



Clyde & Co

**McGill University – IASL
October 2014**

Aviation Issues in the US

Andrew J. Harakas, Clyde & Co US LLP

Presentation Outline

- 1. US Litigation & Why Issues of Jurisdiction Are Important to Air Carriers**
- 2. Does the Case Belong in the US?**
 - Subject Matter Jurisdiction
 - Personal Jurisdiction
 - Forum Non Conveniens
 - FNC and the Warsaw/Montreal Convention
- 3. Montreal Convention – Article 17 Accident**
- 4. Unruly Passengers**
 - The Tokyo Convention
 - The Montreal Convention
 - US Law
- 5. US Litigation Parental Child Abduction Involving International Air Transportation**

US Litigation and Why Issues of Jurisdiction Are Important



Introduction – The Importance of the Issue

Non-US based airlines face potential exposure to US litigation for accidents with little or no connection to the US:

- accident occurring outside the US
- paxs are non-US citizens or residents
- accident flight had no contact with the US
- or, air carrier does not even operate to the US

Why? – The Nature of US Litigation

- **Contingent fees**
 - Each party bears own attorney's fees
 - No award, no fee
- **Jury trials**
 - Decide all issues of fact: liability and damages
 - Juries are unpredictable and tend to be sympathetic to aviation accident victims
- **Extensive and broad pre-trial discovery**

AND.....

Highest Damage Awards in World

- **US damage verdicts are the highest in the world**
 - Most states allow economic and non-economic damages; some allow punitive damages
 - Non-economic damages difficult to assess
- **Damage verdicts continue to escalate**
 - Even court rendered judgments can be influenced by jury verdicts
- **Settlement values of death and injury cases continue to escalate**
- **While choice of law analysis may lead to non-US damage law, the damages are still assessed by a US jury or court**

Types of Damages Recoverable

Damages in a typical passenger death case may include:

- **Compensatory Damages – Intended to compensate injured party**
 - Economic or Pecuniary Damages
 - Loss of support
 - Loss of services
 - Loss of parental nurture, care and guidance (children)
 - Loss of inheritance
 - Non-Economic or Non-Pecuniary Damages
 - Loss of love, affection, companionship, comfort and care
 - Grief and mental anguish of the survivors
 - Mental anguish/pre-death pain and suffering of the decedent
- **Non-Compensatory Damages**
 - Punitive or exemplary damages – intended to punish or deter
- **Pre-judgment and Post-judgment Interest**

Cost of Life

- The figures below are assessed quantum risk figures by a plaintiff's attorney for a 45 year old wage earner (admin position) leaving behind a partner and one teenage child

	USD
UK	\$1,250,000
France	\$1,400,000
Australia	\$1,400,000
New EU	\$450,000
Asia	\$250,000 – \$650,000
Brazil	\$2,500,000
Canada	\$1,700,000
USA	\$4,500,000

Source: James Healy-Pratt, Stewarts Law

Example of US Calculation of Damages in a Pax Death Case: 40 year-old passenger earning \$100,000 per year who is survived by a spouse and two children (8 yrs and 12 yrs)

Lost income	25 yrs x \$100,000	\$2,500,000
Lost services	35 yrs x \$10,000	\$ 350,000
Loss of Inheritance	--	\$ 250,000
Funeral/Burial Expenses	--	\$ 15,000
Grief/anguish	Spouse and Children	\$ 500,000
Lost guidance/care	Children - \$250K each	\$ 500,000
Loss of care, comfort & companionship	Spouse and children	\$1,000,000
Decedent's pre-death pain/suffering	10 minutes	\$1,000,000
Total Compensatory Damages		\$6,205,000
Punitive Damages – if allowed	Can exceed compensatory damages	??
Pre & post judgment interest	Typically 9%	??

Jurisdictional Issues in the US – Does the Case Belong in the US?



Does the Case Belong in the US?

Ask 3 questions:

1. Is there “subject matter jurisdiction”?
2. Is there “personal jurisdiction”?
3. Is the US the most “convenient forum” or place for the litigation to proceed?

If answer to any 3 of these questions is “NO” – a defendant may be able to obtain an early dismissal of the action

Q1. Is There Subject Matter Jurisdiction?

- **“Subject matter jurisdiction”** refers to the court’s authority to preside over the determinations of the law and facts to be made in a case
- **Defendant Air Carrier example:** if transportation governed by the Montreal Convention, are one of the five place for suit set forth in Article 33 of the Convention in the US?
 1. Carrier’s domicile;
 2. Carrier principal place of business;
 3. Place where contract was made;
 4. Final destination; or
 5. Principal and permanent residence of the pax if there the carrier has a place of business in that jurisdiction.
- **If yes, then Court has “subject matter jurisdiction” and will then determine whether there is a “personal jurisdiction” over the defendant.**
- **If no, then the Court does NOT have “subject matter jurisdiction” and the case must be dismissed.**

Q2. Is There Personal Jurisdiction?

