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**THE MONTREAL CONVENTION—THE ELEVENTH
CIRCUIT EMBRACES AIRLINES’ PRACTICE OF
“BUMPING” TO DENY PLAINTIFFS’ RECOVERY FOR
PERSONAL INJURY UNDER ARTICLE 17**

LINDSEY RAY ALTMAYER*

INTRODUCTION

ANYONE WHO HAS TAKEN a commercial flight is likely familiar with the plight of the international air traveler: Delays, lost luggage, and distracting seatmates are as frequent as, and arguably more expected than, passengers arriving to their destination on time and incident free. In addition to technical and weather delays, travelers must also concern themselves with the possibility of being involuntarily bumped from their scheduled flight. “Bumping” is the industry-wide airline practice of intentionally overselling tickets on a flight to compensate for cancellations and exchanges.¹ In the event all paid passengers arrive for the flight, select customers are forced to give up their seats and reschedule on a later flight.² Recently, in *Campbell v. Air Jamaica Ltd.*, the Eleventh Circuit Court of Appeals decided whether a passenger’s personal injuries that resulted from being bumped from an international flight supported a cognizable claim under Articles 17 or 19 of the Montreal Convention.³ The court held that economic damages suffered by the plaintiff due to the delay were recoverable under Article 19; however, recovery was denied under Article 17 as bumping was common practice and therefore did not qualify as an “accident,” which is necessary to state a claim for personal injury.⁴

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¹ *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1172 (11th Cir. 2014) (citing *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 363 (S.D.N.Y. 2006)).

² *Id.*

³ *See id.* at 1165.

⁴ *Id.* at 1171–72.

I. BACKGROUND FACTS

Plaintiff Allan Campbell purchased a ticket for an Air Jamaica Limited flight from Kingston, Jamaica to Fort Lauderdale, Florida, scheduled for September 8, 2009.⁵ Campbell arrived at the airport three hours prior to the scheduled take-off time, checked-in, received a boarding pass, cleared security, and began to board the plane after a four hour delay.⁶ Before taking his seat, Campbell was called back to the boarding gate where he was informed that he would not be accommodated on his reserved flight and must make other arrangements to fly out the next day.⁷ An agent at the check-in counter required Campbell to pay a \$150 change fee to secure a reservation on the next day's Air Jamaica flight and refused to assist him with hotel arrangements for the night.⁸ Airport construction forced Campbell to spend the night outside, exposed to inclement weather.⁹ Campbell claimed he began feeling ill from the delay at the airport.¹⁰ His condition was then exacerbated by the poor treatment from the airline personnel and difficult sleeping arrangements.¹¹ Upon arrival in Fort Lauderdale, he sought medical attention.¹² He later collapsed at his home in Miami and was hospitalized for treatment of a heart attack.¹³

In a *pro se* complaint, Campbell alleged that the airline agent was negligent in "bumping [Campbell] from the flight and abandoning' him" and that the "delay and abandonment were the sole cause of his heart attack."¹⁴ He sued Air Jamaica under Articles 17 and 19 of the Montreal Convention for damages and injury resulting from the delay and being bumped from the flight, claiming the airline's negligent bumping constituted an "accident" for purposes of Article 17.¹⁵ The district court granted Air Jamaica's motion to dismiss finding that Campbell's claims for pure emotional distress and anxiety were not recoverable under Article 19 and "neither flight delay nor bumping

⁵ *Id.* at 1167.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1168.

¹⁵ *Id.* at 1167-68.

constitute[d] a requisite ‘accident’” under Article 17.¹⁶ Campbell appealed the district court’s blanket dismissal.¹⁷ The Eleventh Circuit vacated and remanded the district court’s judgment as to the delay claim: Campbell sought recovery for the \$150 change fee, which was sufficient to constitute economic damages under Article 19.¹⁸ However, the court affirmed the district court’s ruling that Campbell did not state a claim under Article 17.¹⁹ The Eleventh Circuit agreed that bumping is not an “accident,” nor did the events occur during embarkation or disembarkation as required by Article 17.²⁰

II. THE MONTREAL CONVENTION

The Montreal Convention, an international treaty related to aviation, governs damages arising from international air travel.²¹ The Montreal Convention replaced the Warsaw Convention and preempts all state and federal claims that fall within its scope.²² Article 19 of the Montreal Convention, titled “Delay,” provides that an air carrier is liable for damage resulting from the delay of passengers, cargo, or baggage.²³ Courts have widely held that recovery under Article 19 is limited to economic damages and does not provide a cause of action for physical injury or emotional harm.²⁴

Additionally, Article 17 states: “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

¹⁶ *Id.* at 1168.

