none of which means that there is a causal relationship between X and Y."[13] But in using this "plain meaning" example, the court ignores the obvious importance of *context*. Extending the court's example, assume two separate buildings, Building A and Building B, have fire alarms that say "pull in case of emergency." If an emergency occurs in Building B that poses no threat of harm to Building A, should a person in Building A who becomes aware of the emergency pull the fire alarm? The Sixth Circuit would apparently conclude "yes," because the instruction "pull in case of emergency" is purely conditional; under the court's reasoning, the mere fact that there is an emergency in Building B satisfies the condition to pull the alarm in Building A. Most people, however, would reasonably conclude that a person in Building A should not pull a fire alarm unless the emergency is in, or relates to, Building A.

Even if the instruction "pull in case of emergency" may not impart a causal requirement *per se*, most would construe an implicit requirement of relevance or connection, such as "pull in case of emergency *relating to Building A*." In the context of Article 17(1), an air carrier's liability "for damages sustained in case

of death or bodily injury" is therefore reasonably construed—as it has been for decades—as imposing liability for damages *relating to* the death or bodily injury itself, and not the mere "conditional" event.

Implications for Sexual Assault and Harassment Claims

Another implication of *Etihad* is its potential impact on claims involving alleged sexual assault of passengers. There has been a sharp increase in the reported incidents of sexual assault of passengers in the past several years,[14] raising the issue of whether an air carrier may be liable under the Montreal Convention if one passenger sexually assaults another. In order to assess the implications of *Etihad* on sexual assault claims, it is necessary to discuss whether and under what circumstances sexual assault constitutes an "accident" within the meaning of Article 17 of the Montreal Convention.

In order for an air carrier to be held liable for any type of bodily injury under Article 17, there must first be an "accident" which caused the injury, and which "took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The U.S. Supreme Court has defined "accident" under Article 17 of the Warsaw Convention as "an unexpected or unusual event or happening that is external to the passenger."[15] This definition has likewise been applied to Article 17 of the Montreal Convention.[16]

Before even getting to the issue of sexual assault, whether nonsexual assault is an "accident" has been disputed under both the Warsaw and Montreal Conventions, with the results usually turning on the particular facts of the case. For example, in *Ginsberg v. American Airlines*, the Southern District of New York held that an altercation between a passenger and a flight attendant was not unexpected or "external" when the passenger "willfully disregarded [the flight attendant's] instructions and moved the cart with the knowledge that an altercation could occur."[17] Conversely, when an alleged assault is not the result of any particular conduct of a plaintiff, it is generally hard to dispute that such an altercation is an unexpected or unusual event external to the passenger.[18] In this respect, sexual assault, by its very nature, is an unexpected event that occurs external to the passenger, and thus seemingly would constitute an "accident" within the province of Article 17 of the Montreal Convention.

In discussing the term "accident" in *Air France v. Saks*, the U.S. Supreme Court noted that Article 17 was designed to encompass liability "for injuries proximately caused by the risks inherent in air travel," even if the incident is otherwise unexpected and external to the passenger.[19] At first glance, it would seem difficult to conclude that assault, and particularly sexual assault, would be an *inherent risk* of air travel.

To this end, almost all decisions addressing assault—sexual or otherwise—rely on the Second Circuit's decision in *Wallace v. Korean Air*.[20] In *Wallace*, the Second Circuit held that a passenger's sexual assault of another passenger constituted an "accident" under Article 17. In making this determination, the Second Circuit did not decide the issue of whether sexual assault was an inherent risk of air travel, as expressly noted by the concurring opinion.[21] Instead, the Second Circuit latched onto the particular facts of the case, essentially concluding that the assault may have been made possible by a lack of supervision by the flight crew.

The merits of the decision in *Wallace* and the uncertainty as to whether an "accident" under Article 17 excludes risks that are not inherent to air travel is beyond the scope of this article. As a practical matter, nearly all courts that have subsequently addressed the issue of assault have essentially treated *Wallace* as de facto rejecting the inherent risk of travel limitation.[22] Given the U.S. Supreme Court's instruction that the term accident "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries,"[23] it seems likely that future courts would similarly follow these decisions in concluding that sexual assault constitutes an accident.

