



## AIR CARRIER LIABILITY TOWARD PASSENGERS IN CASE OF PANDEMIC

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### Abstract

The "smooth flow of passengers" is in jeopardy due to the existential issues the spread of the COVID-19 virus brought to the worldwide aviation sector. Because of this, it may be appropriate to revisit the key instruments of private international aviation law in order to define the new normal that develops when global travel limitations are removed. Courts in one side have strictly interpreted "accident" under Article 17 to entail an incident that must result from "those dangers that are distinctive of air travel. But there is a lot of grey area existing.

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## Introduction

While there is no doubt that an infectious disease such as COVID-19 can be transmitted or contracted on board an aeroplane or during the course of embarking or disembarking operations, damages may be restricted under the rules of both Conventions if a causal event is related to the transmission or contraction and otherwise meets all the predicates to liability. First, under the Warsaw Convention, an air carrier just needs to show that it took "all necessary precautions to avoid the harm or that it was impossible" to do so. According to the US Supreme Court, the Warsaw Convention's "principal objective was to... restrict the liability of air carriers in order to support the expansion of the young commercial aviation sector," as cited by the court. To put it another way: "in 1929, the parties were more concerned about safeguarding air carriers and encouraging the development of a new business than giving full compensation to passengers who were injured." Since only \$125,000 gold Francs (\$8,300 in 1929) was set as the maximum damage award for each passenger in the final Warsaw Convention text, air carrier responsibility without proof of negligence was only permitted to a limited extent

## 1. LIABILITY UNDER THE WARSAW AND MONTREAL CONVENTIONS

Due care and "all essential means to avoid the harm [were] taken or that it was impossible" to do so are required to exonerate an air carrier from obligation under the Warsaw Convention. If the damages were caused by an air carrier's "wilful misconduct," they would not be subject to the liability cap under the Warsaw Convention. This is a very high bar to clear because airlines are not in the business of intentionally injuring or killing their customers or crew (or damaging their planes).

It was only at that time that the United States began to threaten its denial of its obligations under the Warsaw Convention that an agreement was made to double its personal liability limits—to a maximum of \$26,000.<sup>396</sup> As a replacement for the Warsaw Convention, the Montreal Convention was adopted by ICAO member nations in 1999. However, the Montreal Convention departs significantly and consequentially from the Warsaw Convention in terms of culpability.

The Montreal Convention established a two-tier liability scheme as one of the most significant distinctions between the Conventions. Montreal's strict liability structure, in contrast to the Warsaw Convention's presumptive responsibility and "wilful misconduct" liability cap, was a two-

dimensional strict liability model.<sup>399</sup> Under the Montreal Convention, air carriers are strictly or totally responsible to passengers for death and damage up to "100,000 Special Drawing Rights," which was about \$134,484 on May 28, 1999, the day the Montreal Convention was signed. Beyond that amount, air carriers are presumptively responsible to an unlimited amount (i.e., no limitation) under a second tier of liability under the Montreal Convention unless the defendant-carrier can establish either that "such damage was not attributable to the negligence or other wrongful act or omission of the carrier or its servants or agents," or that "such damage was exclusively due to the carelessness or other wrongful act or omission of a third party."

Whereas the Warsaw Convention reduced air carrier liability to encourage the development of the nascent international airline industry, (Bhat, 2016) the Montreal Convention is more favourable to passengers because it reflects the maturity of the international commercial aviation industry and represents a sort of quid pro quo whereby passengers could recover damages regardless of negligence in exchange for a limitation on liability. However, as discussed in Part III, the route to recovery is not only difficult for Warsaw Convention and Montreal Convention claimants in general, but is especially likely to create distinct proof and persuasion challenges for litigants asserting (or defending against) claims that the transmission or infection of infectious illness is compensable under either of the Conventions.

