

2017

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Recommended Citation

Courtney Luster, *The Warsaw Convention: When Falling Is Not an “Accident”*, 82 J. Air L. & Com. 211 (2017)
<https://scholar.smu.edu/jalc/vol82/iss1/7>

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THE WARSAW CONVENTION: WHEN FALLING IS NOT AN “ACCIDENT”

COURTNEY LUSTER*

I. INTRODUCTION

“**T**ÔI CÓ THỂ LẤY XE LĂN CỦA TÔI?” A blank stare and a kind smile is all you get in return. Imagine being elderly, traveling alone for more than twenty hours to a country where no one seems to speak your language, and then failing to get the wheelchair you requested before you left your homeland. As the plane lands and passengers begin to deplane, every customer seems to follow a pattern, a pattern unknown to you. Everyone gets up simultaneously, grabs their bag, and hurriedly disembarks the plane. People behind your row wait, glaring at you to move. You get up and attempt to keep up with the passengers who were in the row in front of yours; everyone else appears to know where to go, but there are no signs or announcements in your language. You see people from your flight descending on an escalator and—despite your distress and lack of comfort at stepping on—you do not see any help and fear getting lost in this behemoth airport. No one has called your name, spoken your native tongue, or pointed to assistance. As the crowd carries you forward and you step on the moving stairs, your legs give way as the escalator jerks you forward and you plummet toward the unyielding stairs. As you lie there, battered beneath the ever-shuffling crowd, you think: “Where is the person who was supposed to help me?”

In such situations, courts look to the Warsaw Convention, a document that protects customers of international air carriers

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that have signed the document.¹ Under Chapter III, Article 17 of the Convention:

[a] 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.²

However, the question is what qualifies as an “accident” under the Convention; the Convention itself provides no definition for the word.³ In 1985, the Supreme Court of the United States defined “accident” as an “unexpected or unusual event . . . that is external to [a] passenger.”⁴ It further clarified that “this definition should be flexibly applied after assess[ing] all of the circumstances.”⁵ However, in the case of *Nguyen v. Korean Air Lines Co.*,⁶ the Fifth Circuit applied this definition rigidly and incorrectly interpreted the facts and circumstances narrowly to achieve a forced result.

II. CASE BACKGROUND

At the age of seventy-six, Tinh Thi Nguyen flew, by herself, from Vietnam to Dallas, Texas, for the first time.⁷ When purchasing the ticket, Nguyen’s children asked if they could purchase an extra service, usually reserved for children, where airline personnel escort the customer from each location and walk them through all the procedures.⁸ The ticket salesperson informed Nguyen’s daughter not to worry, the airlines would provide wheelchair assistance, and thus, there was “no need to find out [about] any other services.”⁹ After buying the ticket, Korean Air Lines designated Nguyen as a “wheelchair passen-

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

² *Id.* art. 17.

³ *Id.*

⁴ *Air France v. Saks*, 470 U.S. 392, 405 (1985).

⁵ *Id.*

⁶ 807 F.3d 133 (5th Cir. 2015).

⁷ *Id.* at 135.

⁸ Transcript of Deposition of Thuy Nguyen at 35–36, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-5).

⁹ *Id.*

ger” in need of special assistance on both her itinerary and on the flight manifest.¹⁰

