Journal of Air Law and Commerce

Volume 84 | Issue 1 Article 9

2019

Pilots Out of Uniform: How the Sixth Circuit's *Etihad* Decision Undermines the Purpose of the Montreal Convention

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PILOTS OUT OF UNIFORM: HOW THE SIXTH CIRCUIT'S *ETIHAD* DECISION UNDERMINES THE PURPOSE OF THE MONTREAL CONVENTION

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IN *DOE V. ETIHAD AIRWAYS, P.J.S.C.*, the United States Court of Appeals for the Sixth Circuit rewrote the test for mental anguish under the Montreal Convention to allow recovery with *any* physical injury, disregarding years of precedent establishing a universal interpretation that mental anguish must "flow from" a physical injury to be recoverable.[1] Although the Sixth Circuit properly found that, on the facts of the case before it, the plaintiff could state a claim for mental anguish, the court unnecessarily rewrote an established test.[2] In doing so, the court violated the presumption in favor of uniformity, impermissibly disregarded the interpretation of the United States' co-signatory nations, and failed to account for the very purpose of the Montreal Convention—to bring the law of various nations into uniformity.[3] Although the Supreme Court has already declined to grant certiorari,[4] it should take the next possible opportunity to clarify the law and hold that the traditional interpretation is correct.

Doe was a passenger on an Etihad Airways flight from Abu Dhabi to Chicago.[5] She pricked her finger on a stray hypodermic needle located in the seatback pocket, drawing blood.[6] She filed suit against Etihad under Article 17 of the Montreal Convention, claiming physical injury for the pricked finger and

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[1] Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 417–20 (6th Cir. 2017).

[2] *Id.* at 409.

[3] Convention for the Unification of Certain Rules for International Carriage by Air, pmbl., May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

[4] *Etihad*, 870 F.3d 406, *cert. denied*, 138 S. Ct. 1548 (2018) (mem.).

[5] *Id.* at 408–09.

[6] *Id.* at 409.

mental anguish for fear of contracting a disease.[7] The trial court granted partial summary judgment in favor of Etihad, applying the traditional interpretation of Article 17.[8] The Sixth Circuit reversed on appeal, reinterpreting Article 17 and creating a new standard for liability.[9]

The traditional interpretation of Article 17(1) holds that a plaintiff can recover for mental anguish if the mental injury "flows from" a physical injury suffered during an onboard accident.[10] Notably, there is no requirement of proportionality; even a slight physical injury can allow for the recovery of mental anguish damages.[11] For example, one court found that a physical injury existed when post-traumatic stress disorder (PTSD) caused by an emergency landing caused chemical restructuring of the cells in a plaintiff's brain.[12] In other words, the traditional interpretation requires a causal relationship but does not specify a proportional relationship.[13] The Sixth Circuit's interpretation, conversely, does not require a causal relationship between the physical and mental injury.[14] Rather, the physical injury becomes a threshold test that permits recovery of damages for *any* mental anguish resulting from the same accident.[15]

The *Etihad* opinion began by noting that Article 17(1) of the Montreal Convention provided Doe's sole avenue for relief and by ceding that cases interpreting the Montreal Convention's predecessor, the Warsaw Convention, have persuasive value in interpreting the new treaty.[16] It noted that Warsaw Convention jurisprudence should control on issues that the drafters of the Montreal Convention intended to leave unchanged.[17] The court then briefly discussed the Second Circuit's holding in *Ehrlich v. American Airlines, Inc.*,[18] a case interpreting the Warsaw Conven-

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[7] *Id.* at 410–11.

[8] *Id.*

[9] *Id.*

[10] *See, e.g.*, Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 376, 378 (2d Cir. 2004).

[11] *See* Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190, 1192 (D. Mont. 1999), *vacated*, 211 F. Supp. 2d 1252 (D. Mont. 2002).