- **“Personal jurisdiction” refers to a court’s power to decide a dispute over a specific party**
 - The Due Process Clause of the US Constitution permits courts to exercise personal jurisdiction over a non-US defendant if it has **“certain minimum contacts”** with the US jurisdiction such that the maintenance of the suit **not unfair**.
- **The constitutional requirements can be satisfied by showing either:**
 1. *Specific Jurisdiction*: Connection between the injury cause of action and the defendant’s activity in the US state

OR

 2. *General Jurisdiction*: A defendant’s continuous and systematic business contacts with the US state even if those contacts have nothing to do with the cause of action

Factors Considered for General Jurisdiction:

Does the defendant:

- maintain any bank accounts or offices in the Forum
- own any personal or real property in the Forum
- engage, operate or conduct any business venture in the Forum
- maintain telephone numbers or telephonic callback services with any companies in the Forum
- offer direct sales of its services in the US directly or via an agent or internet
- advertise, solicit business or market their services in the Forum
- pay taxes to the jurisdiction
- have any agents or employees stationed/based in the Forum
- participate in litigation in the Forum
- enter or negotiate contracts in the Forum
- have any contracts with a US choice of law and jurisdiction clause

NO ONE FACTOR IS CONTROLLING

Personal Jurisdiction Continued

Bottom line of inquiry:

- **Is it fair to subject a foreign corporation to suit in a particular state – did it purposely avail itself to the rights and privileges of the jurisdiction in such a way that it could reasonably anticipate being brought before a US court?**
 - **If not, the action must be dismissed.**
- Plaintiff has burden to prove personal jurisdiction
- Often assessed at the time the complaint is filed, not when the action arose
- Generally – assessed based on contacts with a specific state and not nationwide contacts

Q3. Is The US The Most “Convenient Forum”?

What Is *Forum Non Conveniens* (“FNC”)?

A common law procedural doctrine that allow a US court to dismiss a case even if it has subject matter and personal jurisdiction over a defendant if the US is not the most convenient forum for the litigation

FNC Steps: FNC doctrine as applied by most courts in the US involves a 3-step analysis:

1. What deference should be given to plaintiff’s forum choice?
2. Is there an adequate alternative forum?
3. Do the balance of the “private” and “public” interest factors weigh in favor of dismissal to the alternative forum?

FNC - Step 1: What deference should be given to a plaintiff's choice of forum?

- A US plaintiff receives great deference
- A non-US plaintiff receive less deference
- Plaintiff must show some legitimate reason why suit was filed in US
 - Is it their home (US citizen/resident)?
 - If not US, why has plaintiff sued in the US?
- The more it looks like a non-US plaintiff chose the US forum to harass a defendant or simply to seek higher damages, the less deference the choice will be given

FNC Step 2: Is there an adequate alternative forum?

Does the proposed alternative forum:

- **Have jurisdiction over all of the defendants?**
 - agreement of all defendants to submit themselves to the jurisdiction of the proposed alternative forum (usually) will suffice
 - Montreal Convention – does Article 33 jurisdiction exist?
- **Provide an adequate remedy?**
 - recognize cause of action – but does not need to provide same remedies, recovery or procedures
 - statute of limitation – must not have passed, though waiver of defense satisfies this requirement
 - allow enforcement of judgment
- **Provide independent and unbiased courts?**
 - issues of corruption

FNC Step 3: Do the “private interest factors” favor dismissal?

Private interest factors: relate to facts that make the litigation inconvenient to the parties:

- Where is the evidence located – documents, witnesses, aircraft?
- If accident, who investigated the accident?
- How easy/expensive is it to get this evidence in the US vs. alternative forum?
- Are translations/interpretation costs significant?
- What are the issues to be tried – liability? damages?
- Possible claims for contribution against non-US entities? – ATC, governmental authorities?

FNC Step 3: Do the “public interest factors” favor dismissal?

Public interest factors: relate to issues that the court considers to best serve the interest of justice:

- Burden on local courts: the administrative difficulties caused by foreign litigation congesting local court dockets?
- Is it fair to impose jury duty on residents of a jurisdiction having little relation to the controversy?
- What is the local interest in the controversy?
- Will a US court be applying foreign law?

FNC – Conditions Often Attached by the Court In Granting Dismissal

In granting FNC dismissal, courts often attach certain conditions:

- Defendant will waive any applicable statute of limitations
- Defendant will agree to submit to the jurisdiction of the alternative forum
- Defendant will agree to satisfy any judgment

ISSUE: FNC and the Warsaw/Montreal Convention

If a court has treaty jurisdiction under Article 28/33 of the Warsaw/Montreal Convention, can it still dismiss on FNC grounds?

- **NO:** *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003) – **FNC dismissal not allowed if the court has treaty jurisdiction per Article 28 of the Warsaw Convention.**
- **YES:** *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3387 (June 7, 2010) – **FNC dismissal allowed even if the court has treaty jurisdiction per Article 33 of the Montreal Convention.**

WHY?

- Per Article 33(4): “Questions of procedure shall be governed by the law of the court seised of the case.”
- In U.S., FNC is procedural question.

***FNC & The Montreal
Convention – Bapte v. West
Caribbean Airlines (S.D.
Fla.)***



West Caribbean Airlines (“WCA”) Flight 708 Accident on August 15, 2005 (S.D. Fla.)