## 2. The definition of the Convention's 'accident'

There was no definition of "accident" in the Conventions which left the door open for judicial interpretations to be made. When interpreting the phrase "accident" under the Warsaw Convention, the Supreme Court of the United States stated that it means "an unexpected or extraordinary incident or occurring that is external to the passenger". There is no requirement that the 'accident,' as defined by the Conventions, be connected to the features of air travel. Several courts throughout the world followed Saks in determining whether or not an incident qualifies as an "accident" by applying the standards set forth in Saks. Saks became a key case in defining the word. Using the standards set down in Saks, the courts are now deciding whether or not the circumstances surrounding each incident qualify as a 'accident' under the Conventions. As a result of the ruling in *Olympic Airways v. Husain*, the Supreme Court of the United States reaffirmed Saks's decision, holding that a passenger with Asthma who had requested three times to be reseated had been denied due to a refusal to comply

with the ordinary unusual definitions of these terms.

Here, the question is whether the external, unexpected, or unusual criteria should be applied to the COVID-19 infection or to the event that caused the infection. Due to the fact that COVID-19 is very communicative, it is impossible for flight travellers to socially dissociate themselves from the other passengers. Is catching COVID-19, in general, anticipated, or normal in these situations? We don't think it's appropriate to inquire if contracting COVID-19 was an "accident." Since there is now no treatment or vaccine for Ebola, becoming infected will not be a "accident," as it should be expected given the existing circumstances. To determine whether an 'accident' occurred, one must look at what happened to the passenger that resulted in an illness.

As a result, the criteria of being external; unexpected and uncommon should be applied to the source of the illness rather than the infection itself. In our perspective, the 'accident' that caused the illness is the injury. According to the court's decision in *Waxman v. CIS Mexicana De Aviacion*, the faulty cleaning of the aircraft where Mr. Waxman was stuck in his right leg by a hypodermic needle protruding from the fabric of the seat immediately before his seat was a "accident." Passengers who catch COVID-19 aboard a plane due to the carrier's or his agents' carelessness should be regarded an "accident," not a disease. Similar to *Waxman*, the court in *Dias v Transbrasil* determined that poor cabin air quality due to the aircraft's air filtering system not operating correctly causing damage to the passenger constitutes an "accident."

### 3. The 'accident' needs not to be the sole cause

The 'accident' as defined by the Conventions does not have to be the only cause of the passenger's injury or death. Simply having an "accident" as a cause of injury, death, or some other link in the chain will suffice. It is only necessary to show that a link in the chain was an exceptional or unexpected incident that occurred outside of the passenger's control a result, the infection with COVID-19 just has to be a cause in the sequence of events to qualify as an "accident." To determine whether or not an incident is an "accident," the facts surrounding the incident that resulted in the passenger's death or injury must be considered in every case. Certain courts have seen the activities of other passengers who have injured some passengers as "accidents" in this context. In one case, a drunk passenger's fall that injured another passenger was deemed an "accident".

One has to wonder, though, if infecting a fellow traveler with COVID-19, which a carrier of the virus is carrying without showing any symptoms of the illness, is an "accident". Whether he was careless in cleaning the aircraft or any aspect of the chain of events that led to the harm, the carrier might be held accountable, in our judgment and in accordance with Saks., an injury caused only by the passenger's internal reaction to the aircraft's customary, normal and anticipated performance would not be considered an "accident." The 'accident' under the strict liability regime

### 4. The period of air carrier's liability for passengers' contraction of COVID-19

The passenger must show that the 'accident' occurred when the carrier was responsible in order to hold the air carrier liable for the passenger's injuries. Passenger safety is a carrier's responsibility when the passenger is on board the aircraft, or in the process of boarding or disembarking, as defined by the conventions of transport by air. All of these concepts, like the term "accident," were not defined by the Conventions, which left open the possibility of judicial interpretation. This raises a number of difficulties (Prager, 2011). What time do the activities of embarking and disembarking begin and terminate, to begin with. Second, the passenger's capacity to establish that the virus was contracted while the carrier was liable. These two topics will be discussed in detail in the sections that follow.

