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Aviation Law - Liability under the Warsaw Convention - Second Circuit Holds that the Determination of Whether an Occurrence Amounts to an Accident Requires a Specific, Factual Inquiry: *Magan v. Lufthansa German Airlines*

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AVIATION LAW—LIABILITY UNDER THE WARSAW CONVENTION—SECOND CIRCUIT HOLDS THAT THE DETERMINATION OF WHETHER AN OCCURRENCE AMOUNTS TO AN "ACCIDENT" REQUIRES A SPECIFIC, FACTUAL INQUIRY: *MAGAN V. LUFTHANSA GERMAN AIRLINES*

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ARTICLE 17 of the Warsaw Convention[1] provides for an air carrier's liability to passengers who are injured by an "accident" while in flight.[2] The Warsaw Convention, however, never defines the word "accident."[3] In *Air France v. Saks,* the United States Supreme Court defined "accident" to mean "an unexpected or unusual event or happening that is external to the passenger."[4] Although *Saks* gave meaning to the word "accident," "courts continued to struggle with its meaning in particular cases."[5] In the recent case of *Magan v. Lufthansa German Airlines,* the Second Circuit ruled on the issue, holding that the determination of whether a particular incidence of turbulence amounts to an "accident" requires a case-by-case factual inquiry.[6] By overruling the district court's institution of a bright-line rule, the Second Circuit's holding in *Magan*: 1) helps to provide international passengers with the means for fair recovery; 2) main-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §40105 (West 2001) [hereinafter Warsaw Convention].

[2] *See id.* art. 17.

[3] Air France v. Saks, 470 U.S. 392 (1985).

[4] *Id.* at 405.

[5] Magan v. Lufthansa German Airlines, 339 F.3d 158, 162 (2nd Cir. 2003) (Magan II).

[6] *See id.* at 162.

tains the apportionment of risk of liability for passenger injury set forth by the Montreal Agreement;[7] and 3) furthers the Warsaw Convention's goal of harmonizing air laws across borders.

On March 27, 1999, John Magan was a passenger aboard Lufthansa German Airlines ("Lufthansa") Flight 5318 from Munich, Germany to Sofia, Bulgaria.[8] The plane, a British Aerospace Avro 146 regional jet, is a "high wing" aircraft with a fuel tank extending over and into the passenger cabin from rows five through eight.[9] This reduces the ceiling height for those rows to just six feet, three inches.[10] On this particular flight, Magan, a tall man, had to crouch down on his way to his seat in row seven.[11]

During flight, Magan went to the lavatory next to the cockpit.[12] While Magan was in the lavatory, the pilot made an announcement instructing passengers to return to their seats and buckle-up in anticipation of turbulence.[13] Magan heeded the warning and proceeded back to his seat as quickly as possible.[14] As he approached the fifth row—the row in which the fuel tank starts to intrude into the passenger cabin—Magan violently struck his head on the low ceiling, breaking his nose and dislodging a dental bridge from his mouth.[15] After the injury, he was diagnosed as having severe and continuing "cluster headaches."[16]

The circumstances surrounding the incident were sharply disputed. Magan claimed that as he returned from the lavatory, the turbulence made it hard for him to stand.[17] Indeed, he maintained his balance by holding-on to the backs of seats.[18] Another passenger also noted that, at the time, the plane was experiencing "very significant" turbulence.[19] On the other hand, the pilot, who after observing heavy thunderstorms on the

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[7] CAB Order No. E-23680, 31 Fed.Reg. 7302 (1966).

[8] *Magan II*, 339 F.3d at 160.

[9] Magan v. Lufthansa, 181 F. Supp. 2d 396, 397 (S.D.N.Y. 2002), *rev'd* 339 F.3d 158 (2nd Cir. 2003) ("Magan I").

[10] *Id.*

[11] *See Magan II*, 339 F.3d at 160.