- Charter flight from Panama to Martinique
- Accident in Venezuela
- 152 paxs and 8 crew members killed
- All paxs residents of Martinique/France
- WCA – a Colombian corporation with no US offices
- Charter organizer a Florida corporation with no insurance
- US, France and Colombia proper jurisdictions under MC
- **In 2006** – Plaintiffs sue WCA and charter organizer in Florida

West Caribbean Airlines Flight 708

- **FNC Motion:** WCA and charter organizer move for FNC dismissal and agreed not to contest liability if actions dismissed on FNC grounds
- **Primary Issue:** *If a court has treaty jurisdiction under Article 33 of the Montreal Convention, can it still dismiss on FNC grounds?*
 - **Plaintiffs argued:** FNC dismissal not allowed if the court has treaty jurisdiction per Article 33 of the Montreal Convention. (see *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002)(WC, Art. 28)
- **September 2007** – court finds FNC dismissal allowed even if the court has treaty jurisdiction per Article 33 of the Montreal Convention.

West Caribbean Airlines Flight 708

- **November 2007** – US district court dismisses cases on FNC grounds finding the Martinique was more convenient forum for litigation
- **October 2009** – Court of Appeals affirms court's FNC rulings
- **June 7, 2010** – US Supreme Court declines to review FNC rulings
 - *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3387 (June 7, 2010)

West Caribbean Airlines Flight 708

- **January 2009** – Plaintiffs refile actions in Martinique but attack Martinique court’s jurisdiction
- Martinique Court of first instance and appeal reject plaintiffs’ arguments and plaintiffs appeal to French Supreme Court
- **December 2011** – French Cour de Cassation agrees with plaintiffs and dismisses the actions, holding:
 - Plaintiffs have exclusive right to select Convention forum
 - Once plaintiffs have selected forum, no national procedure rule such as FNC can alter their selection.
 - Because plaintiffs do not want to be in France, the Court declared the “current unavailability of the French venue”

West Caribbean Airlines Flight 708

March 2012 – Plaintiffs seek to reinstate cases in the US arguing “*extraordinary circumstances*” have made Martinique no longer an “available forum “

May 16, 2012 – US district court denies motion to reinstate the cases finding no extraordinary circumstances warranting relief:

- there were no extraordinary circumstances or hardship to plaintiffs as Martinique was unavailable because plaintiffs made it so; and
- if it reversed its decision in light of plaintiffs’ persistent efforts to un-do the court’s prior FNC order it would:
 - Sanction plaintiffs’ disrespect for the lawful order of the US courts
 - Encourage other litigants to engage in similar conduct

Thus, denial of the motion was not unjust or unfair: “If France chooses to turn away its citizens damage suits, it is difficult to understand why US courts should then take them.”

West Caribbean Airlines Flight 708

May 6, 2013 – Court of Appeals affirms based on waiver:

- Plaintiffs could have raised the same argument initially in their opposition to FNC dismissal but failed to do so, possibly for strategic reasons
- Plaintiffs' success in arguing to the Cour de Cassation that a plaintiff's initial choice of forum under the Montreal Convention precludes other available forums from exercising jurisdiction over the same claims does not constitute “sufficiently extraordinary” circumstances warranting relief.

Galbert v. West Caribbean Airways, 715 F.3d 1290 (11th Cir. 2013)

December 9, 2013 – US Supreme Court denied review

The Montreal Convention – Liability for Passenger Injury or Death



International Civil Aviation Organization

The Montreal Convention

Montreal Convention (1999) sets forth basic principles of air carrier liability for:

1. Article 17.1: Pax injury/death
2. Article 17.2: Damage to baggage and cargo
3. Article 18: Damage to baggage and cargo
4. Article 19: Delay of pax, baggage and cargo

Focus on Article 17.1:

- **Does Article 17 create a cause of action?**
- **Is the Article 17 cause of action exclusive?**
- **When does Article 17 create liability?**

Does the Convention provide a cause of action?

1957: *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957)

- **Issue:** whether plaintiff may bring a civil action based on either the Warsaw Convention or the Death on the High Seas Act, 46 U.S.C.A. §§ 761-767, for a death which allegedly occurred in the airspace over the high seas.
- **Held:** the Convention did not create an independent right of action; only action would be under DOHSA

1978: *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978)

- **Issue:** whether plaintiff may bring a civil action based on the Warsaw Convention
- **Held:** the Convention creates an independent right of action

1994: *Zicherman v. Korean Air Lines*, 43 F. 3d 18 (2d Cir. 1994)

- **Issue:** whether DOHSA governs damages recoverable under the Warsaw Convention
- **Held:** the DOHSA does not apply and damages governed by Warsaw Convention. (**reversed** 516 U.S. 217 (1996))

Does the Convention Provide the Exclusive Cause of Action for damages during “international carriage”?

Original View:

1. Convention only provides exclusive remedy, not exclusive cause of action
2. If passenger is unable to establish Article 17 “accident” condition for liability, *recovery allowed under state law b/c WC not exclusive.*

1999: *El Al v. Tseng*, 525 U.S. 155 (1999)

- **Issue:** If plaintiff cannot establish conditions for liability under WC (e.g., accident), may plaintiff recover damages under state law?
- **Held:** If recovery not allowed under the Convention, ***there is no recovery allowed at all.***
- See Article 29 (Basis of Claim)

Article 17 - Liability for Passenger Injury or Death

Primary Liability Provision – Article 17(1):

“The carrier is liable for **damage 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.**”

Three Conditions for Liability Under Article 17(1):

1. an “accident”, which causes
2. bodily injury or death, which took place
3. on board the aircraft or during embarking/disembarking

Condition 1: Accident



What is an Article 17 “accident”? – *Air France v. Saks*, 470 U.S. 392 (1985)

- “an unexpected or unusual event or happening that is external to the passenger” that causes the pax injury; not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, in which case it has not been caused by an accident under Article 17.
- **But:**
 - definition should be flexibly applied
 - an injured passenger is only required to prove that some link in the chain of causes was an unusual or unexpected event external to the passenger.