¹⁷ *Id.*

¹⁸ *Id.* at 1171.

¹⁹ *Id.*

²⁰ *Id.* at 1173.

²¹ Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

²² The Montreal Convention encompasses much of the previous Warsaw Convention and many courts apply Warsaw jurisprudence to Montreal cases. See *Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106, 110–11 (S.D.N.Y. 2004); Christopher E. Cotter, *Recent Caselaw Addressing Three Contentious Issues in the Montreal Convention*, 24 No. 4 AIR & SPACE LAW. 9 (2012).

²³ Montreal Convention, *supra* note 21, art. 19.

²⁴ See *Campbell*, 760 F.3d at 1170 (“The parties agree that Article 19 permits the payment of economic damages but does not contemplate compensation for emotional loss or physical injury.”). See also *Vumbaca v. Terminal One Grp.*, 859 F. Supp. 2d 343, 367 (E.D.N.Y. 2012) (“Courts in the Second Circuit have found that Article 19 only applies to *economic* loss occasioned by delay in transportation.” (internal quotation marks omitted)).

or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”²⁵ Therefore, as articulated by the Eleventh Circuit, Article 17 requires three elements: (1) an accident; (2) death or bodily injury; and (3) occurrence on board the aircraft or during any of the operations of embarking or disembarking.²⁶ Although much can be said about delay under Article 19 and what constitutes the operations of embarking or disembarking under Article 17, this article will focus on the court’s analysis of “accident.”

A. COURT INTERPRETATION OF “ACCIDENT”

In *Air France v. Saks*, the Supreme Court defined accident as “an unexpected or unusual event or happening that is external to the passenger” and instructed that “the definition should be flexibly applied after assessment of all the circumstances.”²⁷ Furthermore, “when the injury indisputably results from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident.”²⁸ The focus of many courts has been whether the event causing the injury is a routine or customary practice of air travel.²⁹ Given the range of possibilities of unexpected or unusual events in air travel—and the extent that those events have become customary practice—it comes as no surprise that plaintiffs have little direction from case law as to what does or does not satisfy the definition of an “accident.”

Courts have readily found that actions or inactions related to international flights do not establish an Article 17 accident. For example, the Supreme Court held that a passenger who lost hearing in one ear due to the normal pressurization of the airplane cabin had not been exposed to an accident.³⁰ The Eleventh Circuit Court of Appeals held that no accident occurred by a flight crew’s failure to make an emergency landing when a passenger was showing early signs of a heart attack.³¹ The Southern District Court of New York determined that a woman’s slip-

²⁵ Montreal Convention, *supra* note 21, art. 17.

²⁶ *Campbell*, 760 F.3d at 1172.

²⁷ *Air Fr. v. Saks*, 470 U.S. 392, 405 (1985).

²⁸ *Id.* at 406.

²⁹ *Campbell*, 760 F.3d at 1172 (citing *Saks*, 470 U.S. at 404–05); *see also* Cotter, *supra* note 22, at 11.

³⁰ *Saks*, 470 U.S. at 395–96.

³¹ *Kryns v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997).

and-fall on a discarded plastic blanket bag while in-flight was not an accident.³²

On the other hand, courts often find that events that are not routine or customary may be considered accidents. The Supreme Court affirmed that a flight attendant's refusal to move an asthmatic gentleman away from the smoking section of the airplane, resulting in his death, was an accident.³³ A California District Court found that a passenger's movement in the seat and subsequent jostling of the seatback tray, which caused a cup of hot tea to slide off the tray and injure the plaintiff, was an accident.³⁴ A Massachusetts court held that injuries resulting from three liquor bottles falling from an overhead bin constituted an accident.³⁵ In Texas, a passenger's death from stroke caused or exacerbated by a number of events, including the hot temperature in the plane, rude treatment by airline employees, and the flight crew's mishandling of the passenger's medical situation, potentially fell within the definition of an accident.³⁶