On Nguyen’s way to Dallas from Vietnam, there was a layover in Korea.¹¹ Because the layover lasted several hours, the passengers were asked to disembark from the plane.¹² During this layover, no announcements were made, Ms. Nguyen received no assistance, and since she did not possess the correct currency, she remained in the waiting area until her connecting flight boarded.¹³ When she stepped on the plane for the next leg of her flight, she showed the attendants her ticket and they showed her to her seat.¹⁴ During the flight to Dallas, Ms. Nguyen asked a flight attendant how to get the assistance she reserved; however, none of the flight attendants onboard spoke Vietnamese and so the crew could not communicate with Ms. Nguyen.¹⁵ Korean Air Lines’ policy provides that forty minutes before landing, the flight crew is to confirm any wheelchair requests and advise wheelchair passengers to deplane last.¹⁶ However, despite being a connecting flight from Vietnam, the announcement before landing in Dallas was only made in Korean and English.¹⁷ Additionally, despite being classified as a “wheelchair passenger,” no one attempted to communicate to Ms. Nguyen to remain seated until everyone else deplaned.¹⁸ Thus, when her row’s turn came, like all previous rows before her, Ms. Nguyen got up and shuffled off the plane.¹⁹ No one attempted to stop her or inquire if she still needed a wheelchair as she was pushed along in the bustle of the crowd toward baggage claim.²⁰ In her statement, Ms. Nguyen specifically stated that “[she was] afraid of falling off” and how, overall, escalators “just scare [her.]”²¹ As the flow of the crowd funneled to the escalator, Ms. Nguyen had to step

¹⁰ *Nguyen*, 807 F.3d at 135.

¹¹ Second Amended Complaint at 4–5, para. 13, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85).

¹² *See id.* at 6, para. 18.

¹³ *Id.* at 6–7, paras. 23–28.

¹⁴ *Id.* at 6, para. 22.

¹⁵ *Nguyen*, 807 F.3d at 135.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Transcript of Deposition of Tinh Thi Nguyen at 39, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3).

on the escalator, where she lost her balance, fell, and suffered multiple injuries.²²

III. ANALYSIS OF THE FIFTH CIRCUIT HOLDING

In looking at this case, the Fifth Circuit focused heavily on the facts due to the district court's ruling out many of the other legal claims.²³ The district court found that the Warsaw Convention was the only applicable law for Ms. Nguyen. The court held that, under the Convention and the Supreme Court's definition, this was not an "unexpected or unusual event," and thus, Ms. Nguyen's fall did not qualify as an accident.²⁴ Because of the district court's analysis, the Fifth Circuit drilled down on the facts rather than focusing on questions of law.²⁵ The court began its analysis with the conclusory title heading, "Korean Air did not Refuse Nguyen a Wheelchair."²⁶ The court determined this by distinguishing Ms. Nguyen's scenario from precedent where a flight attendant had explicitly refused a passenger's request for help.²⁷ The court stated Korean Air Lines "never refused Nguyen . . . and allowed *any passenger* . . . to use a wheelchair by asking . . . [or even] pointing to a wheelchair."²⁸ While the Foreign Sovereign Immunities Act allows a district court to rule without a jury,²⁹ this is still a question for the court as a fact finder, rather than an analysis as a question of law. Furthermore, the Fifth Circuit failed to recognize that the proper application of precedent requires a different analysis for the unique circumstances of this case.

While Korean Air Lines never explicitly refused Ms. Nguyen a wheelchair, at no point on the entire trip did an airline employee inform Ms. Nguyen in her language how to get assistance or what she needed to do to retain the service she requested.³⁰ The court also cited precedent where a passenger requested a wheelchair during his flight, waited more than twenty minutes but never received one, and then began walking toward baggage

²² *Nguyen*, 807 F.3d at 135.

²³ *Id.* at 136.

²⁴ *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2015 U.S. Dist. LEXIS 177916, at *3 (N.D. Tex. Apr. 20, 2015).

²⁵ *Nguyen*, 807 F.3d at 135–36.

²⁶ *Id.* at 137.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 28 U.S.C. §§ 1330(a), 1605 (2012).

