

Panel

Air Carrier Passenger Liability

Paris, 22 April 2023 9:00-10:00

13th Annual **McGill University / PEOPIL Conference** on
International Aviation:
Liability, Insurance & Finance

Panel
Air Carrier Passenger
Liability

Panelists

- Jean-Michel Fobe – Eutralex Srl., Brussels
- Sharon Holahan – Global Aerospace Inc., Morris Plains
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- Chair: Axelle Cartier, Aviation Consultant

Panel Air Carrier Passenger Liability

Panel Topics

- Review of recent court decisions on what constitutes accident and bodily injury
- Recovery for emotional and mental injuries
- Liability of passengers for incidents involving items/baggage falling out of overhead bins
- Medical emergencies in flight
- Review of recent court decisions on the scope of embarkation and disembarkation
- Liability for passenger-to-passenger assaults?
- Liability for occurrences that are not related to the operation of the aircraft
- Liability exposure of crew and/or air marshals who subdue an unruly passenger
- Impact of Montreal Protocol of 2014, which amends the Tokyo Convention of 1963, on liability issues surrounding unruly and disruptive passengers

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1. Selected Cases

In Highlight

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Pending Case

Canada

Case «IATA v. Canadian Transportation Agency»

Canada Federal Court of
Appeal
December 6, 2022
2022 FCA 211

Brief facts

In 2014, the Minister launched a review of the CTA to examine current issues in transportation, and to identify priorities and potential courses of action in the sector to support Canada's long-term economic well-being. A Report followed describing the system in place as producing "suboptimal, piecemeal outcomes for industry, consumers, and the regulator alike" and recommended that the government enhance air passengers' rights.

Lead to a new legislation and added the new section 86.11, which required the Agency to make regulations in relation "to flights to, from and within Canada, including connecting flights", notably in respect of carriers' obligations in case of flight delay, flight cancellation or denial of boarding, including minimum standards of treatment and minimum compensation, in certain circumstances, and for lost and damaged baggage. Followed consultations with stakeholders. The Regulations were approved in 2019, and modified the rights and obligations of passengers and air carriers, defining carriers' minimum obligations to passengers with respect to, *inter alia*, flight delays, cancellations and denied boarding. The Minister also issued the *Direction*. The Attorney General of Canada filed a motion on December 2, 2019, seeking leave to present expert evidence on foreign law, specifically air passengers' rights in State parties to the *Montreal Convention*.

Outcome/Contentious Issues

- This appeal raises important questions as to how the Montreal Convention applies within Canadian law, and more broadly, on Parliament's ability to provide for the regulation of air passenger rights in the context of international travel.
- The new APPRs in Canada and carrier liability for delay and cancellation of flights
- Case pending appeal

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Accident

Cases

Case « Arthern v. Ryanair »

High Court of Justice King's
Bench Division High Court
Appeal Centre Manchester

16/01/2023

Brief facts

- Ryanair Flight from Manchester to Hamburg on a very cold day. Flight was delayed due to the need for the aircraft to be de-iced. Passengers walked on the tarmac. Arthern sustained an injury when he fell to the floor on board the aircraft near the toilet door. He noticed his clothes were wet and had slipped on a large amount of fluid on the floor, "as though he had stepped on black ice." (his witness statement). The judge found that the appellant had slipped on liquid that was a mixture of de-icing fluid and water (or ice) which had been tracked into the cabin by passengers on the soles of their feet while they were entering the plane. The de-icing of the plane and the subsequent tracking of liquid into the cabin were both "specific events."

Outcome/Contentious Issues

- an unexpected or unusual event?
- With such cold and icy conditions, are the circumstances around the incident to be seen as usual, normal and expected operation of the aircraft?
- Appeal dismissed.

Qatar Airways Group
Inc. v. Ms. Zhao and
others

Beijing Third Intermediate
People's Court
Case Number: (2020) Jing 03 Min
Zhong No. 5683)

Brief facts

- Incident took place on a flight from Shanghai to Doha on 28 May 2019. Passenger died onboard from natural causes. Passenger's family sued the airline for the passenger's death. The first-instance court supported the family's claims. The airline appealed.

Outcome/Contentious Issues

- The Court confirmed that the MC 1999 would apply in this case, and stated that whether the airline was liable depended on whether the passenger's death on board constituted an "accident" under the MC1999.
- The Court found that the airline had failed to prove that: the flight at issue had not encountered any special or abnormal circumstances such as airflow or turbulence; and, the crew had found the passenger and provided sufficient first aid treatment in a timely manner, which might have prevented the passenger's death.
- The Court concluded that the passenger's death constitutes an "accident" under article 17 of the MC 1999, even though the passenger died of cardiopulmonary failure due to natural causes.
- Second-instance (final) judgment.
Precedential value: no binding precedential system in the PRC, however may be providing guidance for subsequent cases

Cathay Pacific Flight CX500 of 28 June 2019

Brief facts

- Flight Singapore-Tokyo on Cathay Pacific
- Passenger died following her collapse in the toilets, while her young children were onboard

