International Aviation Law

Duration of Liability of Carrier under Warsaw Convention, Art 17 of the Warsaw Convention.

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The legal relationship between airlines and international passengers began with a landmark international treaty generally known as the Warsaw convention and was titled *The Convention for Unification of Certain Rules Relating to International Transportation by Air*. It was in the year 1929 when the aviation industry is in its infancy but it was felt that it held a great promise to afford a better, safer, faster and more comfortable journey thus the industry needed protection. So the members agreed to adopt the international treaty that would protect the international airlines from loss in the event of a crash as the crashes were very common then, secondly, promotion of availability of liability insurance to international airlines, thirdly, providing uniform terms and condition of transportation by air and fourthly, provide a framework of internationally uniform law to govern international airline crashes. It was made not only to set uniform standards for aviation industry but also careful consideration was given to safety issues so that the consumers and investors develop confidence in the aviation industry by imposing strict liability on international airlines for passenger injury or death, substantial limits defense would otherwise be available to international airlines under the common law and loss of destruction of cargo.¹

The Warsaw convention establishes the rules of liability and limitation for International Air Carriage. It establishes the rules insuring adequate and reliable recovery for injury to person or property and to protect the infant airline industry.²

Before going into the liability we need have an idea of aviation safety. Safety means freedom from risks, it means state of being protected from or guarded against hurt or injury. But if aviation industry has to be safe then the industry will not exist at all.³ So certain standards needs to established to that passenger is comfortable as well as the industry also flourishes. Aviation safety means state of freedom from unacceptable risk of injury to persons or damage to aircraft and property. It may include imposition of particular safety standards, suspension license of unqualified pilot, rigorous training, grounding of civil aircraft in case of fault or crisis so its approach has to be multi

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² Ibid.
disciplinary ranging from technical, economic, managerial as well as legal. Safety has a
technical dimension but the legal aspect cannot be ignored. The legal aspect also includes
policies which will affect the aviation industry as a whole and thus commerce of the world.\textsuperscript{4}

The liability of the carrier commences from the moment he accepts the goods for
transportation to the period where it transports the goods until these are delivered at the
place of the decided destination. So at the start to the end of the journey the carrier is liable
for many things that can go wrong. These are discussed in different sections.\textsuperscript{5}

### Duration of Liability under Warsaw Convention.

In case of **duration of liability** we still have to consider the length of time during which the
carrier remains with the passengers. It begins from embarking to the flight to
disembarking. **Art 17** makes us liable for damage in the event of death or wounding of a
passenger if there is an accident which caused damage which took place on board the
aircraft or in the course of embarking and disembarking.

**Liability towards passengers**

Liability towards the passengers starts when the passenger is on a process of embarking.

“The 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**.”

**Art 17** of Warsaw talks about liability of the carrier towards the passengers. There are four
key words in this section and they are “accident,” “bodily injury,” and operation of
“embarking,” “disembarking”. Five things need to be proved under **Art 17**. They are (1)
Damage sustained is a result from (2) passengers death or bodily injury (3) caused by an
accident (4) which occurs on board the aircraft (5) in the course of embarking or
disembarking.

Passenger.

First we must understand who is a passenger. Art 1 makes the convention applicable to “all international transportation of persons, luggage and goods. For Art 17 the passenger must be a live person. Art 1(2) indicates that the convention applies to persons with contract of carriage. The working crew is therefore exempted from the scope of the Convention. A passenger has a right to bring an action for bodily injury or wounding. If the passenger dies, his representative has the right to bring action against the carrier.\textsuperscript{6}

What is an Accident on flight?

**Accident must lead to death or bodily injury.** For this we need to understand what accident is. Accident has been defined as an unexpected and sudden event that takes place without foresight.\textsuperscript{7} So it can be understood that the event must be unexpected and unusual, which should then qualify as an accident which should lead to damage. Hijacking can be regarded as an accident which must lead to bodily injury to qualify under Art 17.\textsuperscript{8} In another incident a fellow passenger attacked another passenger. The court held that it does not qualify as an accident under Warsaw. The event which should be unusual or unexpected had to be on board the aircraft and must be directly or indirectly caused by negligence or error of the crew or the cabin assistants.