[12] *Id.* at 1191–92. *But see* Lloyd v. Am. Airlines, Inc., 291 F.3d 503, 512 (8th Cir. 2002) (holding that "physical manifestations of earlier emotional injury are not compensable").

[13] *See Lloyd*, 291 F.3d at 512.

[14] *Etihad*, 870 F.3d at 427.

[15] *Id.*

[16] *Id.* at 411.

[17] *See id.* at 419.

[18] 360 F.3d 366, 368 (2d Cir. 2004).

tion, which followed the traditional interpretation.[19] The court's error, however, was deciding that the Warsaw Convention jurisprudence as pertains to mental anguish under Article 17(1) is unpersuasive and applying a plain-meaning analysis to the text.[20] Specifically, the court looked to the phrase "[t]he carrier is liable for damage sustained in case of . . . bodily injury [of a passenger]" and found that the words "in case of" did not imply a causation requirement for mental anguish.[21] The court reached this conclusion by looking to the dictionary definitions applicable to "in case of."[22] The court gave no clear reason for its position that the drafters of the Montreal Convention intended to displace the Warsaw Convention's version of Article 17.

Instead, the court relied on its characterization of the Montreal Convention as a passenger-minded treaty in arriving at this conclusion, making little effort to analyze the actual history of the Convention itself.[23] The court stated that the purpose of the Montreal Convention was to shift the balance of power to favor passengers.[24] In support of this proposition, it briefly touched on some legitimate purposes of the Convention, such as bringing uniformity in the law and adapting the Convention to accommodate the established and mature airline industry.[25] Notably, however, the primary authority supporting this characterization of the Montreal Convention as a treaty meant to favor passengers is a case which in turn cites to *Ehrlich*—the very case that the court so painstakingly discredited.[26]

The Sixth Circuit then analyzed the other circuit court decisions interpreting the Montreal Convention.[27] It noted that the two circuit cases that had considered Article 17(1), *Bassam v. American Airlines, Inc.* and *Jacob v. Korean Air Lines Co.*, both cited the traditional interpretation.[28] In *Bassam*, the Fifth Circuit stated that "emotional injuries are not recoverable under Article

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[19] *Etihad*, 870 F.3d at 414–17.

[20] *Id.* at 413–14.

[21] *See id.* at 414, 427 (first alteration in original).

[22] *Id.* at 413.

[23] *Id.* at 420–23.

[24] *Id.* at 423.

[25] *Id.*

[26] *Id.* (*citing In re* Air Crash at Lexington, 501 F. Supp. 2d 902, 908 (E.D. Ky. 2007)).

[27] *Id.* at 430–31.

[28] *Id.*

17 . . . unless they were caused by physical injuries."[29] In *Jacob*, the Eleventh Circuit similarly held that "at best, 'mental injuries are recoverable under Article 17[(1)] only to the extent that they have been caused by bodily injuries.'"[30] The court then distinguished these cases from *Etihad* on grounds wholly unrelated to the interpretation regarding mental anguish and disregarded their persuasive authority.[31]

Finally, the court turned its attention to the interpretations of Article 17 that developed in the other nations party to the Montreal Convention.[32] The court turned its attention to the Canadian interpretation, which comports squarely with the traditional interpretation.[33] In *Wettlaufer v. Air Transat A.T. Inc.*, a Canadian court denied recovery of certain mental anguish damages under the Montreal Convention specifically because there was no "sufficient causal link" between the physical and mental injury.[34] The Sixth Circuit, incredibly, found that the *Wettlaufer* interpretation was "entirely consistent with the relief Doe seeks here and [the Sixth Circuit's] interpretation of Article 17(1)."[35] The court accomplished this feat of mental gymnastics by rewriting the opinion of the Canadian court, finding that, despite an explicit holding to the contrary, the Canadian court *actually* found that the mental injuries were caused by the accident and not the physical injury.[36]

This opinion presents several problems. First, it mischaracterizes the purpose of the Montreal Convention, disregarding altogether any scrap of the treaty's history that proved inconvenient to its ends. Second, it impermissibly violates the presumption in favor of uniformity and creates a circuit split by deviating from the traditional interpretation, which other circuits have adhered to. Finally, and most alarmingly, the decision totally disregards the interpretations of the United States' co-signatory nations,

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[29] Bassam v. Am. Airlines, Inc., 287 F. App'x 309, 317 (5th Cir. 2008) (per curiam).