#### 4.1 The operation of embarking

According to the standards presented by the United States Federal Supreme Court in *Day v. Trans World Airlines, Inc.* the text of the Conventions implies that the activities of embarking extend to regions beyond the aircraft and may cover the terminal areas. Prior to boarding an aeroplane, passengers must go through a series of eleven procedures outlined by the Day court. Starting at The upper-level check-in desk, passengers present their tickets to the airline for boarding passes, baggage checks, and an assigned seat number; they then pass through passport and currency controls imposed by the governmental authorities; they submit their carry-on luggage for a similar inspection by the police; and finally, they waltz through the boarding gate. (Hodgkinson & Johnston, 2016)

Passenger involvement in the boarding process was determined by a standard devised and used by the court. On the basis of what passengers are doing, how much control the airline has over them, and where they were when they were involved in an

accident, they were tested. As a result of Day, a fourth criteria was introduced by some court to determine whether or not an individual is likely to board the plane in the near future. The activity test was considered the most important of these measures by the majority of courts that have dealt with similar instances. As a result, the court will look into the passenger's activity (what the passenger was doing), the passenger's relationship to the carrier, the accident's location, and the time it occurred in order to determine whether the events that occurred in the terminal area were part of the embarking operations.

Using these testing, it appears that the passenger's check-in may begin as soon as he or she arrives at the terminal. Any accidents that occur as a result of a lapse in embarkation procedures that takes place between the times of checking in and boarding the aircraft are not the responsibility of the airline. In situations of COVID-19, the virus might be contracted at any of the above-mentioned locations, resulting in a significant financial burden for the carrier ((Johnson-Pawlson, 1986)).

Carriers in COVID-19 situations would have a heavy burden if the aforementioned tests were just focused on the activity test. Therefore, we believe that the two most important tests (control and location) should be taken into consideration. If an accident occurs in a third-party-operated area that the air carrier has no control over, then using these two criteria combined will eliminate the airline's culpability. One may expect a carrier to have control and disinfection capabilities in areas like as the boarding gate and check-in area of the plane. On the other hand, escalators and the space between the check-in area and the boarding gate are utilised by other carriers and other people, thus the carrier does not have authority over them. (Pearson & Riley, 2016)

#### **4.2. The operations of disembarking**

Courts appear to use the same embarking criteria described above when interpreting the disembarking interpretation. *Air Canada v. Catherine E. MacDonald*, the court held that disembarking operations cease 'when the passenger has descended from the plane by whatever mechanical means have been supplied and has reached a safe point inside the terminal,' even though they may continue to be treated as passengers of the carrier while inside the building.

According to *Martinez Hernandez v. Air France*, the United States Court of Appeals confirmed this decision, citing Day's tripartite test and ruling that

the carrier was not "in real control of the passengers' activity" at the time of the accident. Court rejected the basic location test, preferring a 'tripartite test' 'because it is compatible both with the wording of the Convention and with the reality of modern air travel,' according to a statement. Disembarkation cases, in my view, are also covered by the Second Circuit's decision on Article 17's embarkation provision.' (Harakas, 2017) Passengers should keep in mind that disembarking is a much shorter process than boarding one. Disembarking passengers are often placed under the control of the carrier until they arrive at the terminal building, which is where the authors believe the disembarking process terminates (Heere, 1992). As a result, the air carrier's obligation for COVID-19 should be seen to extend from the moment passengers exit the plane until the time they enter the terminal.

### **5. Exoneration of air carrier's liability in COVID-19 cases**

#### **5.1. Defences related to the carrier or third parties**

The defences available to an airline to exonerate itself from liability for the death or bodily harm of passengers vary on the nature of the airline's liability. Carriers' liability is believed to be fault-based under the WC-29 rather than stringent or absolute (Pearson and Daniel S. Riley, 2016) under the MC-99. This is true in tier one and presumed to be fault-based. (Larsen et al., 2012). Presumed-fault liability can be mitigated by proving that both the carrier and its agents took all necessary measures to avoid damage, or that such measures were impossible for either of them to take. Article 20/1 of the WCC says that the carrier is exempt from liability if he can show that both he and his agents did not take any such measures. This defence was adopted by the MC-99, however, the language was altered. It is stated in paragraphs 21/2 and 2/3 of Article 17 of the MCA-99 that the carrier is not liable for damages arising from paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 (128,821 now) Special Drawing Rights if the carrier proves that: (a) such damage was not caused by any negligence of the carrier or its servants and agents; or (b) such damage was solely caused by the negligence or wrongful act of a third party.'