[12] *Magan I*, 181 F. Supp. 2d at 397.

[13] *Magan II*, 339 F.3d at 160.

[14] *Id.*

[15] *See id.*

[16] *Id.*

[17] *Id.*

[18] *See id.*

[19] *Id.*

radar made the in-flight announcement, later characterized the turbulence as only light to medium in nature.[20]

Magan filed a claim against Lufthansa for his injuries under Article 17 of the Warsaw Convention.[21] Lufthansa moved for summary judgment, arguing that the turbulence experienced by Flight 5318 did not amount to an "accident" under the Warsaw Convention, and suggesting that the court defer to standards developed by the FAA and the National Weather Service for characterizing turbulence.[22] These standards help pilots make consistent radio communications regarding turbulence they encounter in flight.[23] Lufthansa reasoned that Flight 5318 encountered only "light" or "moderate" turbulence—as described by the FAA standards—where it is hard for passengers to walk.[24] So, the argument follows, even if Magan's injuries were caused by turbulence, Lufthansa could not be held liable because such turbulence is a normal and expected occurrence during flight.[25]

The United States District Court of the Southern District of New York agreed, holding broadly as a matter of law that injuries sustained in the course of "light" or "moderate" turbulence—as described by FAA turbulence reporting criteria—can never qualify as resulting from an "accident" as defined by the Supreme Court in *Saks*.[26] The court was heavily swayed by the Warsaw Convention's overarching goal of harmonizing the laws that govern international travel.[27] The court reasoned that a bright-line rule utilizing the FAA criteria would further this goal.[28] Thus, the district court created a new test, where only "severe" or "extreme" turbulence, as defined by the FAA, will qualify as an accident.[29]

The Second Circuit reversed.[30] In an opinion written by Judge Oakes, the Second Circuit held that the district court had no authority to create a new legal test for determining whether an "accident" occurred.[31] Moreover, Judge Oakes noted that

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20 *Id.*
21 *Id.*
22 *See id.* at 162.
23 *See id.* at 164.
24 *Id.* at 162.
25 *Id.*
26 *Magan I*, 181 F. Supp. 2d at 401.
27 *Id.*
28 *Id.*
29 *Id.* at 402.
30 *Magan II*, 339 F.3d at 159.
31 *Id.* at 164.

the district court failed to account for the contradictory evidence regarding the degree of turbulence experienced by Flight 5318.[32] Finding that an airline can indeed be held liable for injuries sustained during turbulence, the Second Circuit relied on the definition of "accident" articulated by the Supreme Court in *Saks*.[33] The court restated the *Saks* formulation: "the term 'accident' connotes an 'unexpected or unusual event or happening that is external to the passenger,'" but "'when [an] injury indisputably results from [a] passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident.'"[34]

Guided in its analysis by the principles announced in *Saks*, nothing suggested to the court that a bright-line rule should be established for determining whether a particular incidence of turbulence amounted to an "accident."[35] Instead, the court reasoned, "such a determination—the degree of prevalence, or risk, of a particular weather event in any given circumstances, and to what degree it might be 'beyond the normal and preferred mode of operation for the flight'—is a factual matter more appropriately addressed at trial."[36] The Second Circuit also rejected the district court's adoption of the FAA turbulence criteria, noting that

> [A]lthough the degree of turbulence—as opposed to its mere occurrence—may be relevant among other factors, to the question of whether an "accident" has occurred as a matter of fact, the trial court's attempt to graft weather-reporting criteria for pilots onto the definition to create a new rule of law is misplaced.[37]

The court reasoned that under *Saks*, courts do not have the authority to add requirements for proving that an "accident" has occurred.[38] Therefore, the district court was not empowered to force Magan to prove that the turbulence he encountered was "severe" or "extreme" as described by the FAA turbulence criteria. Accordingly, the Second Circuit remanded the case to the district court for factfinders to determine whether Magan's injuries were caused by an "accident."[39] Thus, under *Magan*, a pas-

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[32] *See id.* at 166.
[33] *See id.* at 161, 166.
[34] *Id.* at 161-62 (quoting *Saks*, 470 U.S. at 405-06).
[35] *Id.* at 163.
[36] *Id.* at 164.
[37] *Id.* at 163.
[38] *Id.*
[39] *Id.* at 166.

senger can recover for injuries sustained in the course of turbulence so long as fact finders agree that the turbulence was unexpected or unusual in terms of intensity or prevalence. This is important for several reasons.