[30] Jacob v. Korean Air Lines Co., 606 F. App'x 478, 482 (11th Cir. 2015) (per curiam) (quoting Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 400 (2d Cir. 2004)).

[31] The court distinguished *Jacob* on the grounds that there was no accident and *Bassam* on the grounds that there was no physical injury. *Etihad*, 870 F.3d at 430–31.

[32] *Id.* at 432–33.

[33] *See id.*

[34] Wettlaufer v. Air Transat A.T. Inc., 2013 BCSC 1245, para. 88 (Can. B.C.).

[35] *Etihad*, 870 F.3d at 433.

[36] *Id.*; *but see Wettlaufer*, 2013 BCSC 1245, para. 88.

which—given that the Sixth Circuit was interpreting a treaty—should have been given considerable weight.[37]

The *Etihad* court's holding stems from the belief that the Montreal Convention is a pro-passenger treaty.[38] The history and debate surrounding the treaty clearly show that this is not the case.[39] Rather, the minutes from the meetings during which the Convention was drafted make evident that the two purposes of the Convention (vis-à-vis Article 17) were to balance the interests of airlines and passengers and to provide uniformity in the law.[40] Delegates of several nations echoed the sentiment expressed by the Delegate of Spain, that: "[a]ir law [is] a universal law and must be uniform."[41] The drafters also expressed that the purpose of the Montreal Convention was to "tak[e] into account the interests of all, be they . . . passengers or carriers."[42]

Clearly, then, the *Etihad* court's characterization of the Montreal Convention as one that favors passengers is at odds with the history of the Convention. Further, the rule in *Etihad* frustrates both of the stated purposes of the Convention. First, it directly undermines uniformity in the law. There can only be uniformity in law if there is uniformity of interpretation—simply having a single text is meaningless if the signatories' courts do not agree on what that text *means*. Second, it upsets the balance of interests between passenger and carrier by creating a rule that is explicitly pro-passenger, which is unsupported by the text of the Convention and its history.

Notably, the drafters of the Montreal Convention left the text of Article 17 largely unchanged from its Warsaw Convention predecessor, evidencing their intent to retain the Warsaw Convention jurisprudence on this issue.[43] It is well established that, where the drafters of the Montreal Convention did not intend to change a given provision from the Warsaw Convention, the Warsaw Convention jurisprudence should be given decisive

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[37] *See* Air France v. Saks, 470 U.S. 392, 404 (1985).

[38] *Etihad*, 870 F.3d at 423.

[39] *See generally* Int'l Civil Aviation Org. [ICAO], *International Conference on Air Law, Montreal, 10–28 May 1999: Minutes*, ICAO Doc. 9775-001 (2001).

[40] *Id.* at 46–47, paras. 6, 12.

[41] *Id.* at 46, para. 5.

[42] *Id.* at 51, para. 29.

[43] *Compare* Montreal Convention, *supra* note 3, art. 17, *with* Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 17, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

weight.[44] The Sixth Circuit noted this but painstakingly undertook to find a way to avoid this rule.[45] The Warsaw Convention's analogue to Article 17 reads as follows:

> 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.[46]

The Montreal Convention's counterpart is nearly identical: "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."[47]

