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Warsaw Convention - Accident During Embarkation - Passengers, Who Were Assembled in an Airport Transit Lounge to Undergo a Search at the Time of a Terrorist Attack on the Lounge, Were "in the Operations of Embarking" as that Phrase is Used in Article 17 of the Warsaw Convention, Thereby Rendering the Air Carrier Liable for Bodily Injuries Sustained. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977)

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Case Notes

WARSAW CONVENTION—ACCIDENT DURING EMBARKATION—Passengers, Who Were Assembled in an Airport Transit Lounge to Undergo a Search at the Time of a Terrorist Attack on the Lounge, Were “in the Operations of Embarking” as That Phrase is Used in Article 17 of the Warsaw Convention, Thereby Rendering the Air Carrier Liable for Bodily Injuries Sustained. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977).

Callioppi Evangelinos and her children purchased round-trip tickets from Trans World Airlines, Inc. (TWA) for transportation from Pittsburgh, Pennsylvania, through New York, to Athens, Greece, and return. On August 5, 1973, they arrived at the Athens Airport for their return flight to the United States and reported to the check-in counter where their luggage was checked and tickets and boarding passes were issued by TWA employees. After their tickets and boarding passes were examined, the Evangelinos proceeded to the transit lounge, which is restricted to passengers ticketed and scheduled to depart, and to other personnel, who are not passengers, needed to service the area. The Evangelinos, in due time, obtained seating assignments and proceeded to their departure gate following the announcement of the boarding of their flight. At the gate there were two separate lines, one for males and one for females, where the Greek police were conducting a handbag search and a physical search. After being searched, passengers were to proceed out of the transit lounge and board buses which would take them to the airplane, approximately 250 meters away. The family took their position in line with the majority of the passengers of the same flight who had not gone through the search. While they were in line, two terrorists threw hand grenades and fired gunshots into the crowd.¹ The Evangelinos were severely wounded

¹ After the attack, the terrorists took up a position behind a bar in the transit lounge and held thirty-two people as hostages. After approximately two hours of negotiations with local officials, the terrorists surrendered. As a consequence of the attack, forty TWA passengers were wounded; two TWA passengers died im-

by shrapnel or bullets and brought suit against TWA, seeking recovery through absolute liability based upon the Warsaw Convention² (hereinafter cited as the Convention) as modified by the Montreal Agreement of 1966,³ and alternatively for negligence. On cross motions for summary judgment on the issue of absolute liability, the District Court of the Western District of Pennsylvania held for the defendant.⁴ The plaintiffs appealed the decision to the Court of Appeals for the Third Circuit. *Held, reversed and remanded*: Passengers, who were assembled in an airport transit lounge to undergo a search at the time of a terrorist attack on the lounge, were "in the operations of embarking" as that phrase is used in Article 17 of the Warsaw Convention, thereby rendering the air carrier liable for bodily injuries sustained. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977).

In 1934, the United States became a party to the Convention, a treaty subsequently signed by 107 nations, applying to all "international transportation of persons . . . performed by aircraft for hire."⁵ The overall objective of the Convention was to provide uniform rules relating to air transportation documents and to limit air carrier liability for accidents associated with air transportation.⁶ The Convention limited damages to a maximum amount of 125,000 francs (\$8,300) per passenger⁷ and provided that a carrier "shall not be liable if he proves that he and his agents have taken all

mediately and a third several days later; a passenger of another airline died immediately; four TWA employees were injured; and an undetermined number of passengers and employees of other airlines were wounded. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 96 (W.D. Pa. 1975).

² 49 Stat. 3000, T.S. No. 876 (1934), concluded at Warsaw, Poland, October, 1929. The treaty is officially entitled Convention for the Unification of Certain Rules Relating to International Transportation by Air. (All cites to the Warsaw Convention are hereafter given by Article number only.)

³ 31 Fed. Reg. 7302 (1966). Both the Convention and the Montreal Agreement are reprinted at 49 U.S.C. § 1502 note (1970).

⁴ 396 F. Supp. 95 (1975).