A passenger is struck by another passenger without provocation is not an accident as it has nothing to do with aircraft operation. So if two passengers starts fighting then carrier will not be liable but if the fight was caused by serving overdoes of alcohol then cabin assistants are liable and thus the carrier is liable. So a direct or indirect act of the crew or the cabin assistants is necessary. If a passenger wants to change his seat due to medical reasons but was not allowed and which lead to health problems in the future, will qualify as an accident and thus bodily injury. A passenger suffers from asthma was exposed to cigarette smoke. He suffered a severe asthma attack and dies as a result. The refusal by the cabin crew to reseat the passenger was a negligent inaction which will be termed as an accident leading

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\textsuperscript{7} DeMarines v. K.L.M. Royal Dutch Airlines, 14 Avi 18,212 (1977)

\textsuperscript{8} Husserl v. Swissair, 13 Avi 17,603 (SDNY, 1975)

\textsuperscript{9} Price v. British Airways, 23 Avi 18, 465 (1992)
to death thus will qualify under Art 17. If there is confiscation of medical bag which contained live saving drugs, then any damage resulting from not having it will be the responsibility of the carrier. The failure of the airline to comply with a health based request to ensure that the hand baggage travelled with the passenger was an ‘event’ or ‘happening’ within the plain meaning of those terms as explained by the supreme court in the *Husain* case. The event has to be unusual and unexpected. If the passengers were given repeated assurances that the medical hand baggage will not be taken from him or will not be delayed on arrival and if the bag is lost in transit then it qualifies as an accident. The unusual and unexpected event is external to the passengers as well as refusal of assistance by the ground staff or the cabin crew. So the action of the carrier must be linked to the death or bodily damage to the passenger. If the illness preexisted it will not matter as there was willful negligence and failure to comply with procedures on the part of the carrier in aggravating the illness considerably. If the seizure of the bag leads to the death then delay will not matter but the seizure must take place during the process of embarking. The failure is responsible for orderly and necessary boarding procedure; if there is no compliance with it then carrier will be liable. Failure to remove the hypodermic needle from the cushion seat was an accident as it was the failure to perform the duty by the cabin crew and thus qualify as an accident. The simple act of not doing anything or remaining silent on behalf the cabin crew will be termed as an accident which thus leads to bodily injury. But if the passenger is not in good health and the flight has aggregated the symptoms then it won’t qualify as an accident leading to bodily injury. An event is not an accident if it arose exclusively from passenger’s state of health. US courts narrowed the term “accident” by stating that an event was not an accident if it arose exclusively from the passenger’s state of health. The word extensively is important as it means that the accident was fully caused by the passenger’s state of health.

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10 *Olympic Airways v Hussain*, 2004 WL 329950
and not by the external influence or negligence of the ground staff during embarking or
disembarking or by the cabin crew during the flight.\textsuperscript{13}

The injury if caused by the changes done by the crew like some necessary changes in the
operation of the flight which in normal, prudent, usual in the course of the journey will not
be termed accident. So any bodily injury caused by that will not be termed as an accident
leading to bodily injury.\textsuperscript{14} If a passengers hearing capacity is damaged due to negligent
maintenance and the pressurization system of the aircraft, then the carrier will be liable as
there was negligence on the part of the crew which lead to the bodily injury. But if it is
found that the system had functioned properly then the passenger will not be liable for
damages as the change in pressure in the cabin is normal as part of the flying in different
altitudes.\textsuperscript{15}

So death or bodily injury must result from an accident and the accident must occur on
boards the aircraft or during embarking or disembarking. Death may occur due to a casual
accident which may not kill the passenger instantly but the passenger may have suffered
leading to death in a few weeks. Damages can be awarded as there is a casual
accident itself and pre death pain. If a passenger without a pre death pain was not provided with a
wheelchair during disembarking which led to a heart attack, then in that case accident was
the failure of the carrier employees to provide the wheelchair which caused the bodily
injury which is heart attack so it is compensable under Warsaw. Another point that needs
to be noted is that there are many injuries that can happen while on board or during
embarking or disembarking but are not compensable as there must be an accident to
qualify it as bodily injury.