Finally, even if an assault constitutes an accident, as discussed above, the passenger must still incur "bodily injury" in order to recover under Article 17. In physical assaults, this requirement is often easily satisfied. In cases of sexual harassment unaccompanied by physical contact, no liability is sustained as even *Etihad* recognizes that *some* bodily injury is a necessary precondition under Article 17. But the standard for "bodily injury" is low and generally satisfied by a showing of even a slight physical injury such as bruising.[24] Thus—and without diminishing the gravity of the offense[25]—a plaintiff could easily allege that even slight or passing physical touching caused a bodily injury, opening up a panoply of emotional damages claims under *Etihad* that did not necessarily result from the actual physical injury itself.

Conclusion

After the Sixth Circuit issued its decision, Etihad filed a petition for an en banc rehearing, which was denied.[26] Etihad then filed a petition for a writ of certiorari with the U.S. Supreme Court, which also was denied.[27] Given the conflict *Etihad* creates with other circuits, the decision warrants review. Yet, the U.S. Supreme Court has not accepted any case relating to Article 17 in nearly 15 years, and has only accepted a few cases during the entire history of both the Montreal and Warsaw Conventions.[28]

Absent review by the U.S. Supreme Court, whether other federal courts of appeal will follow the Sixth Circuit remains to be seen. While the *Etihad* decision is still relatively recent, no court has followed or otherwise adopted its reasoning to date. Instead,

post-*Etihad*, courts that have addressed Article 17 of the Montreal Convention have continued to follow cases limiting damages to those that are the result of the bodily injury itself, noting that Article 17 of the Montreal Convention was drafted with the intent of being consistent with the jurisprudence developed under the Warsaw Convention.[29]

At a minimum, *Etihad* makes courts within the Sixth Circuit a much more attractive venue for future lawsuits. This poses a particular risk to foreign air carriers, which may be sued in any judicial district in which they conduct business. Thus, foreign carriers that conduct any flights or business within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) are more likely to be sued in this jurisdiction, even if the claim arose elsewhere.

Endnotes

1. 870 F.3d 406 (6th Cir. 2017).

2. Convention for the Unification of Certain Rules for International Carriage by Air art. 17(1), May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

3. *Etihad*, 870 F.3d at 433.

4. Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 17, Oct. 12, 1929, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 note [hereinafter Warsaw Convention]. While only the French text of the Warsaw Convention is authoritative, the U.S. Supreme Court has adopted this English translation of Article 17, which was the official translation when ratified by the U.S. Senate in 1934. Olympic Airways v. Husain, 540 U.S. 644, 649 n.4 (2004) (citing 49 Stat. 3000, 3014 (1934)).

5. *See* Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 368 (2d Cir. 2004) (holding that under Article 17 of the Warsaw Convention, air carriers are not liable "for mental injuries that accompany, but are not *caused by*, bodily injuries" (emphasis added)).

6. *See, e.g.*, *id.*; Jacob v. Korean Air Lines, 606 F. App'x 478, 482 (11th Cir. 2015) (per curiam); Jack v. Trans World Airlines, 854 F. Supp. 654, 663–68 (N.D. Cal. 1994); *accord* Plourde c. Service aérien F.B.O. inc., 2007 QCCA 739, para. 29 (Can.).

7. 870 F.3d at 427.

8. E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) ("We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.").

9. *See* Lydia DePillis, *Lots of Americans Fear Flying. But Not Because of Plane Crashes*, Wash. Post (Dec. 31, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/12/31/lots-of-americans-fear-flying-but-not-because-of-plane-crashes; Rick Seaney, *Fear of Flying? Some Good Things to Know*, ABC News (Oct. 7, 2013), http://abcnews.go.com/Travel/fear-flying-good-things/story?id=20471481.

10. *See* Olympic Airways v. Husain, 540 U.S. 644 (2004) (holding that an "accident" occurred within Article 17 of the Warsaw Convention when an unexpected refusal to assist a passenger resulted in the aggravation of the passenger's pre-existing medical condition).

11. Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 387 (2d Cir. 2004) (quoting El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 171 (1999) (rejecting an interpretation of Article 17 that would have encouraged artful pleading)).