First, the Warsaw Convention provides the exclusive remedy for passenger injuries aboard international flights, preempting all state and federal claims.[40] Therefore, it is imperative that the Warsaw Convention provides international passengers with an adequate means for recovery. The Second Circuit's formulation, which provides for a case-by-case inquiry into the facts surrounding injuries, is more in tune with this purpose of the Warsaw Convention than the district court's formulation. With its arbitrary line-drawing, the district court's rule denies recovery whenever the injury-causing turbulence is not deemed strong enough. And, as *Magan* demonstrates, even an occurrence violent enough to cause a broken and bloody nose may not qualify as an "accident."[41] Taken to its logical conclusion, the district court's rule would provide no recovery even if Magan had died. By foreclosing all opportunity for plaintiffs like Magan to recover, the district court's test frustrates the Warsaw Convention's goal of recompensing injured passengers. Unlike the district court, which would cut off plaintiffs as a matter of law, the Second Circuit's rule enables plaintiffs to prove, at trial, other circumstances that factfinders may find relevant to their determination of whether an "accident" occurred.[42] It is arguable that any less would not provide passengers with an adequate means for recovery.

Second, the district court's rule frustrates the Warsaw Convention's carefully negotiated apportionment of air carrier liability. On the other hand, the Second Circuit's holding maintains this appointment and gives air carriers the appropriate incentives to prevent future injuries. One of the Convention's central goals is "to limit potential carrier liability for passenger injuries so as not to frighten away potential investors from the fledgling air industry."[43] Of course, this goal is balanced against the passenger's right to recover for injuries sustained during travel.[44] A compromise was struck in the Montreal Agreement of 1966, where "air carriers consented to a system under which they assumed 'vir-

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[40] *See id.* at 161. *Magan II*, 339 F.3d at 161.
[41] *See id.* at 160.
[42] *Id.* at 164.
[43] Wallace v. Korean Air, 214 F.3d 293, 296 (2d Cir. 2000).
[44] *See id.* at 296-97.

tual strict liability' for death or injury to passengers" in exchange for a $75,000 cap on their liability.[45]

Arguably, the district court's formulation of "accident" upsets this balance, unduly reapportioning *all* risk of liability for injuries caused by minor turbulence to passengers. Without liability for these types of injuries, airlines have no incentive to adopt preventative measures. Such a result conflicts with

> [O]ne of the guiding principles that pervades, and arguably explains, the original Convention, the subsequent modifications, and even the Court's decision in *Saks*, [which] is an apportionment of risk to the party best able to control it . . . which encourages [air carriers] to take steps to minimize that risk to the degree that it is within their control.[46]

With its case-by-case approach, the Second Circuit's rule leaves the appropriate incentives in place. Faced with liability for these types of injuries, air carriers will likely minimize their exposure. Airlines may conduct turbulence studies, pressure manufacturers to design safer aircraft, or adopt better safety procedures. Of course, air carriers will adopt only those measures that cost less than the potential liability they help to avoid. Nevertheless, some incentive is better than none. Thus, to the amount possible, the Second Circuit's rule not only furthers a passenger's right to recovery, but also facilitates the public's interest in making flight safer.