The differences are minimal and largely reflect stylistic changes that evolved in the language over the span of seventy years.[48] The only relevant change is the substitution of the Warsaw Convention's "in event of" language for the Montreal Convention's "in case of."[49] The difference is not persuasive. Should one take the textual analysis used by the *Etihad* court to interpret the phrase "in case of" and apply it to "in event of," the result would be unchanged.[50] Because the Sixth Circuit could point to no other portion of Article 17 that reflected the drafters' intent to displace the Warsaw Convention, the court's decision proceeds from a logically perilous beginning.[51] Further, to argue for a new interpretation, the *Etihad* court noted that the dictionary definition of "in case of" is "in the event of"; however, "in the event of" is the exact language (disregarding the article "the") that the Warsaw Convention used.[52] If anything, this provides further proof that the drafters did not intend to change the interpretation of Article 17. There is flatly no indication whatsoever that the drafters intended such displacement, and as

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[44] *See, e.g.*, *In re* Air Crash at Lexington, Ky., 501 F. Supp. 2d 902, 907–08 (E.D. Ky. 2007).

[45] Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 411–14 (6th Cir. 2017).

[46] Warsaw Convention, *supra* note 43, art. 17.

[47] Montreal Convention, *supra* note 3, art. 17.

[48] *Compare* Warsaw Convention, *supra* note 43, art. 17, *with* Montreal Convention, *supra* note 3, art. 17.

[49] *Etihad*, 870 F.3d at 413–14.

[50] *See id.* at 412–15.

[51] *Id.* at 414–15.

[52] *Id.* at 413; Warsaw Convention, *supra* note 43, art. 17.

such, the traditional interpretation should have been given controlling weight.

Further, the Sixth Circuit impermissibly violated the presumption in favor of uniformity. The presumption in favor of uniformity is the fundamental principle that courts should not create a circuit split without a compelling reason to do so.[53] On the facts of *Etihad*, the Sixth Circuit plainly did not need to create a circuit split to reach a just result for the simple reason that applying the traditional interpretation of Article 17 would have allowed Doe to recover. As has now been repeated ad nauseam, the traditional interpretation requires that the mental anguish "flow from" the physical injury.[54] It cannot fairly be argued that Doe's mental anguish (fear of contagious disease) did not "flow from" the physical injury she sustained (pricking her finger on the loose hypodermic needle). The court characterized the mental injury as resulting from the accident—the contact with the needle.[55] However, this characterization is inaccurate. If the contact with the needle (the accident) had occurred without the physical injury (the needle breaking Doe's skin), Doe would have no rational fear of contagion. Because the result would have been the same regardless of whether the Sixth Circuit applied the traditional interpretation or its new rule, the presumption in favor of uniformity weighs in favor of applying the traditional rule.

Given that the result does not change by applying the *Etihad* interpretation or the traditional interpretation, it seems likely that the Sixth Circuit here was taking *Etihad* as an opportunity to rewrite a test that, in its view, is unfair. Accepting arguendo, however, that the effects of applying the traditional interpretation are undesirable, the courts are not the proper venue to effectuate change. Should the nations party to the Montreal Convention wish to change the standard for recovering damages for mental anguish, they may do so by reconvening and establishing a new convention or an amendment to the existing one. Following this method, the uniformity of interpretation is preserved, and the interests of the various nations are respected. When courts take this task upon themselves, however, neither of these important concerns are given their due weight.

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[53] *See, e.g.*, Wagner v. PennWest Farm Credit, 109 F.3d 909, 912 (3d Cir. 1997) (stating that courts "require a compelling basis to . . . effect[ ] a circuit split").

[54] Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 375 (2d Cir. 2004).

[55] *Etihad*, 870 F.3d at 434.

The issue of gravest concern is the court's apparent disregard for the interpretations of the United States' co-signatories to the Convention. It is a well-established principle that when interpreting treaties, courts should give substantial weight to the interpretations of other nations party to the treaty.[56] In fact, to interpret Article 17 of the Montreal Convention, the courts of multiple other nations that are party to the Montreal Convention have looked to the holding in *Ehrlich* and applied the traditional interpretation.[57] This is a well-established principle of treaty interpretation; as Justice Scalia once said, foreign interpretations serve as evidence of the shared intentions of the nations in establishing the treaty.[58] However, the Sixth Circuit uncritically dismissed the opinions of these co-signatory nations.[59] This has the effect not only of defeating the intent of the various states that entered the treaty, but also of disrupting the uniformity of the law.

