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Please Fasten Your Safety Belts for Landing: The Law of Recovery and Liability In International Flights

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Please Fasten Your Safety Belts for Landing: 
The Law of Recovery and Liability in International Flights
by Michael Peter Waxman

ISSUES
Most commercial flights arrive at their destinations safely. Unfortunately, when an accident does occur, the physical, emotional and economic damages may be enormous. These two cases, argued in succession on the same day, will require the United States Supreme Court to interpret two international agreements relating to air carriage. [The agreements involved are the Convention for Unification of Certain Rules Relating to International Transportation by Air (hereafter the Warsaw Convention) and the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (hereafter the Montreal Agreement)]. In Air France v. Saks, the Court must determine whether a person injured on an airplane may recover under these international agreements although nothing unusual happened during the airplane's inflight operation. In Eastern Air Lines, Inc. v. Mahfoud, the issue is whether the $75,000 maximum recovery for injuries suffered in international air transport set forth in the Montreal Agreement include prejudgment interest damages.

FACTS AND BACKGROUND
The Warsaw Convention is an international treaty among 120 nations (including the United States) entered into in 1929. The convention contemplates among other things the liability of air carriers in international aviation. Due to the Warsaw Convention's liability award ceiling ($8,300.00), the United States fostered in 1966 the development of a private agreement among international air carriers (the Montreal Agreement) which set a maximum liability for accidents in air transportation at $75,000 per person. In addition, the air carriers surrendered their right to assert paragraph 20.1 of the Warsaw Convention which states: “[T]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.”

AIR FRANCE V. SAKS
Since Saks is an appeal of a summary judgment decision, all facts must be accepted as alleged. Saks was a passenger on an Air France flight from Paris, France to Los Angeles, California. She alleges that she totally lost her hearing in one ear as a result of the change in cabin pressure upon the airplane's descent to land in Los Angeles. Air France argues that the operation of the airplane, including the programmed depressurization, was normal in all respects.

The Warsaw Convention states that: “[T]he carrier shall be 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 thus sustained took place on board the aircraft or in the course of any of the operations of the embarking or disembarking.” (Article 17; emphasis added). The Supreme Court must determine whether Saks' injuries were sustained by an “accident” as the term appears in the Warsaw Convention. Does the word accident mean an occurrence while on the airplane or does it mean some unusual or unexpected occurrence?

In interpreting the Warsaw Convention, the Court must also examine the relevance of the Montreal Agreement of 1966. The Montreal Agreement modified the terms of the Warsaw Convention in two respects. First, the Montreal Agreement increased the maximum liability of air carriers as stated in the Warsaw Convention from $8,300.00 to $75,000. In addition, the air carriers agreed not to utilize paragraph 20.1 of the Warsaw Convention as a defense for claims of injuries suffered on board the airplane.

Saks states that Air France is liable for her injuries occurring inflight. She suggests that since Air France cannot argue paragraph 20.1, it is precluded from challenging her claim that the injury was caused by a flight-related accident. Finally, she asserts that a failure to include occurrences which happen in the normal course of air transport under the term "accident" would unreasonably shield air carriers from liability.

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Air France declares that it is not within the intent of the Warsaw Convention as modified by the Montreal Agreement to make the carrier “the absolute insurer of its passengers’ health.” It asserts that there is ample proof to establish that the word “accident” was chosen to require the passenger to show an abnormal occurrence in the air carriage for the carrier to be liable.

This action commenced in state court and was removed to the United States District Court. The district court concluded that an ear injury caused by normal cabin pressurization changes does not constitute an “accident” covered by the convention and therefore issued a summary judgment order.

The United States Court of Appeals for the Ninth Circuit reversed the summary judgment order. The Ninth Circuit imposed absolute liability on airlines for injuries caused by air travel. It held that showing a malfunction or abnormality in the aircraft’s operation is not a prerequisite for liability under the Warsaw Convention.