³⁰ See Second Amended Complaint at 6, paras. 20, 23–24, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85).

claim where he consequently suffered chest pains.³¹ The court stated that, unlike that case, “Nguyen never requested a wheelchair after deplaning, nor did she wait at the gate for one.”³² However, this overlooked the fact that Ms. Nguyen requested a wheelchair when she purchased her ticket and attempted to find out about assistance before deplaning.³³ As to not waiting at the gate, Ms. Nguyen said in her testimony that she knew she was to receive assistance from the airline, but because of the lack of information, she was unsure as to what form the assistance would be given.³⁴ Ms. Nguyen also talked about how her village in Vietnam did not have many stories in buildings,³⁵ so she had no need for and had never seen a wheelchair before this trip.³⁶

Further, the court repeatedly faulted Ms. Nguyen for “walk[ing] right past [the wheelchairs]”³⁷ but failed to recognize Ms. Nguyen’s complete lack of knowledge as well as the impracticability of her alternatives. Due to the layout of the jet bridge, there were not individual attendants behind each separate wheelchair when Ms. Nguyen embarked.³⁸ Rather, the wheelchairs were “stacked” together at the front of the jet bridge with the attendants behind the group of collapsed wheelchairs.³⁹ So, while Korean Air Lines declared that anyone could simply point to a chair, no one would be there to confirm that request or render assistance until after everyone had exited the plane.⁴⁰ Korean Air Lines effectively deprived Ms. Nguyen of the assistance she asked for because they did not provide a reasonable way for her to receive that assistance.

³¹ *Nguyen*, 807 F.3d at 137–38.

³² *Id.* at 138.

³³ *Id.* at 135.

³⁴ See generally Transcript of Deposition of Tinh Thi Nguyen at 39, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3).

³⁵ *Id.* at 35.

³⁶ *Id.* at 53 (Ms. Nguyen also said, though, that she had seen people push others in a wheelchair, but she didn’t know that’s what she would need.).

³⁷ *Nguyen*, 807 F.3d at 138.

³⁸ *Id.*

³⁹ Second Amended Complaint at 10–11, para. 52, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85); Transcript of Deposition of Hyeok Lee at 77, 81–82, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-5).

⁴⁰ See Second Amended Complaint at 10–11, para. 52, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85); Transcript of Deposition of Hyeok Lee at 77, 81–82, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-5).

The court's standard of review here was *de novo*, yet it concluded, in a two sentence paragraph, that the district court was correct and then proceeded to rebut two misconceptions of Nguyen's arguments.⁴¹ The court addressed two of Nguyen's arguments: failure to inform and failure to assist.⁴² The court shaped these arguments to sound unreasonable, effectively creating a straw man argument to knock down.⁴³ In rebutting this constructed argument, the court failed to address Korean Air Lines' deviation from their procedures in the *first leg* of Ms. Nguyen's flight sequence.⁴⁴ The airline assured Ms. Nguyen and her children that she would have wheelchair assistance, so "there [was] no need to find out [about] any other service[]."⁴⁵ On the trip from Vietnam to Korea, the airline provided no instructions or wheelchairs at any point during the four-hour lay-over.⁴⁶ Even though Ms. Nguyen just remained in the gate waiting area the entire time,⁴⁷ the failure on this connection further compounded the issue on the later flight.

IV. RAMIFICATIONS AND RECOMMENDATIONS

Several courts have held that the "negligent failure of the [airline] flight crew to adequately serve the needs of an ailing passenger can be considered [an] 'accident.'"⁴⁸ Thus, while the court argued that Korean Air Lines was not required to provide "personalized instruction" and that failure to ensure Nguyen was actually placed in a wheelchair was not "unexpected or unusual," these arguments ignored the substance of what the court

⁴¹ *Nguyen*, 807 F.3d at 136–38.

⁴² *Id.* at 138.

⁴³ *See id.* at 138–40.

⁴⁴ *Id.* at 138; Second Amended Complaint at 6, paras. 20, 23–24, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85).

⁴⁵ Transcript of Deposition of Tinh Thi Nguyen at 36, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3).

⁴⁶ Second Amended Complaint at 6, paras. 20, 23–24, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85).

⁴⁷ Transcript of Deposition of Tinh Thi Nguyen at 122, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3).