⁵ Article 1(1). The Warsaw Convention was signed by the representatives of 23 countries at Warsaw, Poland, on October 12, 1929, and on October 29, 1934, President Roosevelt proclaimed adherence after the United States Senate had advised adherence on June 15, 1934. 78 CONG. REC. 11,582 (1934). For a thorough discussion of the history of the Convention, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

⁶ Kennelly, *The Warsaw Convention Treaty*, 13 TRIAL LAWYERS GUIDE 213, 217 (1969).

⁷ Article 22.

necessary measures to avoid the damage or that it was impossible for him or them to take such measures."⁸

On November 15, 1965, the State Department filed formal notice of denunciation of the treaty, to take effect six months later.⁹ An accompanying press release stated that this denunciation would be withdrawn if the principal international air carriers agreed to raise the limit of liability to \$75,000 and if there was a reasonable prospect that the Convention would be formally amended to incorporate this modification.¹⁰ On May 13, 1966, the major airlines of the world signed the Montreal Agreement.¹¹ Under the terms of this agreement each airline bound itself to include in its tariffs a special contract raising the limit of liability for each passenger to \$75,000 and waiving the defense of due care. Liability became absolute unless the passenger himself was at fault.¹² Satisfied with the agreement, the State Department officially withdrew the denunciation.¹³

⁸ Article 20.

⁹ Senator Robert Kennedy, in August 1965, had suggested that the United States withdraw from the Warsaw Convention. He stated, on the Senate floor, "Over 2 million Americans travel annually on international flights. Assuring that they and their families are adequately protected in case of accident is, consequently, a matter of widespread importance. . . . No one questions the fact that the protection now afforded international travelers is woefully inadequate." 111 CONG. REC. 20,164 (1965).

¹⁰ Press Release No. 268, 53 DEP'T STATE BULL. 923 (1965).

The Hague Protocol was concluded in 1955 and entered into force August 1, 1963. It modified the Convention by increasing the maximum liability limit to \$16,582. Kennelly, *supra* note 6, at 213.

The 1971 Guatemala Protocol will formally amend the Convention to provide for absolute liability up to \$100,000. Mankiewicz, *The 1971 Protocol of Guatemala City*, 38 J. AIR L. & COM. 519, 523 (1972). The official text of the Guatemala Protocol is in ICAO Doc. 8932 (1971).

Neither treaty was ratified by the United States.

¹¹ The Montreal Agreement was approved by the United States through the Civil Aeronautics Board, May 13, 1966. 31 Fed. Reg. 7302 (1966).

¹² Article 21 of the Convention provides: "If the carrier proves the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with provisions of its own law, exonerate the carrier wholly or partly from his liability."

¹³ 54 DEP'T STATE BULL. 955 (1966).

An accompanying press release stated that "the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives . . . of adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention." Press Release No. 111, 54 DEP'T STATE BULL. 956 (1966).

The terms of the Convention provide that the air carriers must deliver to the passengers a ticket which shall contain, among other things, "[a] statement that the transportation is subject to the rules relating to liability established by [the] convention."¹⁴ If the carrier accepts a passenger without having delivered him a ticket, the carrier will not be entitled to take advantage of the provisions of the Convention which exclude or limit its liability.¹⁵ Likewise, by the Montreal Agreement, the carriers stipulated that they will furnish to their passengers, on the ticket, a notice in ten point type advising them of the limitations of liability.¹⁶

Article 17 of the Warsaw 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* (emphasis supplied).

The Warsaw Convention was the result of two international conferences—one in Paris in 1925 and one in Warsaw in 1929. In Paris, a small group of experts, the Comité Internationale Technique d'Experts Juridique Aériens (CITEJA), was appointed to prepare a draft convention for the delegates to consider at Warsaw.¹⁷ The CITEJA's draft held the carrier liable "from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination."¹⁸ The Conference substantially accepted the proposal as to goods and baggage,¹⁹ but it rejected it for travelers.²⁰ The Brazilian

¹⁴ Article 3(1)(e).

¹⁵ Article 3(2).

¹⁶ 31 Fed. Reg. 7302 (1966).