Accident may be related with aircraft operation. A discussion of \textbf{Air France v Saks} is
required. A passenger on an Air France flight Ms. Saks going from Paris to Los Angeles, felt
severe pressure and pain in her left ear when the aircraft descended towards Los Angeles.
Ms. Saks after disembarked continued to feel the pain but did not inform any Air France
crewmember. She became permanently deaf in her left ear as later revealed by her doctor.

\textsuperscript{13} Lawrance B Goldhirsch, Warsaw convention, Annotated Legal Handbook, Kluwar Law International,

\textsuperscript{14} Warsaw v TWA, 14 Avi 18,297 (1977)

\textsuperscript{15} Air France v Saks, 18 Avi 18, 538
As pressurization system had operated in a normal manner so Air France argued that it is not an accident within the meaning of Article 17 as the injury was caused by the normal operation of the pressurization system and therefore do not qualify as an accident. Definition of accident should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries. The US Supreme Court held that liability under Article 17 arises only if there is an unexpected or unusual event which caused injury to the passenger’s which is caused by or happening that is external to the passenger. Chain of causes must be proved in any injury and it is required that the passenger is able to prove that some link in the chain has led to unusual or unexpected event external to the passenger. Warsaw does not impose carrier liability for injuries that are not caused by an accident. The passenger has the burden to proving that the accident has unusual and unexpected. The Court held that the injury was not a product of a chain of events or causes. Moreover normal operation of an aircraft does not constitute an accident.16

There we can derive five points:
1. Unusual and unexpected event, which should be external to the passenger.
2. Flexibly applied in determining all circumstances.
3. Chain of events leading to the injury thus the cause of the injury and not the injury alone.
4. Warsaw does not impose absolute liability on the carrier.

Carrier should not be liable for most injuries, as long as they are unexpected or unusual. Carrier should not be liable for all damages. Carrier cannot be always held liable for any injury that befalls on a passenger without any causal connection between the damage and the operation of the aircraft. This is the reason why the passenger must insure themselves against all other risks that are not associated with the operation of the aircraft.

Duration of Liability of Air Carrier under Warsaw Convention.

Question now arises what exactly in normal and expected operation of a carrier. Injury occurring due to the fault exclusively to the passenger so it will not be termed as an accident as it is not caused by the operation of the aircraft by personal causes. Accidents like injury due to intoxication can occur in any sphere of life and it would be absurd to hold the carrier liable. But if the intoxicated passenger falls on another passenger and injures him then it will be an accident. This is because it is the duty of the cabin crew to handle the matter and take necessary measures to avoid such occurrences by stop serving excess alcohol or changing the seat of fellow passenger if necessary. So operation of the aircraft not only includes technical matters but also the proper workings of the cabin crew. Injury due to some normal day to day activity will not be termed accident. A passenger is injured by tripping over another passenger's shoes or hand luggage placed in the aisle during boarding is not an accident. A passenger placing hand luggage in the aisle during boarding is an expected normal event and if it causes injury by tripping on a passenger then it will be termed and an unusual event if Saks case is applied. So one must be careful that normal events leading to accident but not directly or indirectly related with the operation of the carrier should not qualify as an accident. Passenger’s own internal reaction to the usual, normal and expected activity of the operation of the flight increases then it will not be an accident. An event can become an accident through an act or omission by the carrier or its agents or servants. In the *Tsevas v. Delta Airlines* case a female passenger was sexually assaulted by a drunken passenger who sat next to her. Ms. Tsevas earlier asked the cabin crew that she should be seated elsewhere. The crew not only ignored her complaints but kept serving the intoxicated passenger with more alcohol. The court held that the sexual assault was an accident as it was caused by the over serving of alcohol and refusal to reseat her by the cabin crew which was casual to the accident. Moreover the accident is unexpected, unusual and external to the passenger which was caused by the service of the flight attendant. The service of the flight attendants is an integral part of the air travel and related with the operation of the aircraft. The airline was held liable. In another case *Wallace v. Korean Air*, a female passenger named Ms. Wallace was onboard Korean air travelling from Seoul to Los Angeles. It was an overnight flight and