⁴⁸ *Gupta v. Australian Airlines*, 211 F. Supp. 2d 1078, 1083 (N.D. Ill. 2002); *see also Husain v. Olympic Airways*, 316 F.3d 829, 836 (9th Cir. 2002) (explaining that "[b]ecause [the airline employee]'s conduct was negligent, it fits the definition of accident under Article 17.").

should have addressed.⁴⁹ Through this case, the Fifth Circuit is allowing foreseeable, negligent handlings of passengers to continue by not classifying them as accidents. The Fifth Circuit became too caught up in the narrow scope of accident defined by the Supreme Court as an “unexpected or unusual event.”⁵⁰ This narrow focus allowed negligent, perhaps even reckless, action to happen with impunity because, unfortunately, the Convention provides the exclusive remedy for Ms. Nguyen, as explained by the Supreme Court’s rule in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*.⁵¹ The court also held in *Gupta v. Australian Airlines* that while the “‘accident’ must cause the passenger’s injury, it need not be the *sole* causal factor” and thus the injury could be a “product of a chain of causes.”⁵²

In the Seventh Circuit, the Northern District Court of Illinois heard a case where the plaintiff alleged that the accident was caused by the airline’s failure to act and render medical aid.⁵³ This shortcoming arose from the airline’s failure to utilize the necessary medical equipment and to adequately train their employees.⁵⁴ The court employed a three-step analysis derived from a California district court opinion.⁵⁵ The inquiry first looked at if the plaintiff’s injury could be legally deemed an accident.⁵⁶ Next, the court looked to see if the acts of the airline’s employees could factually constitute an unexpected or unusual event.⁵⁷ Finally, the court determined if the airline’s failure could be viewed as the cause of the plaintiff’s injury.⁵⁸ In the first step, the court explicitly held that “the negligent failure of [a] flight crew to adequately serve the needs of an ailing passenger can be considered an ‘accident’ under the Convention.”⁵⁹ The court further said that due to the flexible application of the term accident and the factual circumstances surrounding the injury,

⁴⁹ *Nguyen*, 807 F.3d at 139–40 (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

⁵⁰ *Id.*

⁵¹ 525 U.S. 155, 161 (1999) (The Court stated that “if [a cause of action is] is not allowed under the Convention, [it] is not available at all.”).

⁵² *Gupta*, 211 F. Supp. 2d at 1082 (citing *Air France*, 470 U.S. at 405–06).

⁵³ *Id.* at 1082–83.

⁵⁴ *Id.* at 1083.

⁵⁵ *Id.* (citing *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1136 (N.D. Cal. 2000)).

⁵⁶ *Id.* at 1083.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1083, 1085.

this case could not be decided as a matter of law, and therefore, summary judgment was incorrect in this situation.⁶⁰

The Illinois court's analysis is also appropriate here and should have been applied by the Fifth Circuit. The airline was negligent in its duty to exercise the care a reasonably prudent airline would exercise in promising a known elderly, Vietnamese-speaking customer medical assistance in an alarming situation.⁶¹ While the court dismissed the claim at this stage, there was enough dispute over whether the airline's negligent behavior could be reasonably found to be an accident, even viewing the facts in a light most favorable to the airlines, and hence, summary judgment was not appropriate in this situation.

Furthermore, even looking at Ms. Nguyen's arguments through the lens of the court, summary judgment looked unsuitable. The court first qualified, "Personalized Instructions in a Passenger's Native Language are not Required."⁶² The court explained that "people from seven different nations" had requested wheelchairs, and therefore, personal instruction was implausible.⁶³ The court was conveniently side-stepping the language and nationality of these passengers; this case only discusses three different nations.⁶⁴ Moreover, Nguyen's flight from Korea to Dallas was a layover from a flight originating in Vietnam; it should have been expected that there were Vietnamese-speaking passengers on the flight. Additionally, the court ignored that when purchasing the ticket, Nguyen's daughter inquired as to escort services, child services, and any other service the airline provided, and the ticket agent assured her she did not need to inquire about other services because the airlines offers wheelchair service.⁶⁵ Ms. Nguyen's daughter testified that she "[felt] like it could be safe for her . . . mom, so [she] decided to buy the ticket."⁶⁶ Ms. Nguyen and her family clearly thought a wheelchair and some type of assistance upon entering the United States would be provided to her; they even decided

⁶⁰ *Id.* at 1085.