Is it an accident?

- Passenger Health Issues
 - Failure to assist
 - Heart attacks, DVT
- Pax-on-Pax Assaults
- Overhead Bins
- Coffee spills
- Slip & falls

Passenger Health – General Rule

Complications arising from a passenger's medical conditions are not external to the passenger, and thus are not “accidents” under the Montreal Convention

BUT....

Is the Failure to Assist a Pax an Accident?

Early Failure to Assist Cases

1984: *Abramson v. Japan Airlines*, 739 F.2d 130 (3rd Cir. 1984):

- **Issue:** Is failure to move pax which aggravated a pre-existing injury during the course of a routine and normal flight an Article 17 “accident”?
- **NO:** “aggravation of a pre-existing injury during the course of a routine and normal flight” not an accident

1997: *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997)

- **Issue:** Is failure to divert for medical treatment of pax an Article 17 “accident”?
- **NO:** Continuation of the flight to its scheduled point of arrival is not an accident

***Olympic Airlines v. Husain*: The failure to assist a pax is an accident**

- Pax allergic to smoke
- Smoking allowed on flight but pax requested non-smoking seat
- Assigned to non-smoking seat but only 3 rows in front of smoking section
- Pax's wife had asked a flight attendant to move him to a seat farther away from the smoke, and the attendant had incorrectly informed her that there were no vacant seats.
- The Court held that any chain in the causal link could be such an “unexpected or unusual event or happening that is external to the passenger”, and that the flight attendant's failure to lend assistance was such an event
- In dissent, Justice Scalia pointed to appellate court decisions in Australia and the United Kingdom which held that inaction could not be an “event”, but was instead a “non-event”, and therefore not an accident under Article 17.

Why difference with *Krys & Abramson*?

Pre-*Tseng* decisions – *recovery not allowed under WC but allowed under state common law*

Heart Attack: *White v. Emirates Airlines* (5th Cir. 2012)

- Pax flying from Dubai to Houston
- Pax collapsed in aircraft lavatory 15 minutes prior to landing
- Cabin crew administered first aid and pax son request crew use AED
- On landing EMS boarded and performed CPR
- Pax taken to nearby hospital and died two days later
- The probable causes of death were listed as heart and respiratory failure.
- Action filed claiming crew failed to use AED despite request

Is it an "Accident"?

- **No.** "[E]ven a flight crew's arguably imperfect response to a passenger's medical emergency does not necessarily constitute an Article 17 'accident.'"
- "even in the midst of an imminent landing, the flight crew here did far more in response to [the passenger's] incident than did many of the crews confronted with medical emergencies in [other cases where courts found no accident]".

Failure to assist: *Safa v. Lufthansa* (EDNY 2014)

- LH flight from Philadelphia to Beirut, with a layover in Frankfurt
- 3 hours before landing in Frankfurt, FA alerted of a potential medical emergency
- FA found pax lying in the aisle
- LH crew properly responded and assisted
- Medical doctors on board assisted and stated no diversion necessary
- Pax claimed exacerbated injuries due to delayed treatment

Was failure to divert an accident?

- **NO** - the record makes clear that crew followed LH policy and procedure in all material respects

**Is a Pax Injury caused by
another Pax the result of an
“accident?”**

Is a pax-on-pax assault an “accident”?

- **Some courts strictly apply *Saks* standard and find liability**
- **Other courts hold that the event/happening not only must be unexpected or unusual but also must be:**
 1. a risk of air travel, or
 2. related to the operation of the aircraft

On this basis, these courts find that absent some causal connection/air carrier complicity in the event leading to the assault/injury, an assault of a passenger by another passenger is not an "accident" and, therefore, the air carrier is not liable

Is it an Accident? – Pax-On-Pax Assault

Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000)

- Sleeping pax sexually assaulted by pax seated next to her during flight from Korea to US

Is it an "Accident"?

- **Trial Court:** dismissed finding assault not an accident - not related to operation of aircraft
- **Court of Appeal reverses:** did not resolve issue whether accident must also be related to operation of aircraft or a characteristic risk of air travel
- Rather, the Court held that even under this approach there was an “accident” because the circumstances this case

Wallace: The unusual circumstances found by the Court

- the characteristics of air travel increased Ms. Wallace's vulnerability to the assault
- When Ms. Wallace took her seat in economy class on the KAL flight, she was cramped into a confined space beside two men she did not know
- The lights were turned down and the “sexual predator was left unsupervised in the dark”
- Equally important to the court was the manner in the predator was able to carry out his assault:
 - “While Ms. Wallace lay sleeping, Mr. Park: (1) unbuckled her belt; (2) unbuttoned her shorts; (3) unzipped her shorts; and (4) squeezed his hands into her underpants. These could not have been five-second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous.”
- One Judge concurred with the result but not with the above rationale – simply would apply strict holding of *Saks*

Deplaning Aircraft: *Buckwalter v. US Airways* (E.D. Pa. Jan. 13, 2014)

- While descending air stairs, another pax fell into pax and knocked her down
- No prior request for assistance and air stairs were ok, but pax claimed:
 - deplaning process was disorderly
 - crew took no action to ensure an organized deplaning process
 - crew did not read warnings that air stairs would be used for disembarking

Is it an "Accident"?