It was introduced to the carrier's obligation in tier two of the carrier's liability in the MC-99 by exonerating it from liability where the harm was solely attributable to the carelessness of the third party'. As a result, if another cause contributed to the passenger's damage, the carrier will not be

exonerated from obligation, as stated in the later defence. (Pearson & Riley, 2015)

### **5.2. The passenger's contributory negligence**

The passenger's contributory negligence is a prevalent defence among the Conventions in all sorts of carrier liability. (Hodgkinson & Johnston, 2016) if a carrier can prove that someone else's negligence or other wrongful act or deed contributed to a claimant's damages, the carrier will be exonerated from liability to the claimant to the extent that such negligence or deed contributed to the damage. 'If the carrier establishes that the harm was caused by or contributed to carelessness of the injured person, the Court may, in accordance with the rules of its own law, exonerate the carrier totally or in part from his obligation', according to Article 21 of the WC-29.

According to this article, the New York Supreme Court ruled that KLM Royal Dutch Airlines was not liable because the passenger's leg injury was caused by her own negligence in failing to fasten her seat belt before falling out of the plane and injuring her leg, which was caused by her failure to do so. *Chutter v. KLM Royal Dutch Airlines*:

COVID-19 can be averted if the passenger is cautious and follows the WHO and the carrier's guidelines, thus applying this defence to these situations would alleviate some of the pressure on carriers. To sum up, each case's circumstances and national legislation determine whether contributory negligence occurred.

### **6. The scope of safety from the aviation perspective**

Many international aviation companies during COVID 19 are exploring possible routes for facilitating a "restart" of international aviation by airlines in safety way to grant passengers trust and safety. (Harakas, 2017) Therefore, the resumption of international flights would entail crossing a range of hurdles to allow governments to fly, and more hurdles in terms of passenger fly, including departure and arrival airports, flights themselves, and other elements such as the measures should be applied in the airport and in the plane by the air carrier. However, these measures are enforceable for the air carriers since its very important for the safety of the passengers such as temperature screening which should be employed at both departure and arrival, using of surgical masks and gloves as advised by WHO, preventing people from having close contact with each other, cleaning and disinfection of frequently/recently touched surfaces is advised by WHO, All of the measures employed currently around the world to slow the spread.

Aviation safety is at the core of ICAO's fundamental Objectives. The organization is constantly striving, in close collaboration with the entire air transport community, to further improve aviation's successful safety performance while maintaining a high level of capacity and efficiency. Individually and collectively, air carries should understand the global challenges now facing, and it must, therefore, rely on that understanding, and on its ability to develop tailored recovery measures that are consistent with the new situation of COVID-19 while addressing their specific priorities. (Abeyratne, 2019)

During COVID-19, several international aviation businesses are looking into ways to make it easier for airlines to "restart" international aviation in a safe way that gives customers confidence and security. There are many obstacles that must be overcome before the resuming of international flights can be achieved, including the need for governments to be able to fly and an even greater number of obstacles for passengers to overcome, such as the need for the air carrier to implement measures in the airport and on board the aircraft. Temperature screening, for example, should be used at both departure and arrival, as well as the use of surgical masks and gloves, as recommended by WHO, to prevent people from having close contact with one other and to clean and disinfect frequently or recently touched surfaces.

ICAO's main objectives are centered on aviation safety. While maintaining a high level of capacity and efficiency, the organization is always working to improve aviation safety in conjunction with the broader air transport community. As a result, air carriers must rely on their ability to develop tailored recovery measures that are both consistent with the new situation and address their specific priorities ("Guidance Material," n.d.) and that each individual and collective air carrier understands the global challenges it now faces.

### **7. Definition of safety**

There's no denying that human care is at the heart of the aviation safety philosophy. All aspects of air transportation and activities connected to passengers and employees and the work environment in aeroplanes and airports, as well as in the areas of maintenance, offices, and places of reservations and waiting rooms within the airports, are subject to this level of attention. (Johnson-Pawlson, 1986)

There are urgent need to limit the danger of the COVID -19 pandemic through air transport, and ICAO's main aims are to achieve this goal by



specific measures such as social distance practise, workplace closure, and other public health intervention measures. While maintaining an extremely high level of adaptability and efficiency, the ICAO has organised a collaborative effort including the whole air transport community in order to significantly improve aviation's safety performance. The aviation industry is concerned about air safety since it is the most critical axis of air transportation. However, the idea of airport safety concentrates solely on the airside without losing sight of the significance of maintaining a safe working environment for employees, tools, and machinery.

