

Title: Concept of Accident under Warsaw Regime and Air Passenger's Right to Seek Compensation for Actual Bodily and Mental Injury: A Critical Analysis

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Abstract

The air transportation was just like a dream at some time, but the efforts made by the Wright brothers made that true. The first decade of the 19th century was the inception time for the aviation industry. The aviation industry was growing with the speed, which also gave the reason for new law and regulation for the new emerging aviation law. The need for the law or regulation gave rise to the Warsaw Convention 1929. WC 1929 first time ever provided the uniformity to the various available rules on international air industry. It covered the broad area on the international level regarding the luggage, carriage of the persons carry out by the aeroplane for remuneration.

Introduction

In 1929, when Convention was held, there was no definition given to the term 'carrier'. In the year of 1933 effect was given to the Convention in the United Kingdom. There are 123 states signatories in this convention. The WC has been amended and upgraded by time to time on many occasions some of them are The Hague Protocol 1955, Guadalajara Convention 1961, Montreal Agreement 1966, Guatemala City Protocol 1971, 4 Montreal Protocols of 1975, and Montreal Convention 1999. As time went on there was need to amend the original convention to make it more valuable in the advanced contemporary period. Regime modernised to rules on aviation law by accepting and signing the Montreal Convention in 1999 whereby rules on compensation, limit of compensation etc were incorporated and amended.

Warsaw regime with its time to time amendments and modernisation of aviation rules has made to rules on compensation in various events and occasions for international air travellers. Montreal Convention tends to amalgamate rules made by the Warsaw regime for various happening in different eras. Convention gives rules on injury or death of the passenger, and offers certain rules for the provision of compensation to the passengers injured in result of accident, damage to his baggage, delay in flight etc. However none of the instrument of Warsaw

regime was perfect and has weaknesses which offer a good scope to the aviation researchers to conduct their research on the topic.

Warsaw convention is running successfully from the 1929 till the present time. Although many changes have been made to it but it always provides air traveller and Montreal is a modern version which offers amendments in the old system to improve it. The “accident, mental injury, bodily injury, delay and compensation” always remained centre of controversies for the air passenger, carrier, airline management and aviation researchers and lawyer.

The dissertation more emphasis will be given on the responsibility of the airline management for “**accident and bodily injury or mental injury**”¹ In both the conventions these issues have been main focus of discussion all the time. The dissertation will find whether these conventions deal with all the aspects related to these topics. In the present time with the development of the aviation law the troubles are also increasing day by day. Most of the times the passengers while travelling on the international air line face some accident which may not cause them any physical injury but some psychological injury. Whether these types of injuries come under the Art 17? Can the passengers get the compensation for the all there injuries, e.g physical or mental injuries? If yes, then how and on what grounds they can get the damages, if answer is ‘No’ then why?

Introduction of topic and scope of work:

In the present time the international air transportation plays very much important role in the daily life of millions people. In all over the world Air Law attracts and getting the attention of lawyers, scholars and also from the air industry. Air law was becoming the issue of interest for everyone in the early 1900 when Wright brothers were trying to carry out their flight. Wright brothers succeeded were in the year of 1903 the carried out their first flight. That flight was first engine powered flight. After this aviation had become a matter of modern issue and interest for all over the world and in 1910 first conference was held in the Paris. But that conference was failed because they were against the freedom of theory and they all were want the sovereignty over the space of their states or territories. But in the failure of this conference any legal differences were not involved it failed just because of the political disagreements and come out without any results. But after the Paris conference 1910 states started discussion and changing their views on

¹ (Art 17).

the new area of law i.e. Air law. In the First World War the first schedule flight started in between Paris and London on the 8 February 1919.

At that time first time it was considered that all the regulations must be included in to the convention. After the First World War every state started defending the national interest. When the air law came into existent then many times this question was raised that whether there was need to make any special body of rules to manage or administer the air law or whether this law also be made subject to the rules which are already present to govern the for other means of transportation. So there were many issues at that time regarding the air law. Because there was starting of new time with the air law, many questions were raised by states, some were in the favour of air law and some had many questions on the sovereignty over the their space over their territories. At that time there was need for Convention to give answers to all the questions and also made rules to protect the interest of everyone. Due to all these controversies in 1929 the Warsaw Convention came into force.