¹⁷ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34-35 (2d Cir. 1975), cert. denied, 425 U.S. 989, (1976).

¹⁸ Minutes, Second International Conference of Private Aeronautical Law, October 4-12, 1929, Warsaw, 264 (R. Horner and D. Legrez transl. 1975). (as cited in *In Re Tel Aviv*, 405 F. Supp. 154, 157 (D.P.R. 1975), *aff'd sub nom. Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976), cert. denied, ___ U.S. ___, 97 S.Ct. 246 (1977)) [Hereinafter cited as Minutes].

¹⁹ *Id.* at 206 (as cited in *In Re Tel Aviv*, 405 F. Supp. 154, 157 (D.P.R. 1975), *aff'd sub nom. Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976), cert. denied, ___ U.S. ___, 97 S. Ct. 246 (1977)).

²⁰ Minutes at 82-83 (as cited in *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 158 (3d Cir. 1977)).

delegates proposed that liability not attach until the plaintiffs are inside the aircraft,²¹ but Professor George Ripert, the French delegate, argued that the article should be broad enough to allow the courts to take into account the facts of each case.²² The delegates accepted Professor Ripert's proposal and cast Article 17 in its present form.²³

Prior to the decision in *Evangelinos*, only one other American case had arisen in which the court was called upon to interpret "operations of embarking." In *Day v. Trans World Airlines, Inc.*,²⁴ a case arising out of the same incident in *Evangelinos*, the Second Circuit affirmed a district court ruling that the passengers in the line waiting to undergo search were in the operation of embarking. The *Day* court agreed with the district judge that a tripartite test should be applied, based on "activity (what the plaintiffs were doing), control (at whose direction) and location."²⁵ It concluded that, applying the facts in *Day* to each of these factors, the plaintiffs were in the course of embarking.²⁶ To further support its judgment for the plaintiffs, the *Day* court maintained that a broad construction of Article 17 is in harmony with modern theories of accident cost allocation;²⁷ that its interpretation fosters the goal of accident prevention;²⁸ and that administrative costs of the absolute liability

²¹ *Id.* at 71 (as cited in *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 161 (3d Cir. 1977) (dissenting opinion)).

²² *Id.* at 73 (as cited in *Hernandez v. Air Fr.*, 545 F.2d 279, 283 (1st Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 246 (1977)).

²³ *Id.* at 82-84, 205-06 (as cited in *In Re Tel Aviv*, 405 F. Supp. 154, 157 (D.P.R. 1975), *aff'd sub nom. Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 246 (1977)).

²⁴ 528 F.2d 31 (2d Cir. 1975), *aff'g* 393 F. Supp. 217 (S.D.N.Y. 1975), *cert. denied*, 425 U.S. 989 (1976).

²⁵ *Id.* at 33 (parentheticals by the court).

²⁶ "Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate . . . the plaintiffs were 'in the course of embarking.'" *Id.* at 33-34 (parentheticals by the court).

At the time of the terrorist attack two of the plaintiffs were being escorted by a TWA passenger relations agent to the departure gate, where they would be searched. All the other plaintiffs were standing in line waiting to be searched. The court stated that these differences in location had no significance to the outcome of the case. *Id.* at 32 n.5.

²⁷ "The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims." *Id.* at 34.

²⁸ "The airlines, in marked contrast to individual passengers, are in a better

system are dramatically lower than other alternatives.²⁹ Finally, the court found support for its interpretation in the legislative history of the Warsaw Convention.³⁰

Before *Day* there were no American decisions defining the scope of "operations of embarking." A German court, the Berlin Court of Appeals, granted relief under Article 17 to a plaintiff who fell down a staircase leading from the terminal to the traffic apron, stating that the air carrier had already committed the passengers under its care when it requested them to go from the waiting room to the aircraft.³¹ Prior to *Day* the only plaintiffs seeking relief by virtue of Article 17 alleged injuries which occurred while aboard the aircraft or while disembarking. In *McDonald v. Air Canada*,³² recovery was denied a woman who fell and was injured in the baggage area of the airport after leaving the defendant's airplane. She argued that she was in the operation of disembarking and therefore the defendant was liable under Article 17. The court disagreed, stating that if the words of Article 17 are given their ordinary meaning, a passenger has completed the operations of disembarking by the time he has descended from the plane and has reached a safe point inside the terminal building.³³ The court further maintained that the economic rationale for liability limits does not apply to accidents "far removed from the operation of aircraft."³⁴