The implications of this decision are significant.[60] Uniformity of law is only possible where there is uniformity of interpretation of the law. A common text does nothing to bring about uniformity if the various courts do not agree on its meaning. When the interpretation of the Convention becomes fractured, the Convention fails to provide the clarity and predictability that air carriers need to be able to conform their behavior to the law. Uniformity is an issue of particular concern to international air carriers.[61] Today, large air carriers may fly to several nations all over the world on any given day. For multinational air carriers, sufficiently fractured interpretations could force them to conform to tens, if not hundreds, of different laws; the purpose of the Convention is to allow them to conform their behavior to only one. Further, the *Etihad* interpretation runs the risk of une-

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[56] Air France v. Saks, 470 U.S. 392, 404 (1985).

[57] *See generally Pel-Air Aviation Pty Ltd v Casey*, [2017] NSWCA 32 (Austl.).

[58] Olympic Airways v. Husain, 540 U.S. 644, 660–61 (2004) (Scalia, J., dissenting).

[59] *Etihad*, 870 F.3d at 432–33.

[60] In addition to its significance for the reasons stated above, *Etihad* also represents a sweeping expansion of tort liability for air carriers. This aspect of the case has been discussed at length elsewhere and is beyond the scope of this note. For a considered discussion of *Etihad*'s expansion of liability, see David M. Krueger, *Mental Distress for Airline Lawyers: The Sixth Circuit's Decision in* Doe v. Etihad, 31 No. 2 AIR & SPACE L. 4 (2018).

[61] Brief of Amicus Curiae International Air Transport Association in Support of Petition for Writ of Certiorari at 22–24, Doe v. Etihad Airways P.S.J.C., 870 F.3d 406 (6th. Cir. 2017) (No. 17-977).

qual treatment of passengers and violates the basic principle that like cases should be treated alike.[62] As the law stands today, two passengers with factually identical accidents would not receive the same treatment under Article 17 if one happened to land in Michigan and the other in New York.

The Supreme Court should take its earliest opportunity to clarify the law on this important issue. Because the Sixth Circuit disregarded the presumption in favor of uniformity, the interpretations of co-signatory nations, and the history of the Montreal Convention, the *Etihad* interpretation should be overruled. Doubtlessly, there are times when the facts of an individual case and the interests of justice will require that these principles of interpretive methodology be discarded. The obvious critique of the traditional interpretation is that the results it can reach are unjust. If there is a proper time to rewrite the rule, however, this case is not it because the interests of justice are equally advanced by either interpretation. The result here would be unchanged whether the Sixth Circuit had chosen to apply the traditional—and universally applied—interpretation of Article 17 or whether it had created its new test. Further, even if the traditional interpretation is viewed as undesirable, the courts are an improper venue for changing it. If the nations party to the treaty wish to create a more pro-passenger rule, they may do so by reconvening and creating a new Convention. This is the proper venue in which to reform the rule because it respects the intentions of the nations becoming party to the Convention and preserves the essence of the Convention, uniformity. Moreover, the drafters of the Convention knew what the previous interpretation was, and the history of the Convention shows clearly that they chose not to change it. Allowing this new test to stand only serves to encourage forum shopping, discourage the similar treatment of similar cases, and frustrate the ability of international air carriers to conform their behavior to the law.

When considering the interpretation of the Montreal Convention, the importance of uniformity, both among nations and among the circuits, cannot be overstated. For these reasons, the rule established in *Etihad* should be disregarded.

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[62] *See, e.g.*, Rex v. Wilkes (1770) 98 Eng. Rep. 327, 335; 4 Burr 2527, 2542 (Eng.) (opinion of Lord Mansfield).