Warsaw convention was the new progress in air law and international law. First commercial flight from the Florida Keys to Havana took place then international aviation becomes the reality for everyone. The rules made in the Warsaw Convention applied to whole the world. This convention gave security to the passengers that they are secure and there are certain rules given under which the air carrier is liable. The Convention which started in the year 1929 and running successfully till now has covered almost every aspect of the aviation law. But to make it effective and modern with time Warsaw convention has been amended many times. Finally in 1999 it has been amended by Montreal Convention. After the amendment to Warsaw convention 1929 the Montreal Convention 1999 tries to provide reasonable and sufficient compensation to the passengers. This convention is independent Convention differ and more effective from the Warsaw Convention.

The amendments made in this convention provide evidence of unsolved problems in Warsaw convention which needed necessary amendments for improvement. Most important problems which need further research and dissertation will focus are the concept of accident, mental injury and the delay. These issues are very important because whenever air passengers are affected and tried to seek compensation dispute on definition of accident and right of passenger to get compensation for actual bodily injury and mental injury came in front of the courts.

After every incident scope of accident and what constitutes the accident within the meaning of WC 1929 remained disputed and controversial. Montreal convention also does not define the accident. One reason of the controversy was that WC 1929 did not define the accident. Question on compensation for mental injury u/a 17 was also controversial and disputed. In this dissertation it will be critically analysed, whether or not both the conventions clearly address the all the aspects of compensation for accident, delay, mental injury and actual bodily injury? ‘Does Warsaw regime effectively give the justice to the passengers in the event of accident, bodily injury and delay?’

Literature review

A study on safest mean of travelling demonstrates that air travel is safest mean of travel comparing to other source of travel. But several incidents are documented in the history of air industry which had made the air travel dreadful. Survey mainly relied on the data collected by the Federal Aviation Administration and the National Transportation Safety Board which has recorded 450 death tolls in 46 massive air accidents until 2005 across the world.

“A survey conducted in 2004 revealed that the 2,147 aviation accidents that occurred since 1950 were caused by: 37%: Pilot error ,33%: Undetermined or missing in the record ,13%: Mechanical failure ,7%: Weather , 5%: Sabotage such as bombings, hijacking, and shoot-downs ,4%: Other human error such as plane/tower miscommunication, language incompatibility, air traffic controller error, improper maintenance or loading, fuel inconsistencies or problems ,1%: Other cause.”²

Statistics show that there is different kind of air accident and that have different reasons, due to this controversy arose on death or injury of the passenger. Law involves very complex issues which include nationality of air Carrier Company and the affected passenger, insurers liability based on its place of business and insured areas, applicability of law and cause of disaster.

First ever in the history of air industry WC 1929 provided rules, perimeters and limits on liability of air carrier and cargo service on international destinations. WC 1929 and the Hague Protocol 1955 had increased the maximum limit of \$8300 for a passenger who got injury or was died in an accident due to wilful error or negligence of air carrier while travelling on an international flight.

² Airplane Accident Statistics Aviation Lawyers & Aviation Accident Information
www.resource4aviationlaw.com

The Countryman & McDaniel Practice Guide to Montreal Protocol 4 identifies following features of the Montreal Convention;

“(1) it removes all arbitrary limits on recovery for passenger death or injury; (2) it imposes strict liability on carriers for the first 100,000 SDR of proven damages in the event of passenger death or injury; (3) it expands the bases for jurisdiction for claims relating to passenger death or injury to permit suits in the passenger's homeland if certain conditions are met; (4) it clarifies the obligations of carriers engaged in code-sharing operations; and (5) it preserves all key benefits achieved for the air cargo industry by Montreal Protocol No. 4.”³

The main controversy among the aviation lawyers and researcher was on scope and definition of accident. Warsaw Convention does not provide definition or explanation on term accident. In *Chaudhari V British Airways (1997)*⁴ phrase accident was elaborated by the court. It has been stated that while defining the term accident it is required to consider the reasons of accident and not only its consequences. Court suggested that, “word given under the Art 18 ‘occurrence’ is different than the “accident”.