The worth of human life and the expenses of catastrophes like the COVID -19 need our attention to aviation safety, even though there is legal insurance in terms of compensation and damages. There are also disadvantages for the airline's image, such as saying that we must live with COVID-19 until the vaccine is available, which has long-term repercussions.

In light of the COVID-19 pandemic, passengers and workers must pay attention to the work environment by adhering to the conditions and safety of work sites such as the airfield, halls, and offices, and this interest is critical in all areas in order to protect its health and give the greatest levels of giving and performance to the work system, and therefore exclude or minimise the transmission of sickness or infection to others, taking into account that flying is the most attractive and safe means of transport. (Pearson & Riley, 2015)

### **8. The ICAO's COVID-19 safety measures**

Regardless of the immediate requirement to reduce the dangers and legal liabilities connected with the COVID-19 pandemic via air transport, the airport will have defined safety measures addressing the structure, washing, disinfection, and cleanliness of airport terminals, physical distance, staff safety, entrance, check-in area, security screening, airside areas, gate facilities, passenger transfer, disembarkation, baggage claims, and arrivals areas. Consequently, the air carrier should be responsible for additional measures, such as physical distancing in the side plane, boarding, disembarking, and arrivals, in addition to the airport's other measures.

#### **8.1. Terminal building**

The passenger safety department will be in charge of giving instructions for how to run the terminal building. These instructions will cover all aspects of operations, such as who can get into the terminal, how to keep it clean and how to disinfect it, as well

as health measures, instructions, and protocols for first aid and medical care for passengers and staff. If they don't, they will be responsible for any spread of disease.

#### **8.2. Cleaning and disinfection**

To ensure passenger safety and avoid legal responsibility, a documented strategy for improved cleaning and disinfection should be agreed upon by the Airport Health Authority, airport operators, and service providers in line with the standard operating procedures provided in the WHO guidance on aviation hygiene and sanitation. Keep changing the plan as you learn more about the operation, the schedule, and the products. As a result, terminal facilities and all equipment should be cleaned and disinfected on a regular basis, and the frequency should be increased as needed due to traffic and usage, as well as increasing the available cleaning and sanitising materials (Guide to Hygiene and Sanitation in Aviation Third Edition Module 1: Water Module 2: Cleaning and Disinfection of Facilities, 2009).

To stop the spread of disease and protect public health, the airport authority will make sure that all passengers know about the cleaning and disinfecting programme. This will happen as employees use the right products and talk about the areas that are most affected and most likely to be infected, such as the special needs desks, check-in areas, immigration/customs areas, security screening area, boarding areas, lifts, and escalators. It is important to make sure that trash cans and seats are available before and after security screening, in boarding/check-in areas, on parking shuttle buses and on airside buses, and those disinfectants are used in the right way and for the right amount of time ("Safety," n.d.).

Also, it's important to keep in mind that increasing the use of air conditioning is very important and that effective filtration systems are needed to keep the air clean, cut down on recirculation, and increase the ratio of fresh air to stale air. Horizontal airflows should be the only ones allowed.

#### **8.3. Physical distancing**

Physical distancing is an effective method to restrict COVID-19 transmission at the moment and should be part of a full package of actions to limit COVID-19 spread. So far as airports are concerned, physical distance measures should be at least consistent with those used for other modes of transportation – specifically, urban public transportation used for access to/from airports, applied

to the greatest extent possible throughout the airport (Airport Module - Terminal Building).

At the same time, additional specific procedures should be implemented to the greatest degree practicable across the airport. Physical separation should aim for at least one (1) metre between all persons. Passengers should, however, use masks or other facial coverings in compliance with current health recommendations and when their usage does not create a scarcity of healthcare staff. However, without rejecting the fact of mutual acknowledgment of equal physical distance measures that decrease health risks at the time of departure and arrival (IATA - COVID-19 Corona virus & Travelers).

#### 8.4. General check-in area

The general check-in area at an airport is often a high-traffic area for travellers. In order to reduce line-ups and congestion, passengers will complete as much of the check-in process as possible before arriving at the airport (ready to fly). Self-service solutions should be made available and used as much as feasible to minimize engagement at passenger touch points.