- **Yes.** If it is true that
 - there was a disorderly deplaning process that involved pushing by the passengers and the flight crew took no action to ensure an organized deplaning process, then an omission of the flight crew may have occurred."
 - the flight crew was required by airline's policies to make an announcement warning the passengers that they were going to deplane via air stairs and failed to make that announcement, an omission of the flight crew occurred and passenger's fall may be related to the operation of the aircraft.

Deplaning Aircraft: *Goodwin v. British Airways* (D. Mass. Aug. 8, 2011)

- Pax disembarking aircraft in Paris
- As pax approached front of the aircraft, pax paused to shake hands with flight attendant at aircraft door and pax's granddaughter warned her to be careful of the lip when stepping off the aircraft
- Pax claimed that she was bumped by another pax while deplaning, lost balance and fell

Is it an "Accident"?

- **No.** The court held that the event giving rise to the plaintiff's injury did not relate to the aircraft's operation and, as a result, was not an "Accident."

Injury by fellow pax: *Bland v. EVA* (SDNY 2014)

- Pax injured eye while aboard an EVA flight from LA
- While plane taxiing to the gate pax struck in eye by a shopping bag held by a fellow pax
- There was a dispute whether FA saw or should have seen other pax standing and should have alerted the pax to remain seated
- EVA argued no accident because pax there was no causal connection between his injury and the operation of EVA's airline or aircraft.

Is it an Accident?

Maybe. Pax produced sufficient evidence to raise a genuine issue of material fact as to whether his injury was causally related to the operation of EVA's airline or aircraft

**Injuries Involving Overhead
Bins, Items in Aisle & Hot
Liquid Spills – result of an
“accident?”**

Is it an “Accident”? – Tripping on things on cabin floor

- *Rafailov v. El Al Israel Airlines, Ltd.* (S.D.N.Y. May 13, 2008).
 - Several hours into an international flight pax gets up from seat
 - Slips and falls on a plastic blanket bag on the floor by another passenger

Is it an "Accident"?

- **No.** The court held that it is not unusual that a certain amount of trash will be left on the floor of the aircraft during a long flight. It is not unexpected that a passenger may slip on a discarded blanket bag.

- *Sethy v. Malev-Hungarian Airlines* (2d Cir. 2001)

- Pax tripped over luggage left in aisle during boarding

Is it an "Accident"?

- **No.** "there is nothing `unexpected or unusual' about the presence of a bag in or near the aisle during the boarding process."

Is it an “Accident”? – Overhead Bin

- Plaintiff flying from Boston to Shannon, Ireland
- Carrier's practice to warn passengers to use caution when opening overhead bins (the warning is given twice before departure, and again as passengers prepare to disembark)
- Fellow passenger opened overhead bin upon arrival
- Bag containing three liquor bottles fell out and struck plaintiff in the head

Is it an "Accident"?

- **Yes.** The court held that “[w]hile a reasonable passenger would expect some shifting of the contents of an overhead bin, particularly during a turbulent flight, she would not expect, as an ordinary incident of the operation of the aircraft, to be struck on the head by a falling object when the bin above her seat is opened by a fellow passenger.” See *Maxwell v. Aer Lingus Ltd.*, 122 F. Supp.2d 210 (D.Mass.2000).

Hot Liquid Spill – *Wipranik v. Air Canada* (CD Cal 2007)

- Plaintiff flying from Toronto to Tel Aviv
- Plaintiff seated in the aisle seat in economy class
- Plaintiff was served hot tea and placed it on her tray table which she claimed was unstable
- Pax seated in front of plaintiff shifted and tea fell on plaintiff

Is it an "Accident"?

- **Yes.** The slide of the tea off of the tray table and its fall onto Plaintiff's lap were events “external” to Plaintiff.
- those events were unusual and unexpected.
- Although it may be common for an airline seat to shake when its occupant moves around, it is not common for beverages placed on the tray table behind that seat to be so jolted by the movement that they fall onto another passenger. It is the failure of the tray table to hold beverages securely despite passenger movement in the seat in front that is *unexpected*

Air Carrier Liability for the Unruly Passenger Under the Tokyo Convention & Montreal Convention

Are Unruly Passengers A Problem?

There is a steady increase in unruly and disruptive behavior:

- **IATA:** 687% increase in incidents in 2009 as compared to 2007
- **US:** over 300 (2004); 101 (2012) reported "enforcement actions" by the FAA.
- **Australia:** 488 incidents (2011)
- **UK:** 44 (2011)

What are the causes?

- **unprecedented growth in the number of people flying**
- **poor customer service**
- **consumption of alcohol and illegal drugs**
- **stuffy cabin air**
- **smoking bans**
- **claustrophobia & mental conditions of passengers/crew**
- **flight delays and overbooking situations**
- **confined and cramped conditions on board aircraft**
- **fear of flying**
- **intrusive security measures**
- **lack of prosecution and enforcement**

What is the liability of the air carrier?