*Air France V. Saks*⁵ also has significance for the interpretation of the phrase accident. In this judgment court refused to award the compensation to the passenger who became deaf in result of air pressure in the aircraft cabin. Court ruled that claimant is not entitle for the compensation unless claimant proves the malfunction in the operational system of the aeroplane. However court of Appeal reviewed the judgment and further held that merely proving the malfunction or defect in operational system of the air carrier is not enough to hold the airline responsible. “Legal responsibility U/A17 starts only if reason of passenger's injury was an unexpected or unusual occurrence or occurrence that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft”.

By revisiting the Art 17 of WC 1929 which contains the phrase accident, the House of Lords did not incline with the passenger’s claim who sued the airline for damages claiming that during the

³ MESSAGE from THE PRESIDENT OF THE UNITED STATES The Warsaw Convention of 1929 September 6, 2000 106th Congress Treaty Doc. 106-45 UNITED STATES SENATE - 2d Session

⁴ Chaudhari V British Airways (1997)

⁵ AIR FRANCE V. SAKS, 470 U. S. 392 (1985)

flight Deep Vein Thrombosis DVT had been developed.⁶ Since Warsaw Convention is a worldwide accepted treaty therefore issue of compensation for the bodily and mental injury and as well the interpretation of the Art 17 is a hot subject before the courts of US.

Supreme Court of US in *Olympic Airways v. Husain* dealt with the issue of scope of accident u/a 17 of convention. In Husain case claimant's decedent was a patient of asthma who was allocated a seat nearby the smoking area and despite of the repeated request air carrier crew did not change his seat, thereafter he died. The issue before the court was "*The issue we must decide is whether the 'accident' condition precedent to air carrier liability under Article 17 is satisfied when the air carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin.*" On this issue court held that for the purpose of Art 17 claimant only has to establish that "*some link in the chain was an unusual or unexpected event external to the passenger.*" Failure to reseat the passenger and his exposure to cigarette's smoke were amount to contribution in accident, "*happenings that . . . contributed to the passenger's death.*" Consequently court held that an accident under Article 17 can take the form of inaction.⁷

In another significant case which followed the dictum of the Husain case is ***Blansett v. Continental Airlines***. In this case passenger was permanently disabled due to DVT. He was affected with the DVT during the flight but he did not claim any unusual occurrence or episode in the flight, but he claimed that failure to give warning about likely DVT, airline infringed the industry standard. District court held that "*an airline's violation of an industry standard of care, alone, can be . . . an 'accident'.*" However court of 5th circuit overturned the judgment and held that Continental's failure to warn and instruct its travellers about the danger of deep vein thrombosis does not make it an accident under the meaning of the WC 1929. Court recognized the dictum of Husain case to the extent the in some certain situations an accident" *may constitute an omission or refusal to act, the Court determined that the appropriate test is whether there was an unexpected or unusual event.*⁸

⁶ Deep Vein Thrombosis(DVT) and Air Travel Group Litigation [2005] UKHL 72 (8 December 2005)

⁷ 540 U.S. 644, 124 S. Ct. 1221, 157 L.Ed.2d 1146 (2004).

⁸ MICHAEL SHAWN BLANSETT V CONTINENTAL AIRLINES, INC Appeals from the United States District Court for the Southern District of Texas m 03-40545

Controversy and uncertainty can be seen between the judgments of the court on the issue of mental injury, reason for this perhaps vague wording of the Warsaw Convention. The common view is against the awarding compensation for the mental injury where such injury was not accompanied by the actual bodily injury. The centre of the debate on mental and actual bodily injury was “*whether mental injuries that simply accompany bodily injuries are “damages sustained in the event of bodily injury” under the Warsaw Convention?* While answering to this question in ***Ehrlich v. American Airlines*** court held that *mental injuries that accompany, but are not caused by bodily injuries, are not compensable under the Warsaw Convention. Absent proof of causation between the two, there is no recovery permitted.*”⁹

Where plaintiffs claimed for *Post Traumatic Stress Disorder (“PTSD”)* that they were physically battery for about forty five minutes by putting them in immense fear of almost death, bodily and emotional injury court rejected the claim and held that it had already declared that PTSD is not compensable under Warsaw Convention.¹⁰ Court relied on dictum laid down in ***Terrafranca v. Virgin Atlantic Airways Ltd***¹¹ and ***Ehrlich v. American Airlines***, *that mental injuries are only compensable where they are caused by bodily injuries.*