There have been no cases, however, that have held that bumping constituted an accident for purposes of Article 17.³⁷ The courts that have decided the issue of bumping under the Montreal Convention or Warsaw Convention have instead considered it as an Article 19 delay or, alternatively, as contractual nonperformance and, therefore, outside of the scope of the Convention.³⁸

B. *CAMPBELL V. AIR JAMAICA*

The Eleventh Circuit in *Campbell* likewise dismissed bumping as an Article 17 accident.³⁹ The court relied heavily on the Supreme Court's instruction that "'routine travel procedures' do not amount to Article 17 accidents."⁴⁰ The court broadly and boldly declared that bumping is simply a routine travel proce-

³² *Rafailov v. El Al Isr. Airlines, Ltd.*, No. 06 CV 13318 (GBD), 2008 WL 2047610 (S.D.N.Y. May 13, 2008).

³³ *Olympic Airways v. Husain*, 540 U.S. 644 (2004).

³⁴ *Wipranik v. Air Can.*, No. CV 06-3763 AHM (AJWx), 2007 WL 2441066 (C.D. Cal. May 15, 2007).

³⁵ *Maxwell v. Aer Lingus Ltd.*, 122 F. Supp. 2d 210, 212 (D. Mass. 2000).

³⁶ *McCaskey v. Cont'l Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001).

³⁷ *See Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1172-73 (11th Cir. 2014).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1172 (citing *Air Fr. v. Saks*, 470 U.S. 392, 404-05 (1985)).

ture.⁴¹ The *Campbell* court supported its holding that bumping is not an accident with a brief citation to cases that found bumping instead to be either an Article 19 delay or contractual nonperformance.⁴²

The court did at least acknowledge the plaintiff's contention that this was no ordinary bumping.⁴³ To Campbell's argument that the airline did not follow proper bumping procedures by issuing him a boarding pass, requiring him to pay a change fee, and not updating their records to reflect the correct date of travel, the court responded by claiming these "alleged irregularities are irrelevant."⁴⁴ The Eleventh Circuit looked to only those precise events that were alleged to cause the injury, disregarding the surrounding circumstances and subsequent chain of events in determining whether an accident occurred.⁴⁵ This narrow view contradicts the Supreme Court's instruction that *all* of the circumstances surrounding the injury should be considered.⁴⁶ Furthermore, the Supreme Court "require[s] only that the passenger be able to prove that some link in the chain was an unusual or unexpected event."⁴⁷

III. ANALYSIS

By its broad generalization that bumping, as a matter of law, is not an accident for purposes of Article 17, the court is heading down a dangerous path that inappropriately limits the terms of the Montreal Convention, unnecessarily forecloses on avenues of recovery for international travelers, and promotes irresponsible and reckless behavior by the airline industry at large. Primarily, as previously mentioned, the Supreme Court directs that the definition of accident should be "flexibly applied after assessment of all the circumstances."⁴⁸ The test should not be whether the one precise event that caused the injury is a common practice, but whether, taking the facts and circumstances collectively, the common practice became an unexpected event

⁴¹ *Id.* ("[Bumping] is systematic, widely practiced, and widely known. There is nothing accidental about it. . . . As a general matter, then, an Article 17 accident does not occur merely because a passenger is bumped from a flight.")

⁴² *Id.* at 1172-73.

⁴³ *Id.* at 1173.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Air Fr. v. Saks*, 470 U.S. 392, 405 (1985).

⁴⁷ *Id.* at 406.

⁴⁸ *Id.* at 405.

somewhere along the chain of events.⁴⁹ Refusing to allow passengers to change seats may be a common practice, but refusing to allow an asthmatic gentleman to move away from the smoking section is an accident.⁵⁰ Serving hot beverages onto seatback trays is a routine travel procedure, but when a fellow passenger moves in his seat and the tea tumbles into a woman's lap, an accident has occurred.⁵¹ Rude flight attendants, hot airplane cabins, and negligence by airline employees may be common across the industry, but when the result is a man's death from stroke, there is potential for liability as an accident.⁵² Finally, a passenger being bumped from a flight may be a routine practice, but when a man, already ill from a four hour delay, is bumped from a flight, kicked to the curb with no overnight shelter, and forced to pay a change fee to secure a reservation on a subsequent flight, an accident arguably has occurred. At the very least, it poses a question of fact for the jury.