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she was seated between two men. She was sexually assaulted by one of the men when the lights were switched off at night. She tried to stop him but ultimately had to hit the perpetrator and flee. She was seated later elsewhere. The assaulter was not served alcohol so there was no direct relation with the service of the flight attendants. The assaulter did not show any signs of being a sexual molester prior to the attack. The court held that it is an accident under sec 17 as it was connected with the operation of the aircraft. Here there is strict application of Saks but we must understand that sexual assault can occur in any mean of transportation and it is not a specific risk to air travel only. It is natural to be travelling on a public transportation when you are seated next to someone unknown to you. Dimmed light or unknown passenger cannot be a circumstances leading to the accident. A sudden and unexpected assault by between passengers has nothing to do with the operation of the aircraft and cannot qualify as an accident according to Article 17. There are some inherent defects in Warsaw when it comes to terrorist attacks as Warsaw is applicable to injuries sustained by passengers on an international flight when an accident happens. It does not apply to domestic flights or persons killed as a result of the operation of the aircraft. It does not cover acts done by terrorist which is not connected with the operation of the aircraft. The act that a carrier will be held responsible are acts done by the employees of the carrier or have substantial connection to the carrier. Terrorist attack are linked with the third party how have no connection with the carrier. US courts have held that terrorist attack is a part of air travel and air carrier should be held liable under Warsaw. If tort law is applied then carrier is definitely liable for such acts. Carrier is in a position to prevent such attack as it has an internal mechanism of safety to prevent such attack on board the aircraft. It also has the power to implement safety and security measures so if there is insufficiency is the safety measures leading to a terrorist attack then carrier will be held liable for such acts. In Haddad v. Air France case it was held that accident could not be restricted to mechanical and technical events on the carrier in case of a hijacking situation if the passenger is injured due to the accident of hijacking.

The term accident needs to be extended to include unexpected actions of third parties during flight.\textsuperscript{21}

**What is “bodily injury” on flight?**

**Bodily injury** requires some proof of physical damage or impairment of the body of the passenger. So a broken arm, burns or broken leg does qualify. Mental injury if any like nervous breakdown or trauma must result from a bodily injury. As the area of mental injury is vast and cannot be proved like that of bodily injury so it is outside the scope of Warsaw. A natural ailment of passengers which may get aggravated in flight does not quality as bodily injury. Mental and emotional harm, psychic injuries, unaccompanied by physical injury is not compensable under Art 17.\textsuperscript{22} So mental injury must emanate from physical injury and the physical injury must be caused by an accident.

As per art 17 three condition must be fulfilled when it comes to bodily injury. They are that bodily injury can be suffered by a passenger on board the aircraft during embarking or disembarking. The advent of terrorist hijacking first brought the concept of emotional distress into the picture. So people started demanding compensation for mental trauma caused by terror even though they did not receive any physical injuries. So the question arose if Art 17 included mental trauma exclusively without physical injuries. In the case *Burnett v. TWA* a Trans World Airlines aircraft was hijacked on September 6 1970 and was forced to land in the dessert near Amman, Jordan.

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\textsuperscript{21} Haddad c. Air France 1982 RFDA 342

\textsuperscript{22} Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 478 (1978)