Likewise in another case court did not allowed compensation where plaintiff claimed for the mental damage due to some inconvenience caused by the delay and thereafter cancellation of the flight. Court held that claim relates to the mental suffering thus is not compensable under Warsaw Convention.¹²

US courts remain consistent to some extent with the opinion that mental injury compensation is covered by the Warsaw Convention until or unless it is proved that it is accompanied by or reason of the bodily injury caused due to unusual and unexpected incident in the flight. Court rejected the claim of a passenger for mental injury due to concerns about the health of unborn child. She claimed that she fall down during the international flight and were mentally distressed

⁹ Gary EHRlich and Maryanne EHRlich , Plaintiffs-Appellants, v. AMERICAN AIRLINES INC., 360F.3d 366 (2004)

¹⁰ Bobian v. Czech Airlines93 Fed. Appx. 406, 2004 WL 628864 (3rd Cir. 2004).

¹¹ 151 F.3d 108 (3rd Cir. 1998)

¹² Lee v. American Airlines355 F.3d 386 (5th Cir. 2004).

due to concerns about the health of her unborn child. Court rejected the claim due to lack of evidence of link between the incident of falling down and mental injury.¹³

US court continued with issue of mental and bodily injury and developed the law on the issue. Court broadened the scope of accident under Art 17 of Warsaw Convention in the **Prescod v. American AMR**.¹⁴ In instant case airline staff refused to allow the passenger to carry bag of breathing equipment despite of the request of the passenger's daughter and same was held with the air carrier staff and checked in. later on air carrier staff failed to return the bag as same was allegedly lost for two days. As a result to it patient's medical condition became critical, she was hospitalised and where she died. It was concluded by the court that, "*the seizure of the bag was an unusual and unexpected occurrence under the circumstances and determined that an Article 17 accident had occurred. Carrier's failure to comply with a request to ensure that the bag travel with the passenger was an "event," and that seizing the bag, in light of the carrier's knowledge of the passenger's need for it, was unusual or unexpected.*"¹⁵

Court also considered the Husain case and reached to the conclusion that conduct of the air carrier management is deemed to be a link the chain of causes which result the injury. As air carrier was aware about the need and medical importance of the respiratory equipment of the passenger therefore notwithstanding the fact that passenger died after few days of the incident court held air line responsible for wilful misconduct within the scope of Warsaw Convention.¹⁶

RESEARCH METHODOLOGY:

This dissertation is mainly focused on secondary research based on library and computer based research. The discussion on different issue of aviation law, right to compensation and Warsaw regime up to Montreal Convention are normally found on electronic and print media. Internet is one of the useful sources of library based research to access various fresh news clippings, reports, articles and research of other researchers in the airline industry. To achieve the latter for this piece of work one will be using a lot of case law and mention facts of cases and also the

¹³ Marks v. Virgin Atlantic Airways, Ltd2004 WL 1574637 (S.D.N.Y. 2004)

¹⁴ Florence R. PRESCOD, individually and as successor in interest to Caroline v. AMR, INC., dba American Airlines; British West Indies, dba BWIA, Defendants-Appellants. 02-55097. No. United States Court of Appeals, Ninth Circuit.

¹⁵ Florence R. PRESCOD, individually and as successor in interest to Caroline v. AMR, INC., dba American Airlines; British West Indies, dba BWIA, Defendants-Appellants. 02-55097. No. United States Court of Appeals, Ninth Circuit.

¹⁶ Prescod v. American AMR 383 F.3d 861 (9th Cir. 2004).

judgments will be given. For this, internet sites such as *Nexus Lexus* and *Westlaw* will be preferred.

Law library of the University of Bedfordshire will be used to find the air law journals, books and other research work. If supervisor finds it necessary at any stage of research that other library eg London library or any other online source is important to complete the research and dissertation the instructions will be followed. Electronic and print sources are normally easy to access and cheap so there is no difficulty to find the necessary material to complete the dissertation.

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