**EASTERN AIR LINES, INC. V. MAHFOUD**

In Mahfoud, the Supreme Court is again asked to interpret provisions of the Warsaw Convention and the Montreal Agreement. Here, the issue is whether the damage recovery limitation of $75,000 denies recovery in excess of that amount if pre and postjudgment interest is awarded to the plaintiff. The $75,000 maximum recovery set forth in the Montreal Agreement permits only one specific exception. If the law of a state permits a court to separate legal fees and court costs from the rest of the plaintiff’s recovery, the maximum liability is set at $58,000 plus such legal fees and costs.

Bernard and Odile Mahfoud, decedents of Robert F. Mahfoud, were on Eastern Airlines’ Flight 66 from New Orleans, Louisiana to New York City (John F. Kennedy International Airport) enroute to Paris, France on June 24, 1975. Flight 66 was caught in a “windshear” and crashed just prior to landing at Kennedy Airport. The Mahfouds and many other passengers were killed in the accident. Since Flight 66 was the first leg of an international journey for the Mahfouds, the provisions of the Warsaw Convention and Montreal Agreement were applicable to the claims on their behalf. As noted below, due to the procedural assertions of Eastern Airlines, Robert F. Mahfoud was denied recovery on behalf of the decedents until December 2, 1982. By that time, Eastern’s accumulated interest on the unpaid amount was over 50% of the total amount recovered (prior to interest) by Mahfoud.

Mahfoud asserts that to permit Eastern to delay the payment of its maximum liability through dilatory procedural tactics, and yet not pay the interest awarded, effectively denies the plaintiff the full value of the appropriate recovery. In addition, the Montreal Agreement provides for the payment of greater amounts as long as such payments are no greater than $75,000 in dollars valued at the time of injury. He argues that this constitutes an acceptance of interest amounts greater than the $75,000 maximum recovery.

Eastern asserts that the Montreal Agreement contemplated no exception from the maximum except where legal fees and court costs are ordered separately. Where separate legal fees and court costs are ordered, the maximum is reduced to $58,000 plus the fees and costs.

In addition, Eastern states that the $75,000 maximum was negotiated down from $100,000 in exchange for the agreement not to assert paragraph 20.1 of the Warsaw Convention. Eastern argues that to increase the maximum for interest would eliminate the fruits of the negotiation.

The judicial history of the Mahfoud case is serpentine. Mahfoud’s original action against Eastern was filed in 1975 in the United States District Court for the Western District of Louisiana. This action was transferred to the Eastern District of New York in 1976 and consolidated with other claims related to flight 66.

A summary judgment was entered in the Eastern District of New York against Eastern Air Lines, Inc. in 1978. The decision was reversed by the United States Court of Appeals for the Second Circuit on procedural grounds in 1980. Ultimately, the case was transferred back to the Western District of Louisiana. In November, 1982, Eastern was held liable for the injuries to the Mahfouds. The district court also concluded that Robert F. Mahfoud was entitled to recover prejudgment and postjudgment interest from Eastern over and above the $75,000 limit on liability at the rate established by the Louisiana Civil Code. The court reasoned that the Montreal Agreement contemplated prompt recovery from an air carrier by a passenger or passenger’s estate and that it is unconscionable to let an airline delay litigation to an extent that a smaller amount of money may be invested to pay a $75,000 claim. On December 2, 1982, Eastern deposited $150,000 (2 x $75,000) with the district court.

Eastern appealed the award of prejudgment interest in excess of the $75,000 limit of liability to the United States Court of Appeals for the Fifth Circuit. While this appeal was pending, the Fifth Circuit held in Domangue v. Eastern Air Lines, Inc. that both prejudgment and postjudgment interest might be awarded over and above the $75,000 limit of liability. Citing Domangue, the Fifth Circuit affirmed the judgment of the district court in Mahfoud. The Domangue court based its ruling on two objectives embodied in the Montreal Agreement. The first objective was to increase the limit of liability. This was achieved by the increase in liability to a maximum of $75,000. An important additional objective was to encourage the speedy disposition of claims. Having identified these objectives, the court of appeals then sought to
balance the objectives of maintaining a fixed and definite level of liability against the objectives of speedy compensation and maximum recovery for injured parties or their survivors.

