

Montreal Convention Liability Could Be Expanding - What You Need To Know

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A United States Court of Appeals radically altered the scope of an air carrier's liability under the Montreal Convention, the international treaty controlling an air carrier's liability for damages to persons or property during international flight, in the case *Doe v. Etihad Airways*, No. 16-1042 (6th Cir. Aug. 30, 2017). While this particular case involved passenger carriage, it is not unreasonable to expect that creative plaintiffs will attempt to extend these arguments to air cargo.

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, causing it to bleed. Jane Doe was given a bandage 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." 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 damages were caused by the needle, was separate from the physical injury, and therefore not compensable under Article 17(1) of the Montreal Convention.

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*." Because Doe's supposed 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.

Damages Under the Montreal Convention

The Sixth Circuit's decision in *Etihad* represents a radical expansion for an air carrier's potential liability under the Montreal Convention. Under the Warsaw Convention, the predecessor to the Montreal 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.

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 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. 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 with 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.

Passenger Carriage Considerations

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). The Sixth Circuit attempted to leave intact Article 17(1)’s requirement that there must 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 will invariably raise specious claims of pinched fingers, being sore, or other types of nominal injuries as means to satisfy the “bodily injury” requirement and seek broader emotional damages from whatever the actual accident is.

Second, plaintiffs’ attorneys will undoubtedly rely upon *Etihad* to try and expand the scope of potential damages in other jurisdictions. Air carriers defending claims subject to the Montreal Convention must be prepared to address *Etihad* through the facts, the court’s reasoning, and why other courts should not follow this decision. While the Sixth Circuit lauds itself for its “plain meaning” interpretation of Article 17(1), and denigrates nearly 20 years of precedent under the Montreal Convention in various offhand comments, there are several clear 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*,” although causation is precisely the material inquiry.

Whether other Circuits will follow the Sixth Circuit remains to be seen. At the very least, however, *Etihad* makes courts within the Sixth Circuit a much more attractive venue for future lawsuits. This particularly poses a substantial risk to foreign state air carriers, which may be sued in any judicial district in which they conduct business. So, foreign state carriers that conduct any flights or business within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) are substantially more likely to be sued in this jurisdiction moving forward, even if the claim arose elsewhere.

Air Cargo Considerations

The risk that an expanded scope of liability such as that in *Etihad* will extend from passenger carriage to air freight is due in large part to the striking similarity between passenger and cargo provisions in the Montreal Convention. Damage to cargo is addressed in Article 18(1) with language structured nearly identical to the Article 17(1) language interpreted by the court in *Etihad*. It is not inconceivable that shippers could seek attenuated types of damages by applying similar expansive reading to Article 18(1)’s provision of liability for damage sustained in the event of the destruction, loss, or

damage to cargo during air carriage. Even mental distress could be available to aggressive plaintiffs if, for example, loss or damage to a shipment of household goods. Causation will remain key, specifically, whether the damage must be to cargo and sustained at the very same time as the event during carriage.

The existence of *Etihad* may be a valuable opportunity to consider the currency and veracity of contracts for air carriage. Carriers and other service providers enjoy freedom to contract under Article 27 of the Montreal Convention, provided that carrier liability is not limited lower than that provided by the Convention including the Special Drawing Rights (SDR) measure of monetary damages. The Montreal Convention excludes non-compensatory damages in Article 29. However, clear statements of causation, liability, and the claims process together with the possible negotiation of well-drafted statements enforceable waiver of certain attenuated damages remains the best practice for managing exposure from a carrier's or service provider's perspective.

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