1. Claims by the offending passenger against the carrier for action taken in response to unruly/disruptive behavior
2. Claims by a passenger effected by the conduct of the unruly/disruptive behavior

What are the primary laws regarding air carrier liability?

- **The Tokyo Convention of 1963**
- **The Montreal Convention of 1999**

The Dilemma – To act or not to act?



"C'mon, c'mon — it's either one or the other."

The Tokyo Convention of 1963 – Is the carrier liable for its response to an unruly passenger?

Convention on Offenses and Certain Other Acts Committed on Board Aircraft



Scope of the Tokyo Convention

- **Article 1 – The Convention applies in respect of:**
 - a) offences against penal law
 - b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board
- committed on an aircraft registered in a contracting state while the aircraft is in flight
- does not apply to purely domestic transportation

Primary Objectives of the Tokyo Convention

- To establish a positive rule of international law allowing for a Contracting State to exercise jurisdiction over certain offences and acts committed on board an aircraft.
- To provide the aircraft commander with the necessary authority to deal with persons who have committed, are about to commit or may commit a crime or act jeopardizing safety and ***without fear of subsequent retaliation through civil suit or otherwise.***
- 185 nations have agreed to be bound by the Convention

Powers of the Aircraft Commander

- **The Convention authorizes the aircraft commander to take certain actions when when he has “reasonable grounds to believe” that a person has committed, or is about to commit, on board the aircraft:**
 - offences against penal law;
 - acts which, may or do jeopardize the safety of the aircraft or of persons or property therein; or
 - acts which jeopardize good order and discipline on board.
- *These powers arise only during international flights from the moment when all external doors are closed following embarkation and until an external door is opened for disembarkation*

Actions the Aircraft Commander May Take

- The Aircraft Commander may:
- Article 6 – Restrain a pax if the aircraft commander **has reasonable grounds to believe** the pax has or is about to commit an act (1) which may jeopardize the safety of the aircraft or of the persons/property on board; or (2) which jeopardizes good order or discipline on board. *[cabin crew/paxs also unilateral may take action if immediately necessary].*

Restraining the Passenger



Actions the Aircraft Commander May Take

- The Aircraft Commander may:
- Article 8 – Disembark a pax if the aircraft commander has ***reasonable grounds to believe*** the pax has or is about to commit an (1) offence against penal law; (2) act which may jeopardize the safety of the aircraft or of the persons/property on board; or (3) which jeopardizes good order or discipline on board.

Disembarking the Passenger



© Original Artist Search ID: jhon61

Rights Available from CartoonStock.com

"And stay out!"

Actions the Aircraft Commander May Take

- The Aircraft Commander may:
- Article 9 – Deliver a pax to authorities if aircraft commander has ***reasonable grounds to believe*** pax committed an act which, in his opinion, is a serious offence according to penal law of the States of registration of the aircraft

Immunity Granted to the Aircraft Commander

To encourage the aircraft commander to take action without hesitation, Article 10 expressly immunizes the commander (and the airline/crew/other pax) from civil or criminal liability **for actions taken in accordance with the Convention.**

Confronting the Unruly Pax

What Happens When the Carrier Acts? – Eid v. Alaska Airlines



***Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010), cert. denied, 131 S. Ct. 2874 (2011)**

- **First appellate court case in world to address immunity under the Tokyo Convention**
 - September 29, 2003: a group of 9 Egyptian paxs traveling from Vancouver to Las Vegas
 - All 9 paxs seated in first class cabin
 - Aircraft diverted to Reno and the 9 paxs disembarked after Captain advised by flight attendant of pax disturbance in first class cabin (“I have lost control of first class cabin”)
 - Local authorities interview and clear paxs to continue
 - Airline declines to transport paxs to Las Vegas
 - Paxs sue carrier

What does “reasonable grounds to believe” mean?

- **Trial Court:** grants summary judgment finding Article 10 immunity
- **Plaintiffs Appeal**
- **Appellate Court in a 2-1 decision reverses**
- **Issue:** Meaning of “reasonable grounds to believe”
 1. Is the decision of the Aircraft Commander entitled to any deference or is it assessed under standard negligence principles?
 - Court of Appeals rejected deference standard (e.g., arbitrary & capricious) in favor of a standard akin to negligence
 2. May the Aircraft Commander rely on the crew statements or must the Aircraft Commander undertake an independent investigation of the incident before action is allowed?
 - Court of Appeals faulted Captain for not investigating before taking action

Majority found no support in drafting history for an “arbitrary and capricious” standard

- Majority quoted US delegate statement:

“Within the general concept of United States law, the phrase “reasonable grounds” would give the impression that the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief to the effect that a person had committed or was about to commit the kind of act under consideration.”

“In other words, the aircraft commander could not act arbitrarily or capriciously.”

- Case remanded to lower court for jury trial
- **February 2013:** Jury finds immunity – Captain had reasonable grounds to act

Montreal Convention – What happens when the carrier doesn't act?