In this instance, improved passenger flow planning and monitoring should be used to take strategies that alleviate congestion inside these zones. Airports, on the other hand, should provide signage, floor markings, and statements over the Public Address (PA) system to encourage physical separation. Aid in the coordination of key safety messages from health authorities through audio messages and signage at key passenger travel touch points and various self-service tools, such as boarding passes and baggage tag kiosks, and baggage drop, are of particular concern due to the high physical contact levels that increase the likelihood of contamination.

Nonetheless, the use of these gadgets should be promoted in order to eliminate face-to-face encounters, but with particular attention paid to regulating passenger flow and keeping such equipment sufficiently maintained and disinfected. Passengers should be urged to complete check-in formalities before arriving at the airport wherever feasible to prevent traffic. Online check-in, online boarding passes, off-airport baggage tagging, and other innovations will help to reduce contact with airport personnel and infrastructure. As a result, the International Civil Aviation Organization (ICAO) advised that nations remove any legislative barriers to such enabling types of off-airport activities. It appears that retractable stanchions and floor

signage are required in the queuing area at traditional check-in counters to encourage physical distance, as well as consider setting up transparent barriers before staff at counters and self-sanitizing technology for integration in touch screen kiosks so that the screen can be disinfected between each application.

Airports and other stakeholders should embrace contactless procedures and technologies as much as feasible, including contactless biometrics such as facial or iris recognition. These digital identification methods may be expanded to include self-service bag drops, distinct queue entrance, boarding gates, and retail and duty-free shops. This will, without a doubt, remove or significantly minimise the requirement for interpersonal and passenger engagement with travel papers. This can also expedite numerous operations, resulting in greater health security, reduced waiting, and other operational efficiencies.

#### 8.5. Security screening

Passenger screening at the airport is the most critical aspect of security to ensure your safe arrival. We should anticipate the necessity to maintain physical separation measures at security checkpoints, including the screening procedure, in the early phases of the pandemic response (Sakano et al., 2016). Steps to monitor access to the security screening checkpoint, as well as potential adjustments to the conventional screening method, must be addressed for compliance with new COVID-19 hygienic criteria.

#### 9. Is disease an inherent characteristic of air travel?

Aside from the fundamental and ongoing issue of how to define "accident" under the Conventions, the challenging question of whether transfer of illness from an asymptomatic passenger (or crewmember) to a fellow passenger constitutes an "accident" for which air carriers are responsible remains. Saks did not make it "obvious if an occurrence's relevance to the functioning of an aircraft is crucial to whether the event is a 'accident. 'As a result, courts have struggled to apply the Saks definition of "accident" when the alleged injuries are caused by torts committed by other passengers—the most likely route for infectious disease spread aboard flight.

Courts in one side have strictly interpreted "accident" under Article 17 to entail an incident that must result from "those dangers that are distinctive of air travel. "For example, courts have held that terrorist attacks and hijackings constitute

"accidents," but passenger fights are not. Furthermore, in the lower court rulings mentioned with approbation in *Saks*, all of the passenger injuries resulted from dangers inherent in air travel or aircraft operation. In reality, the district court in *Saks* held that no "accident" had happened only after considerable evidence proved that the aircraft's pressurisation system had worked normally. In this context, courts may be reluctant to label the spread of an infectious illness aboard an aeroplane (or when arriving or disembarking from an aircraft) as a "accident" unless there is some aberrant functioning of the aircraft itself (e.g., failure to operate an air filtration system or carrying out procedures or operations in an unreasonable manner). Other courts have interpreted the term "accident" liberally. In *Barratt v. Trinidad & Tobago Airways Corp*, for example, a New York federal district court reasoned that:

The Supreme Court ruled in *Air France v. Saks* that an "accident" for the purposes of Article 17 is a harm caused by "an unexpected or exceptional incident or occurring that is external to the passenger." This term is not restricted to injuries caused by hazards specific to aviation. [Article 17] restricts culpability for accidents not by reference to the inherent dangers of aviation, but by whether they occur "on board the aircraft or during any of the procedures of embarking or disembarking." Under this broad interpretation of *Saks* and Article 17, an air carrier might be held liable for injuries caused by co-passenger torts, regardless of whether they resulted from a typical risk of air travel or not. To the degree that disease transmission is a common danger of air travel, claims by affected passengers would fall under this precedent.