Three other American cases have also held the Convention inapplicable where the passengers had, as the courts determined, completed the operations of disembarking.³⁵ In addition to these

posture to persuade, pressure or, if need be, compensate airport managers to adopt more stringent security measures against terrorist attacks." *Id.*

²⁹ "If Article 17 were not applicable, the passengers could recover—if at all—only by maintaining a costly suit in a foreign land against the operator of the airport." *Id.*

³⁰ *Id.* at 34-35. The court noted the rejection of the Brazilian proposal and the CITEJA draft and the acceptance of the French proposal.

³¹ *Blumenfeld v. BEA*, 1962 Z. Luft. R. 78 (Berlin Court of Appeals 1961) (as cited in *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 156 (3d Cir. 1977)).

³² 439 F.2d 1402 (1st Cir. 1971).

³³ *Id.* at 1405.

³⁴ *Id.* The plaintiff in this case was not able to establish what had caused her to fall and suffer injuries. The court, in addition to its ruling that disembarking had been completed, was not convinced that an accident had occurred, which is necessary under Article 17.

³⁵ In *Felismina v. Trans World Airlines, Inc.*, 13 Av. Cas. 17,145 (S.D.N.Y.

cases, a French court determined that the passenger there was not covered by Article 17 even though he had not completed the operations of disembarking.³⁶

The *Evangelinos* court initially conceded that its task had been significantly facilitated by the Second Circuit's recent decision in *Day*.³⁷ It then continued to extend, as did the Second Circuit, the period of embarking to at least include the time that passengers are waiting in line to be searched, pursuant to directions by the airline.

The court maintained that in order to determine whether or not the plaintiffs were in the operations of embarking, three factors are relevant: the location of the accident, the activity in which the passengers were engaged, and the control exercised by the airline over the passengers when they were injured.³⁸ The court noted the contrast in Article 17 between the phrase "while on board the aircraft" and the phrase "in the course of any of the operations of embarking," and reasoned that the draftsmen made a conscious

June 28, 1974), a passenger, after landing, had walked through a jetway which led from the aircraft door to the terminal, had continued across the upper floor of the terminal, and had boarded an escalator to a lower level baggage area, when she fell and was injured. The court simply stated that she had disembarked from the aircraft as that term is used in Article 17.

In *Klein v. KLM Royal Dutch Airlines*, 46 App. Div. 679, 360 N.Y.S.2d 60 (1974), the court likewise found that the plaintiff had disembarked when he was injured on a baggage conveyor belt after arriving safely within the terminal building.

In *Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 246 (1977), the passengers had left the airplane and were in the baggage area of the terminal building when they became victims of a terrorist attack. The court adopted the tripartite test applied in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34-35 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976). In denying recovery the court stated that the plaintiffs were not engaged in any activity relating to disembarkation from the plane, that they were located approximately one-third to one-half mile from the aircraft, and that they did not appear to be acting under the direction of the airline.

³⁶ *Maché v. Air Fr.*, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd*, Rev. Fr. Droit Arien 311 (Cour de Cassation 1970). Following a landing, the plaintiff was being conducted with other passengers to the terminal building by an employee of the airline. As he was crossing the "customs garden" en route, he fell through a broken manhole cover and was injured. Although the court held that the act of disembarking is not intended to cease when the passenger puts his foot on the traffic apron, the plaintiff did not establish that the "customs garden" presented risks inherent in aeronautical operation. [A brief translation of the facts and holding is taken from 33 J. AIR L. & COM. 207 (1967).]

³⁷ 550 F.2d at 154.