Finally, the Second Circuit's rule is also more in tune with the Warsaw Convention's goal of harmonizing the laws that govern international travel. By calling for a case-by-case approach to the determination of what constitutes an "accident," *Magan* brings the Second Circuit in line with relevant international cases. In *Quinn v. Canadian Airlines International Ltd.*,[47] for example, the Ontario Court General Division reviewed relevant prior cases before noting that the case law "is authority for the proposition that extreme turbulence can amount to [an] 'accident' under Article 17. It does not stand for the proposition that some lesser but unusual or unexpected degree of turbulence could not be held to constitute an 'accident'."[48] There, just as the court in *Magan* instructed the district to proceed on remand, so Judge Sutherland proceeded to inquire into the

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[45] *Id.* at 297.

[46] *Magan II*, 339 F.3d at 162.

[47] [1994]18 O.R.(3d) 326.

[48] *Id.* at 333.

facts surrounding the episode of turbulence before holding that it did not amount to an "accident."[49]

Although the Second Circuit's final conclusion was correct, the court misstated a portion of the *Saks* test for determining whether an "accident" occurred. In its discussion of the issue, the court noted that "[t]he *Saks* definition makes specific reference to the individual passenger's injuries as part of its inquiry."[50] This seems to indicate that a finding of a serious or specific type of injury can lead to a finding of an "accident." But this is not what *Saks* stands for. Rather, the court in *Saks* stated that "[t]his definition should be flexibly applied after [an] assessment of all the *circumstances surrounding* a passenger's *injuries*."[51] Read carefully, this statement indicates that courts should review the circumstances surrounding an injury—not including the injury itself—to determine whether an accident has occurred. This interpretation of the *Saks* opinion finds support in the text of the Warsaw Convention. The applicable section, Article 17 of the Convention, provides:

> The 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* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[52]

From the text of the Article 17, it is apparent that "accident" and "damage" are two distinct and independent concepts. The court in *Saks* picked up on this, noting that "American jurisprudence has long recognized this distinction between an accident that is the cause of an injury and an injury that is itself an accident."[53] By muddling the two, the Second Circuit's holding could lead to interesting and unexpected results. Take, for example, an elderly man who falls and breaks his leg as his flight encounters turbulence. To a court following *Magan's* instruction to inquire into the passenger's injury, the extent of the man's injuries might suggest that the turbulence was indeed an "accident." However, a court following *Saks* would only consider the man's pre-injurious rather than his post-injurious condition to determine whether an "accident" occurred. Instead of find-

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49 *See id.* at 334.

50 *Magan II*, 339 F.3d at 163.

51 *Saks*, 470 U.S. at 400 (emphasis added).

52 Warsaw Convention *supra* note 1 (emphasis added).

53 *Saks*, 470 U.S. at 399.

ing an "accident," the court could find that the elderly man was more prone to fall, and his bones more apt to break, during an unfortunate encounter with normal and expected turbulence. As this example demonstrates, two courts could come to very different conclusions about the same incident. By calling for an inquiry into the injury, as well as the circumstances surrounding the injury, the *Magan* court confuses the *Saks* test and reduces the relative importance of other facts surrounding the injury. Although this hiccup in the *Magan* court's reasoning has not yet been tested, it could lead the district court, on remand, to find that there was an "accident" when one may not have really occurred.

Even had the court applied the *Saks* principles correctly, the outcome would have been the same—a reversal of the lower court's holding. Until the district court revisits the case, or another similar case arises, we cannot know what effects the court's misinterpretation of *Saks* will have. Despite its shortcomings, the court's holding is good for international travel. By giving passengers a better opportunity to recover for their injuries, *Magan* is not only consistent with the goals of the Warsaw Convention, but also encourages safer flight. Faced with the possibility of liability for turbulence-related injuries, airlines will take the appropriate steps to reduce their own exposure to liability. Additionally, by clarifying the *Saks* formulation, *Magan* should help other courts grapple with the word "accident." At least in the Second Circuit, courts must conduct an intensive inquiry into case-specific facts before determining that an "accident" has or has not occurred.