Even if the surrounding circumstances do not take the bumping out of an ordinary industry practice and into an unexpected or unusual happening, the Eleventh Circuit erred in affirming the district court's dismissal. The Supreme Court instructed that "where there is contradictory evidence, it is for the trier of fact to decide whether an 'accident' as here defined caused the plaintiff's injury."⁵³ The court's decision that bumping could never qualify as an accident serves a further injustice to future plaintiffs.

Furthermore, the court's misguided reliance on those decisions that treat bumping as an Article 19 delay or as a state contract claim will prevent plaintiffs from recovering for personal injury damages rightfully afforded to them under the Montreal Convention. The Eleventh Circuit acknowledges that Article 19 does not allow compensation for physical injury, thus Campbell could not have recovered damages for his heart attack based on

⁴⁹ See *id.* at 406.

⁵⁰ See *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004).

⁵¹ See *Wipranik v. Air Can.*, No. CV 06-3763 AHM (AJWx), 2007 WL 2441066, at *5-6 (C.D. Cal. May 15, 2007).

⁵² See *McCasky v. Cont'l Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001).

⁵³ *Saks*, 470 U.S. at 405; see also *McCasky*, 159 F. Supp. 2d at 574 (concluding that a failure to divert is not an *ipso facto* accident, nor is it never an accident, but instead a question of fact for the jury).

delay.⁵⁴ Furthermore, to prevail on a claim for contractual non-performance, the airline would have to actually *not perform*.⁵⁵ Because Campbell eventually reached his destination on an Air Jamaica flight, it is unlikely he would be awarded damages based on a contract claim.⁵⁶ Therefore, the only right of recovery for international air travelers that suffer physical injury from an accident during or near flight is Article 17 of the Montreal Convention, and the Supreme Court has approved a liberal interpretation of the definition of "accident."⁵⁷

Finally, the court compares bumping to routine weather or maintenance delays, "unpleasant, but . . . not unexpected or unusual."⁵⁸ The court fails to take into account, however, that unlike weather and maintenance delays that are often unavoidable and necessary, bumping is a creature of the airline industry to fill seats and hedge against losses from last minute cancellations. Any business-minded American can appreciate a company—or even an entire industry—taking measures to boost profit and protect its bottom line; however these practices must be done safely and responsibly. Bumping from international flights is particularly worrisome: in many instances flying transnationally, compared to nationally, is more expensive, requires more planning and preparation by the passengers, and is more demanding physically and mentally.⁵⁹ If an airline insists on betting against all reserved passengers arriving for their scheduled flight, it should be prepared to pay the price when an accident occurs by the bumping of certain individuals. The Eleventh Circuit's broad approval of bumping as a common industry practice, thereby preventing plaintiffs from recovering damages for *any* resulting injury, may promote reckless and unconscionable

⁵⁴ *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1170 (11th Cir. 2014) ("Article 19 permits the payment of economic damages but does not contemplate compensation for emotional loss or physical injury.").

⁵⁵ *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 366 (S.D.N.Y. 2006) (quoting *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir. 1987)) ("The court held that bumping was a case of non-performance of contract . . . , noting that the appellants in the case were not 'attempting to recover for injuries caused by their delay Rather their complaint [was] based on the fact that . . . they never left the airport.'").

⁵⁶ *Id.*

⁵⁷ *See Saks*, 470 U.S. at 405; *McCaskey*, 159 F. Supp. 2d at 570.

⁵⁸ *Campbell*, 760 F.3d at 1172–73.

⁵⁹ *Traveler's Checklist*, U.S. DEPARTMENT STATE, BUREAU CONSULAR AFF., <http://travel.state.gov/content/passports/english/go/checklist.html> (last visited Feb. 2, 2015).

behavior on the part of the airlines and flies in the face of the goals of the Montreal Convention.

In conclusion, with its decision in *Campbell v. Air Jamaica Ltd.*, the Eleventh Circuit Court of Appeals has critically limited the definition of "accident" under Article 17 of the Montreal Convention, precluded plaintiffs from their rightful recovery for personal injury from accidents in flight, and opened the door—or should I say cleared the runway—for airlines to detrimentally mistreat their customers in an effort to increase revenue: all by embracing "bumping" as a routine travel procedure. To borrow the well-known sentiment from Judge Learned Hand, if it is common industry practice to deny passengers their reserved seat on a flight at the cost of the travelers' physical, financial, and emotional well-being, it is time to change industry practice, and the "courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."⁶⁰

⁶⁰ The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