³⁸ *Id.* at 155.

choice to go beyond a mere location test. If a strict location test were adopted, results could differ based solely on the fortuity of where the passenger was situated when he was injured.³⁹ The court believed that a location test alone would be too arbitrary and too specific to have broad application, since almost every airport and every situation is different.⁴⁰

The court argued that TWA had assumed control over the passengers by announcing the flight and directing them to stand near the departure gate. The airline caused the passengers to "congregate in an area and formation directly and solely related to embarkation on Flight 881."⁴¹ Further evidence of this control was the fact that TWA service personnel were guiding the passengers at the gate and TWA security personnel were present.⁴²

Activity and location are relevant factors, according to the court, in construing "operations of embarking." They are, however, treated as aspects of control, meaning, the Evangelinos were where they were directed to be, doing what they were instructed to do in order to board the aircraft. The court stated that it placed less weight upon carrier control than did the *Day* court, but control appears to have been the primary concern.⁴³

The first consideration then, is the actions an airline must take before it is deemed to have assumed the necessary control. The airline, in fact, never has complete authority over the passengers, at least until they are secured in the aircraft. The court, however, apparently determined that TWA had assumed control in the sense that it had begun instructing passengers as to the procedure necessary for boarding, and it had directed them to begin. This being so, it would appear that upon the announcement of a flight and directions to proceed to a designated location for boarding, passengers will be in the "operations of embarking," provided the pas-

³⁹ *Id.* at 157.

⁴⁰ *Id.* at 155.

⁴¹ *Id.* at 156.

⁴² *Id.*

⁴³ *Id.* at 155. Matte, in *Traité de Droit Aérien-Aéronatique* at 404-05 (1964), maintains that coverage within Article 17 begins when the passengers are taken in charge by the airline (as cited in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37 n.17). See also SHAWCROSS & BEAUMONT, *AIR LAW* 441-42 (3d ed. 1966). They argue that coverage extends throughout the time the passenger's movements are under the control of the carrier for the purposes of embarking and disembarking.

sengers are complying with the instructions being given by the airline.

The court stated that the tripartite test is appropriate for the determination of a "safe place"; however, it offered no analysis of how this test is to be applied to make such a determination. It simply concluded that, applying the test, the plaintiffs were not in a safe place. The court stated that the test was appropriate because the "danger of violence—whether in the form of terrorism, hijacking or sabotage—is today so closely associated with air transportation."⁴⁴ Thus, the court may well deny recovery on the basis of Article 17 to a plaintiff if he was engaged in the same activity, at the same location, and under the same degree of control as the plaintiffs in *Evangelinos*, but the injury results from exposure to a risk determined by the court not to be closely associated with air travel.⁴⁵ Such a result would be consistent with those cases denying recovery to passengers who alleged they were disembarking when injured.⁴⁶ In those cases, the courts determined that the plaintiffs were injured at a "safe" point, distant from the risks of air travel, and therefore had completed disembarking.⁴⁷ Conceding that the

⁴⁴ 550 F.2d at 157.

⁴⁵ "If we regard the Convention as a whole, we are safe in assuming that the intention was to limit its application to such time that the passenger is exposed to dangers of aviation." Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 20 (1936).

⁴⁶ *McDonald v. Air Can.*, 439 F.2d 1402 (1st Cir. 1971) (injury resulting from an unexplained fall); *Felissima v. Trans World Airlines, Inc.*, 13 Av. Cas. 17,145 (S.D.N.Y. June 28, 1974) (injury from a fall on an escalator); *Klein v. KLM Royal Dutch Airlines*, 46 App. Div. 679, 360 N.Y.S.2d 60 (1974) (injury on a baggage conveyor belt); *Maché v. Air Fr.*, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd*, Rev. Fr. Droit Arien 311 (Cour de Cassation 1970) (injury from a fall into a manhole).

⁴⁷ In *Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 246 (1977), however, the passengers were injured in a terrorist attack, a risk the *Evangelinos* court deems applicable. The court stated that "the sort of senseless violence involved in this case" cannot be appropriately regarded as a characteristic risk of air travel. 545 F.2d at 284. This determination was not, however, crucial to the court's disposition of the case, for it applied the tripartite test utilized in *Day* and *Evangelinos* and concluded that the passengers in the baggage area had completed the process of disembarking. The court distinguished the terrorist attack in *Day* and *Evangelinos* by noting that the terrorists there took hostages and demanded an aircraft with which to escape. 545 F.2d at 284 n.8.