Pax-On-Pax Assault

Again – Wallace v. Korean Air Lines

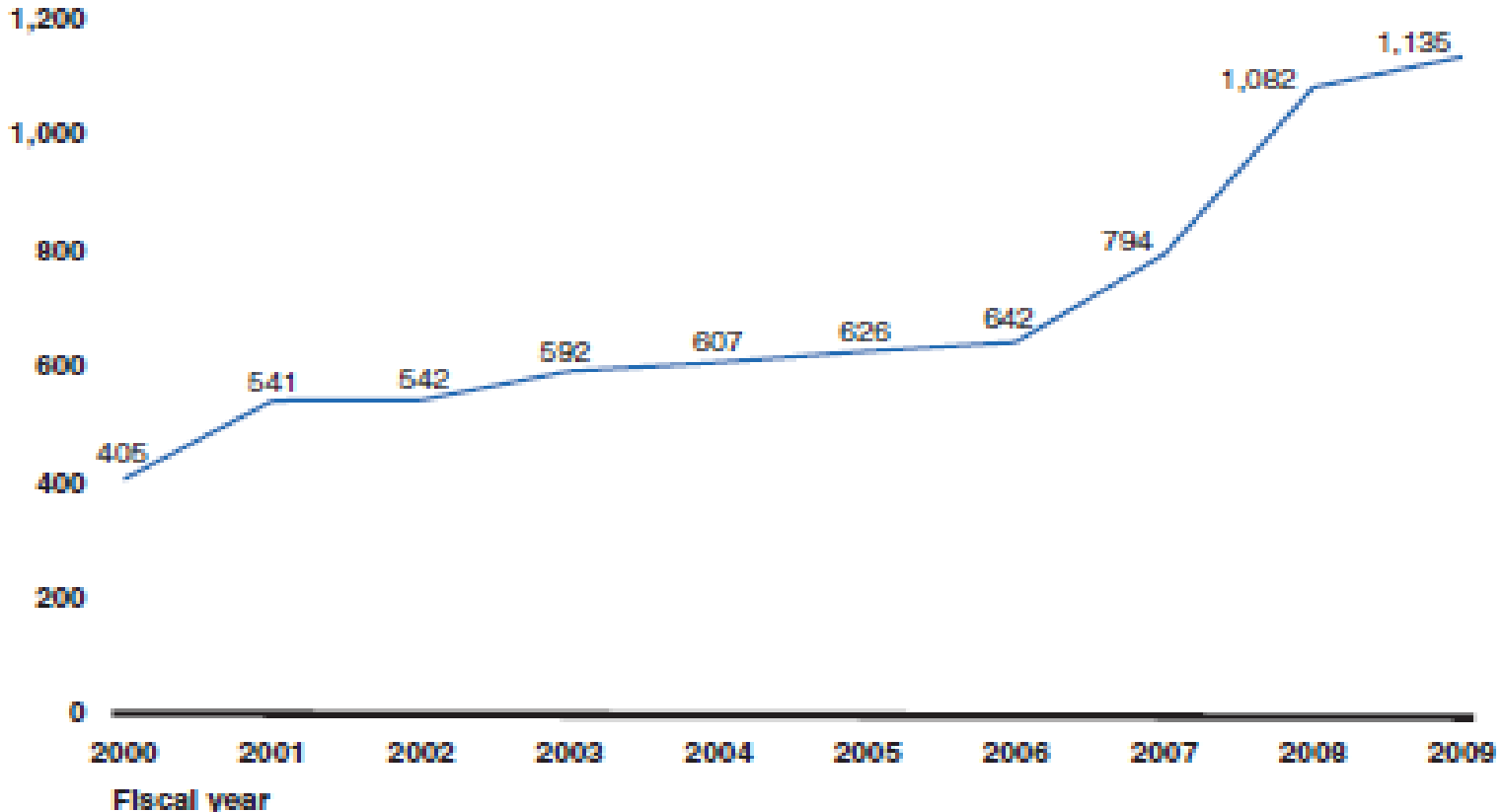
Parental Child Abduction Involving International Air Transportation



Parental Child Abduction Involving International Air Transportation

Figure 1: International Parental Child Abduction Cases Reported to State Department, Fiscal Years 2000-2009

Cases of International Child Abduction



Parental Child Abduction Involving International Air Transportation

- **2007-2009:** 3011 requests for assistance made to the U.S. Government seeking the return of 4,365 abducted children per Hague Convention on the International Aspects of Child Abductions
 - 36% Abducted to Mexico and Canada
 - 64% Abducted to non-bordering countries
 - These almost always involve air transportation

Parental Child Abduction Involving International Air Transportation

Figure 2: Nonborder Countries Children Were Abducted to Most, Fiscal Years 2007-2009



Sources: GAO and Map Resources (map).

US Government Study

- **Commercial Aviation: Program aimed at high-risk Parent abductors could aid in preventing abductions**
 - June 2011 GAO report to subcommittee on Transportation and Infrastructure, House of Representatives
www.gao.gov/new.items/d11602.pdf
- **GAO Report however found that air carriers not in best position to address the problem and issue should be addressed at governmental level:**
 - Lack of central data base -- Existing governmental no-fly lists can not be used under existing law
 - Lack of US exit control was a problem
 - Dual parental consent forms not effective and raise privacy and social issues - no US gov't rules or requirements