In this perspective, *Wallace v. Korean Air* may be the most important ruling. The Second Circuit Court of Appeals ruled that an airline was responsible when one of its passengers sexually attacked a passenger in an adjacent seat. The *Wallace* court held that "the features of air travel heightened [the passenger's] vulnerability to assault," citing *Saks*' wording that the "definition [of the accident] should be flexibly interpreted" after an evaluation of all the circumstances surrounding a passenger's injuries. "When Ms. Wallace boarded the KAL aircraft in economy class, she was crammed into a close area next to two young men she didn't know, one of whom turned out to be a sexual predator." As a result, her attack constituted "an unexpected or extraordinary actor happening that [was] external to the passenger," according to *Saks*.

*Wallace* may provide an analogue for holding airlines accountable for disease transmission from passenger to passenger (and maybe crew to passenger). After all, aboard an aeroplane, social distance is not an option. According to some scientific evidence, international flights represent a larger risk of infectious illness transmission than shorter-distance and shorter-duration flights (e.g., less than 1.25 hours). As a result, judges may be persuaded that the "characteristics of [international] air travel" increase a passenger's vulnerability to infection, much as the tight environment of an international flight's economy class increased a passenger's chance of sexual predator assault. However, *Wallace*'s logic and the potential connection it makes between actual facts and the hypothetical possibilities of viral transmission onboard aeroplanes at the heart of this Article are not a perfect fit. In *Wallace*, the concurring opinion highlighted that "imposing a 'inherent in air travel' condition [into the *Saks* formulation] does not conform with the plain sense of" *Saks* as a co-tort passenger's is a "accident" to the degree it is "an unexpected or exceptional incident or happening that is external to the passenger." Furthermore, unlike the passenger in *Wallace*, travellers may anticipate and limit (if not eliminate) the danger of infectious disease by avoiding travelling at all or by following air carrier regulations such as donning a face mask and completing boarding procedures. Furthermore, the *Wallace* majority determined that "not a single flight attendant saw a concern" throughout the lengthy period during which the sexual assault occurred. Today's airlines are considerably more aware of the health risks aboard flights, therefore an airline's disregard for aircraft hygiene would be rare or unexpected.

## 10. DAMAGES AND DEFENSES

Any or all of the early steps adopted by airlines to combat the COVID19 pandemic—from asking passengers to wear masks to leaving middle seats open during the reservation process to suspending in-flight service—would very certainly meet this "necessary measures" standard.

Furthermore, violating the Warsaw Convention's responsibility cap is very difficult for claimants in general, and it would be even more difficult in the situation of infectious disease transmission. After all, passenger plaintiffs would have to prove an airline's "wilful misbehaviour" to overcome the liability cap. Given the economic destruction caused by COVID-19 viral policies, such self-defeating conduct is impossible to comprehend. Of fact, economic incentives may always exist to



dissuade carriers from taking costly efforts to strengthen onboard health, and an air carrier's decision not to invest in or implement antiviral technology or processes may easily serve as the basis for a Husain-like claim. However, in the abstract, the idea that an airline would purposely or wilfully hurt customers who are already hesitant to resume international travel after the COVID-19 virus destroyed them makes little logic.

Finally, claims for damages will face significant evidentiary headwinds and heavy defences under the Montreal Convention's two-tier liability framework. First, there is a strict liability tier under Article 21(1) up to 100,000 Special Drawing Rights, which states that "the carrier shall not be able to exclude or limit its liability for damages arising under paragraph 1 of Article 17 that do not exceed 100,000 Special Drawing Rights for each passenger. "Following that, Article 21 (2) states:

The carrier is not responsible for damages resulting under paragraph 1 of Article 17 to the extent That they exceed 100,000 Special Drawing Rights per passenger if the carrier establishes that:

- (a) Such damage was not caused by the carrier's or its servants' or agents' carelessness or other wrongful act or omission; or
- (b) Such damage was exclusively caused by a third party's negligence or other wrongful act or omission.