The court of appeals struck the balance in favor of allowing the payment of postjudgment interest above and beyond the $75,000 limit to liability established by the Montreal Agreement. The court held that awards of postjudgment interest would encourage the payment of judgments when the victim or survivors most need help and that by referring to legal rates of interest or paying the principal amount into the registry of the court or an escrow account, the air carriers would still be provided with a definite basis for determining their liability. Moreover, since the Montreal Agreement expressly provides for including legal fees and costs in the $75,000 limit, the failure of the drafters of the agreement to specifically include interest in the limit suggests that it is proper to award postjudgment interest. The Domangue court held prejudgment interest warranted the same treatment.

SIGNIFICANCE

Both Mahfoud and Saks require the United States Supreme Court to address the meaning and intent of these agreements. Although the cases are far from glamorous, their effect on the traveling public may be substantial. The result in Saks may be that air carriers will be held to be responsible virtually \textit{prima facie} for damages that occur in the air. Conversely, a finding for Air France may burden the passenger with proving that something out of the ordinary occurred on the flight in order to recover.

In Mahfoud, a decision to permit air carriers to delay paying liability claims, thereby lessening the real effect of the damage award may encourage such practices. By contrast, a decision in support of Mahfoud may foster prompt payment of major claims.

The future effect of these cases could become vitiated if the Warsaw Convention and Montreal Agreement are modified to define the term “accident” and state whether pre and post judgment interest shall be included in the $75,000 ceiling. Of course, this does not mean our courts will surrender their right to analyze those provisions in future cases.

ARGUMENTS

\textbf{For Air France (Counsel of Record, Stephen C. Johnson, Two Embarcadero Center, San Francisco, CA 94111; telephone (415) 421-4600)}

1. The decision below disregards the language of the convention by redefining “accident” as “occurrence.”
2. The Montreal Agreement does not alter the meaning of Article 17 nor make air carriers insurers of their passengers’ health.
3. The Third Circuit’s definition of “accident” gives effect to the language of the convention and is not a negligence-based standard.

\textbf{For Valerie Saks (Counsel of Record, Daniel U. Smith, P. O. Box 278, Kentfield, CA 94914; telephone (415) 461-5630)}

1. The decision below properly permitted Saks to recover under the Warsaw Convention for her total and permanent hearing loss proximately caused by the change in cabin pressurization during descent.
2. Under the Montreal Agreement, international airlines are liable for all damages proximately caused by operating the aircraft.
3. The Warsaw Convention should be interpreted in light of its history and in light of improvements in aviation safety since 1929.
4. Air France cannot invoke the limitation of “accident” because the ticket advice to passengers under the Montreal Agreement does not limit airline liability to “accident.”
5. Apart from the interpretation of the Warsaw Convention, it was proper to reverse the summary judgment against Saks.

\textbf{AMICUS BRIEF}

\textbf{In Support of Air France}

The International Air Transport Association, an organization of 135 international air carriers, filed a brief arguing that the court of appeals misread the language of the convention and of the agreement with its absolutist construction; international air carriers are liable only for passenger injuries which are caused by an accident.


1. The plain language of the Warsaw Convention and the Montreal Agreement precludes an award of prejudgment interest over and above the carrier’s limit of liability.
2. An award of prejudgment interest over and above the carrier’s limit of liability is inconsistent with the purposes of the convention and the agreement.
3. The plain language and purposes of the convention and agreement cannot be overridden by the equitable considerations relied on by the courts below.

\textbf{For Robert F. Mahfoud (Counsel of Record, George E. Ferrell, 1216 Sixteenth Street, NW, Washington, DC 20036; telephone (202) 833-2003)}

1. The award of prejudgment interest is inconsistent with the purposes of the Warsaw Convention and Montreal Agreement.
2. The convention and agreement permit awarding prejudgment interest as reimbursement for delay.

\textbf{AMICUS BRIEF}

\textbf{In Support of Robert F. Mahfoud}

This amicus curiae brief was filed on behalf of the surviving family members or personal representatives of deceased passengers who were killed while engaged in international travel on various airlines.