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Sixth Circuit Expands Air Carrier Liability Under the Montreal Convention: How Should Air Carriers Respond?

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In *Doe v. Etihad Airways*, No. 16-1042 (6th Cir. Aug. 30, 2017), the United States 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 damages to persons or property during international flight.

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 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." 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*." (Emphasis in original.) 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.

Why Does This Matter?

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 district, circuit, and foreign court would reach the same conclusion in the above scenario: 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. Ironically, the Sixth Circuit takes numerous potshots at Etihad's position, calling it everything from "curious" and that it may "seem absurd," yet then spends nearly 20 pages having to explain why Etihad, every prior district court, every prior Circuit court, and every foreign court to have addressed the issue collectively were all also wrong.

What Happens Next?

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*."

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." 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 which 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 be 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.

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.