While both measures appear to promote the policy aim of expediting settlement and facilitating compensation, their primary purpose is to define air carrier responsibility, and none eliminates the need that a passenger demonstrate that a "accident" occurred. Furthermore, Article 20 of the Montreal Convention allows a path to exoneration even for tier-one strict liability:

Any obligation for damages that the carrier may have to the claimant is reduced or eliminated if the carrier can show that the loss was created or worsened as a result of the person suing it's own carelessness or any other wrongdoing on their own....

As a result, air carriers can lessen or eliminate responsibility by showing contributory negligence, such as establishing that a passenger-plaintiff disguised an illness in order to fly or refused or failed to comply with the carrier's or international health authorities' standards, such as WHO (e.g., wearing a face mask during the flight). Passengers are in the best position and ultimately accountable for their own well-being. They can choose whether to conceal or deny sickness or wear an air-carrier face mask.

## 11. CONCLUSION

There are a few primary purposes of the Montreal Convention, including the need to "modernize" international liability schemes and to promote the "orderliness and seamless movement of passengers, luggage, and cargo in conformity with the principles and objectives" of air transportation. "Laid the groundwork for the norms and procedures for peaceful worldwide air navigation," according to Chicago Convention, a major post-war pact created during a dark period in human history. The "smooth flow of passengers" is in jeopardy due to the existential issues the spread of the COVID-19 virus brought to the worldwide aviation sector.

Because of this, it may be appropriate to revisit the key instruments of private international aviation law in order to define the new normal that develops when global travel limitations are removed. One federal district court judge said it best in a letter he penned over four decades ago:

The Convention was created during a time when things were simpler. To board a flight, several airlines just require a passenger and their luggage to be weighed, their ticket to be taken and their foot to be placed on the boarding ladder. Air travel in these troubled times necessitates flexible interpretation of the treaty's original intent. As interpreted by the Saks Husain line of cases, however, the Conventions appear to be ill-suited to the risk of infectious illness on-board international airplanes.

Unfortunately, the judicially created meaning of "accident" is confusing given the current reading of Article 17 and the precedent set by Saks. It is possible for an illness to be anticipated, unexpected, normal, exceptional, exterior and internal at the same time on an aeroplane or in an airport.

Passengers just need to establish that a "link in the chain was an exceptional or unexpected incident external to the passenger" for air carriers to be responsible for "any injury that is the outcome of a chain of causes. "Co-passenger torts might be included or excluded from the definition of "accident" in accordance with Article 17. Due to the Sixth Circuit's decision to embrace "fear of contagion" mental suffering claims, a new circuit divide has formed. Husain, on the other hand, sets U.S. law at variance with the understanding of its sister signatories fundamentally by declaring non-events actionable.

While "close questions" and line-drawing exercises are frequently challenged by courts, it is not

uncommon for reasonable persons to disagree on these issues. The Conventions' purpose of uniformity is in conflict with this ambiguity and variety in results. When an airplane's operation is not "normal" (such as when an air filtration system fails), courts should interpret Article 17 to exonerate air carriers from liability, even if the Warsaw and Montreal Conventions provide that air carriers are responsible for the transmission of infectious diseases. Courts should therefore resist the temptation to enshrine in the words "operations of embarking and disembarking" additional duties for air carriers, which are mitigated by the inherent dangers of air travel.

It is clear that Conventions do not support mandating airlines to monitor passengers' health, make expensive cabin reconfigurations or implement antiviral technology as part of their "regular" operations. In other words, under international laws for international air transportation, on-board health may be at the same liability level as flight safety. However, courts should be wary about blaming airlines for the spread of dangerous diseases on foreign flights unless there is clear textual evidence to the contrary.

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18. Price v. Brit. Airways, No. 91 Civ. 4947, 1992 WL 170679, at \*3 (S.D.N.Y. July 7, 1992) (an injury caused by a fistfight between two passengers was not an "accident" because "a fracas is not a characteristic risk of air travel nor may carriers easily guard against such a risk through the employment of protective security measures"); see also Curley v. Am. Airlines, Inc., 846 F. Supp. 280, 283 (S.D.N.Y. 1994).
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