⁶¹ *See* Nguyen v. Korean Air Lines Co., 807 F.3d 133, 135–36 (5th Cir. 2015).

⁶² *Id.* at 138.

⁶³ *Id.* at 139.

⁶⁴ *See id.*

⁶⁵ Transcript of Deposition of Tinh Thi Nguyen at 35–36, Nguyen v. Korean Air Lines Co., No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3).

⁶⁶ *Id.*

to purchase the ticket from Korean Air Lines on this belief.⁶⁷ So, while the court made personalized assistance seem outlandish, Ms. Nguyen and her family were relying on it to help her make the trip.⁶⁸

The court’s second contention, that the airline’s failure to “track [Nguyen] down . . . did not . . . constitute an ‘unexpected or unusual event’ leading to an ‘accident,’”⁶⁹ misstated Ms. Nguyen’s assertion. Since there were no instructions given in Vietnamese, Ms. Nguyen was not aware she needed to remain in her seat on the plane until after the other passengers had disembarked.⁷⁰ But the accident, in the negligent failure of Korean Air Lines to provide Ms. Nguyen with a wheelchair, was not in the failure to “track her down,”⁷¹ but rather in the airline’s failure to convey to Ms. Nguyen to remain in her seat.⁷² With actual knowledge that Ms. Nguyen was classified as a wheelchair assisted passenger and was only able to communicate in Vietnamese, the airline was negligent in failing to instruct her to remain on the aircraft so she could be assigned assistance.⁷³ As the flight attendant watched passengers disembark, she had a duty to inform Ms. Nguyen to remain seated, which could have been done with simple hand gestures. Korean Air Lines’ negligence was its failure to stop Ms. Nguyen from exiting the plane and failure to check if mobility assistance was what Ms. Nguyen tried to communicate, which lead to Ms. Nguyen’s accident.⁷⁴

V. CONCLUSION

The Fifth Circuit unreasonably granted summary judgment. The court made three errors: (1) it misconstrued the facts when applying precedent; (2) it failed to review the case in true de

⁶⁷ *Id.*; Brief in Support of Plaintiff’s Motion for Partial Summary Judgment at 11, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2015 U.S. Dist. LEXIS 179024, at *1 (N.D. Tex. Oct. 30, 2014) (No. 95).

⁶⁸ Transcript of Deposition of Tinh Thi Nguyen at 36, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2014 U.S. Dist. LEXIS 194964, at *1 (N.D. Tex. Oct. 30, 2014) (No. 98-3); Brief in Support of Plaintiff’s Motion for Partial Summary Judgment at 11, *Nguyen v. Korean Air Lines Co.*, No. 4:13-CV-509-Y, 2015 U.S. Dist. LEXIS 179024, at *11 (N.D. Tex. Oct. 30, 2014) (No. 95).

⁶⁹ *Nguyen v. Korean Air Lines Co.*, 807 F.3d 133, 140 (5th Cir. 2015).

⁷⁰ *Id.* at 135.

⁷¹ *Id.* at 140.

⁷² Second Amended Complaint at 7–10, paras. 29, 36, 49, *Nguyen*, 2014 U.S. Dist. LEXIS 194964 (No. 85).

⁷³ *Id.*

⁷⁴ *Nguyen*, 807 F.3d at 135, 140.

novo fashion; and (3) it did not appreciate the Convention as Ms. Nguyen's sole cause of action. The court's mistakes caused it to not consider the airline's negligence as an accident under the Convention. The court's precedent as it stands allows international airlines to negligently handle customers and their wellbeing. The court will likely not have cases with identical fact patterns, but fear of judicial activism should not stop the court from applying the Convention when it is necessary. The judicial process is wronged passengers' only source for redress, and to allow international airlines to get away with this type of behavior fuels lack of faith in the courts. The Fifth Circuit should not accept international airlines' escalating excuses or tolerate their handicapping of the American justice system.