Current Systems Ineffective to Prevent Abductions

- **FBI National Crime Information Center Missing Persons File:** checked against international flight passenger manifests within 30 minutes of departure but parent must have reported child missing and insufficient time to respond
- **Children's Passport Alert Program "CPIAP":** parent may request State Dep't notification of passport application for child under 18 years of age but no ability to revoke passport previously issued and no ability to prevent another country from issuing child a passport or requiring country to notify US State Dep't
- **Amber Alerts** distributed by TSA but only issued where officials believe child is in imminent danger of serious bodily injury or death
- **DHS Prevent Departure List:** applies only to non-US citizens and law enforcement must request an alert [some recommend expansion to US citizens but privacy issues]
- **Child Custody Orders:** Issued at local family court level and no central database; airlines have no authority to verify/enforce
- **Hague Convention on the International Aspects of Child Abductions:** Only address return of children; not prevention

Failure of Legislative Efforts – US and Internationally

- **US House of Representatives:** considered legislation to empower President to take action against countries demonstrating pattern of noncompliance with Hague Convention but bill failed to make it past the committee stage. The International Child Abduction Prevention and Return Act of 2011 H.R. 1940, 112th Cong., 2011.
- **US Senate** “Simple Resolution” (non-binding expression of the sentiments of the Senate) condemning international parental child abduction. S. Res. 543, 112th Cong., 2012.
- **Permanent Bureau of the Hague Conference on Private International Law** research regarding the feasibility of developing standard international travel consent form for minor children. Note on the Possible Development of a Model Consent to Travel Form, Preliminary Document No. 15, Jan. 2012.
 - **2012:** Special Commission to the Hague Conference determined that development of model form too difficult given language and procedural differences

Air Carrier Defenses

Airline Deregulation Act

- States cannot regulate the “prices, routes or *services*” of air carriers
- Ticketing, check-in and boarding practices are “services”

– Montreal Convention

- No “Accident” under Article 17
- Even if an Accident, no bodily injury

– No Legal Duty Owed by the Carrier

- To the non-traveling parent – no special relationship
- To child – abduction not foreseeable

Practical issues involved in the question of legal duty

-
- Defining carrier's duty of care to passengers
- Does a private air carrier have the authority to demand family information?
- Passengers' right to travel
- Lack of government exit controls at U.S. Borders
- Does air carrier have the ability and resources to confirm the validity and authenticity of court orders, consent forms, and family status?
- Passenger Privacy Rights: Would the airline have the right and authority to store private passenger information indefinitely?

The Case Law

1. *Pittman v Grayson* (Icelandair) (1998): USD15M
Verdict/Reversed
2. ***Streeter v Executive Jet Management* (2005): USD 27M
Verdict/Settled**
3. *Braden v ANA* 2010: Dismissed
4. *Ko v EVA Airways* 2012: Dismissed
5. ***Bower v EgyptAir* 2012: Dismissed**

Summary of Cases and Holdings

Case Name	Parent Marital Status	Parent Abducting Child	Type of Custody Order	Type and Sufficiency Notice to Carrier	Legal Holding
<i>Pittman(1998)</i>	Divorced	Mother	Father had sole legal custody	Telephone calls to local offices of carrier. Notice insufficient	No liability No Duty
<i>Streeter(2005)</i>	Unknown	Father	Mother had primary physical custody, shared legal custody	Wilful blindness constituting knowledge	Liability •No ADA preemption •Duty
<i>Braden(2010)</i>	Never Married	Mother	Joint legal and physical custody	No notice	No liability •No ADA preemption •No Duty
<i>Bower(2012)</i>	Divorced	Mother	Father had sole legal custody but shared physical custody	No notice	No liability •ADA preemption •No Duty
<i>Ko(2012)</i>	Divorced	Mother	Joint custody	No notice	No liability •Preempted by ADA

***Streeter v Executive Jet*, 2005 WL 4357633 (Conn. Super. Nov. 10, 2005)**

- Adult male with two children chartered one-way flight to Egypt
- Less than 30 hours advance notice for the charter
- USD160,000 cost of the flight – USD15,000 limit on father’s credit card, remainder wired by third-party
- Carrier did not follow its “know your customer rule”
- Carrier marketed the “privacy” and “discretion” of its services
- Court charged carrier with “constructive knowledge” of father’s illegal conduct
- USD 27M verdict

***Bower v EgyptAir*, 847 F. Supp. 2d 266 (D. Mass. 2012), *aff'd*, 2013 WL 5452805 (1st^t Cir. Oct. 2, 2013)**

- Adult female traveling with two children (6 and 8 yrs)
- Red Flags?
 - Different last names in their Egyptian passports
 - One-way, same day travel without reservations
 - USD10,000 paid in cash for 3 business class tickets
 - No entry visa in children’s Egyptian passports
 - No “Parental Consent Form” or other evidence of “missing” father’s consent to the transportation
 - Egypt not a party to the Hague Convention on the International Aspects of Child Abductions
- Complaint dismissed on motion based on no legal duty (rejected preemption defense as not applicable to negligence claims)
- Affirmed on appeal ***but*** based on ADA preemption

Need for Government Solution

- Cases decided on specific facts and courts have not adopted a uniform approach when finding no liability
- Even if airline provided notice of a custody dispute, problem with verifying information and storing it
- Potential privacy law issues
- Need for Government Solution
 - not responsibility of the airlines to determine the legality of travel or imposing exit controls on citizens
 - law enforcement issue

QUESTIONS?

Andrew J. Harakas
Clyde & Co US LLP – New York
Tel: +1 212.710.3920
andrew.harakas@clydeco.us

www.clydeco.com