12. *Etihad*, 870 F.3d at 413.

13. *Id.*

14. *See, e.g.*, Rene Marsh & Juana Summers, *Women Detail Sexual Assaults and Harassment on Commercial Flights*, CNN Pol. (Dec. 28, 2017), https://www.cnn.com/2017/12/27/politics/women-sexual-assaults-harassment-commercial-flights/index.html (reporting that "FBI investigations into midair sexual assaults have increased by 66% from fiscal year 2014 to 2017").

15. Air France v. Saks, 470 U.S. 392, 405 (1985).

16. *See, e.g.*, *Etihad*, 870 F.3d at 432.

17. No. 09 Civ. 3226, 2010 U.S. Dist. LEXIS 107688, at *11 (S.D.N.Y. Sept. 27, 2010); *see also* Levy v. Am. Airlines, No. 90 Civ. 7005, 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993) (concluding that no "accident" occurred where a passenger was allegedly assaulted by federal agents during the flight because their "conduct was in response to [the plaintiff's] actions and was completely independent of the operation of the flight").

18. *See* Matveychuk v. Deutsche Lufthansa, AG, No. 08-CV-3108, 2010 U.S. Dist. LEXIS 92450, at *7 n.4 (E.D.N.Y. Sept. 7, 2010).

19. *Saks*, 470 U.S. at 396.

20. 214 F.3d 293 (2d Cir. 2000).

21. *Id.* at 300 (Pooler, J., concurring).

22. *See, e.g.*, Lahey v. Singapore Airlines, Ltd., 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (holding that passenger-on-passenger assault constitutes an accident, and "the actions of the crew are not relevant to the determination of whether the assault was an 'accident' because it is clear that nothing in the term 'accident' suggests a requirement of culpable conduct on the part of the airline crew"); *Matveychuk*, 2010 U.S. Dist. LEXIS 92450, at *7 n.4 (stating that *Wallace* stands for the proposition that a "passenger's sexual assault of a fellow passenger was an 'accident' under Article 17"). *But see* O'Grady v. British Airways, 134 F. Supp. 2d 407 (E.D. Pa. 2001) (holding that an assault committed upon a seated plaintiff by a fellow passenger does not automatically qualify as an accident as a matter of law).

23. *Saks*, 470 U.S. at 405.

24. Ligeti v. British Airways PLC, No. 00 Civ. 2936, 2001 U.S. Dist. LEXIS 15996, at *10–11 (S.D.N.Y. Oct. 5, 2001) (holding that inflammation and slight bruising constitutes "bodily injury").

25. Article 17 the Montreal Convention only governs liability of the air carrier, not that of the actual tortfeasor.

26. Doe v. Etihad Airways, P.J.S.C., No. 16-1042 (6th Cir. Oct. 6, 2017).

27. Etihad Airways, P.J.S.C. v. Doe, No. 17-977 (U.S. Apr. 16, 2018).

28. *See* Olympic Airways v. Husain, 540 U.S. 644 (2004) (holding that an "accident" occurred within Article 17 of the Warsaw Convention when an unexpected refusal to assist a passenger resulted in the aggravation of the passenger's pre-existing medical condition); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (holding that the plaintiff was barred from pursuing a tort action against the air carrier under the Warsaw Convention); Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) ("We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules."); E. Airlines v. Floyd, 499 U.S. 530 (1991) ("We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."); *Saks*, 470 U.S. 392 (defining the term "accident" under Article 17).

29. *See* Ojide v. Air France, No. 17-cv-3224, 2017 U.S. Dist. LEXIS 162419, at *6 (S.D.N.Y. Oct. 2, 2017) (quoting *Ehrlich* for the proposition that mental injuries that are not caused by bodily injuries are not compensable under Article 17 of the Montreal Convention); Yang v. Air China Ltd., No. 14 C 6482, 2017 U.S. Dist. LEXIS 158507, at *29 n.7 (N.D. Ill. Sept. 27, 2017) (noting that "the drafters of Article 17 of the Montreal Convention 'expected that this provision will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments'" (citing Montreal Convention, art. 17 cmt. 1)).