In *Maché v. Air Fr.*, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd*, Rev. Fr. Droit Arien 311 (Cour de Cassation 1970), the court agreed that the plaintiff was still disembarking, but was not injured through a risk associated with air travel.

danger of terrorism is a current risk of air transportation,⁴⁸ it would appear that no place in the terminal building can be considered safe, unless the court was maintaining that the passengers were only exposed to this risk while in the search line.

TWA argued that the rejection of the CITEJA draft evidences the intent of the delegates to exclude from liability the period during which passengers are inside the terminal.⁴⁹ The court disagreed, noting that "nothing in the debates indicates that the line was finally and unalterably drawn at the walls of airline terminal buildings" and "if such an explicit line had been intended, the language of Article 17 would now reflect it."⁵⁰

The two circuits which have now considered the scope of "the operations of embarking" have not drawn a definite line marking the beginning of the period of embarkation. Under the test applied in these cases, no certain line can be drawn, which, as the *Day* court determined, was the intention of the delegates to the Convention in accepting the French proposal for Article 17. It is now at least established that the operations of embarking may extend into the terminal building. It is unlikely that a court would extend the process of embarking to include the entire period after which the passenger enters the terminal building, if the court considers the treaty history and gives weight to the rejection of a proposal to have embarkation begin at that time.⁵¹ Furthermore, the terms of the Convention provide that a carrier cannot take advantage of the liability limitations unless they are printed on the passenger's ticket.⁵² The primary emphasis, however, is apparently placed upon the control exercised by the airline over the passengers. A court could conceivably hold that a carrier assumes control over the passenger when the ticket is issued to him. At that point, arguably,

⁴⁸ I am unable to agree, however, that this particular hazard is an incidental risk of air travel when it occurs within the confines of an airport terminal. Rather, in my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank or other public place.

Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 159 (3d Cir. 1977) (dissenting opinion).

⁴⁹ 550 F.2d at 158.

⁵⁰ *Id.*

⁵¹ Minutes at 82-83 (as cited in *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 158 (3d Cir. 1977)).

⁵² Article 3(1)(e), 3(2).

the airline has given its approval to board the plane, and the first step of embarkation has taken place.⁵³

Aspects of control will vary from case to case and will certainly change in future years, so that it is impossible to forecast now what a court will consider to be control in the future.⁵⁴ It is now at least established in one circuit that the danger of terrorism is a risk inherent in air transportation. Terrorism is certainly not unique to air transportation, so it is difficult to delineate the risks which will be considered inherent in air travel. The opportunity remains for future plaintiffs to argue coverage within Article 17 because their injury resulted from exposure to another air transportation risk while they were under the control of the airline, despite their distance from the aircraft.⁵⁵

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⁵³ The *Evangelinos* court did note that control may be irrelevant in certain instances. For example, the airline might exercise strict control over passengers when they are checking their baggage, relinquish control, and then reassume it after they enter the line to go through the gate leading to the aircraft. 550 F.2d at 155 n.8a.

⁵⁴ [T]he technology of embarkation has . . . changed in ways unforeseeable to the Warsaw delegates. Moreover, airports are today far larger and boarding procedures substantially more complex than forty-six years ago. And, many of the operations of embarking have been moved inside the terminal building. Indeed, even the boarding ladder, now being increasingly replaced by the jetway, may soon become anachronism. 528 F.2d at 37-38 n.18.

⁵⁵ One writer suggests that:

[C]onsideration could be given to the question whether the present provision of Article 20 (providing a due care defense for the carrier) of the Convention should not continue to be applicable to damage sustained during embarkation and disembarkation. The rule of absolute liability would then apply only in respect of damage sustained on board an aircraft in flight.

Heller, *Notes on the Proposed Revision of Article 17 of the Warsaw Convention*, 20 INT'L & COMP. L.Q. 142, 146 (1971).

See Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 *FORD. L. REV.* 369 (1976).

Current Literature