Outcome/Contentious Issues

- Passenger died following her collapse, the crew did not intervene immediately
- Criminal case could not be opened in Japan

Case Flying Service – IDH Diamonds

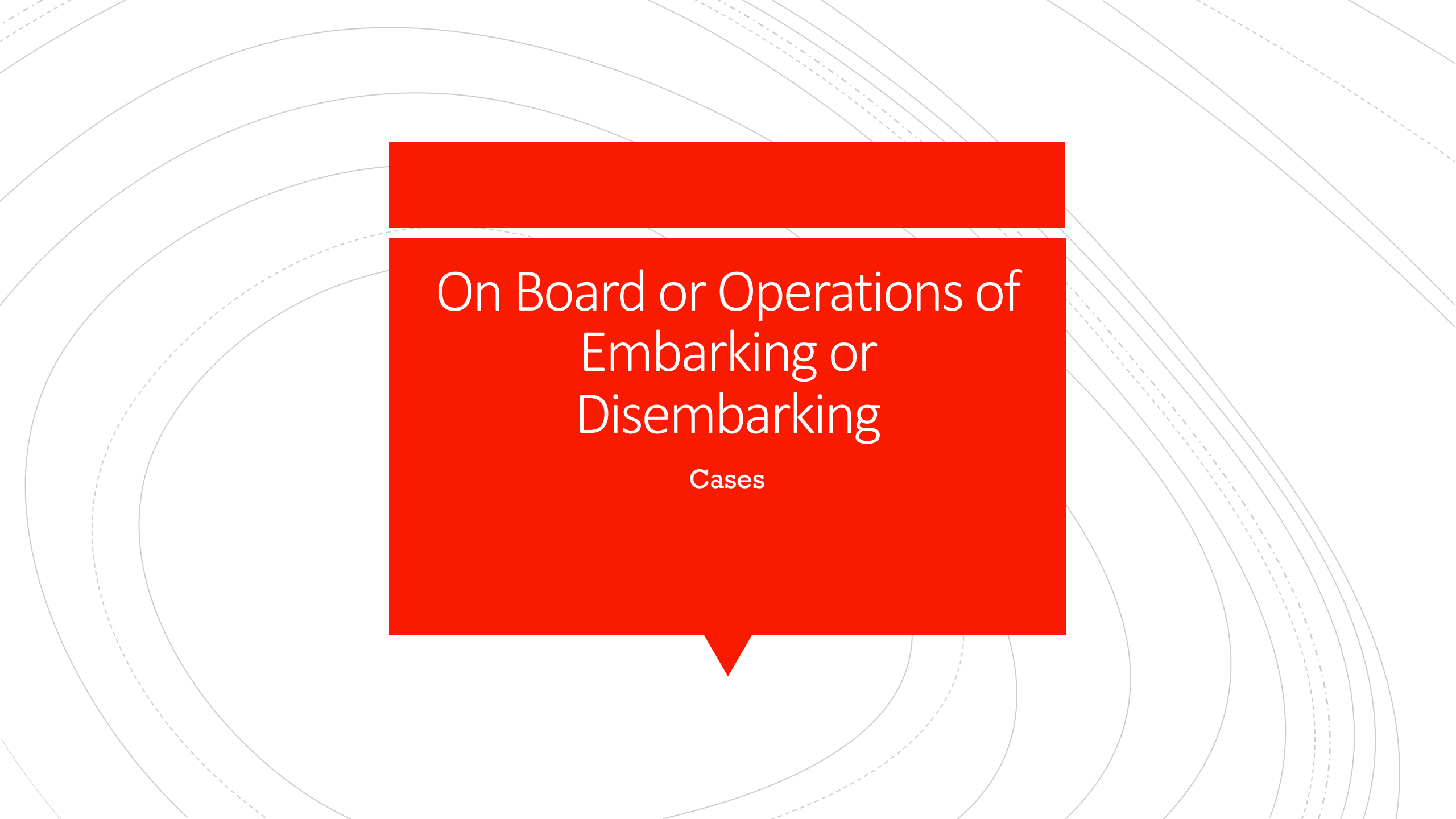
CA Antwerp
12 April 2016

Brief Facts

- Passenger found dead in Business during flight from Antwerp to Harare while on board to retrieve auctioned diamonds – Report from crew and local doctors upon arrival: heart failure

Outcome/Contentious issues

- Family requested order for additional investigations from the judge because of suspicions on the real cause of death
- Court of Appeals considered “no reason to have doubts about the declarations of the pilot and crew” – “when in flight above DRC co-pilot and cabin crew tried to reanimate the passenger and since PIC witnessed the death, the decision was made to continue the flight to final destination” – “These statements were confirmed in the statement about the cause of death in the death certificate”

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On Board or Operations of Embarking or Disembarking

Cases

Case «Moore v. British Airways PLC»

US Court of Appeals, First Circuit
(D. Mass. Dec. 28, 2020), rev'd, 32 F.
4th (1st Cir. 2022)
April 29, 2022

Brief facts

- Flight Boston-London Heathrow.
Accident while disembarkation (height differentiation with the stairs).
- Moore flew from Boston to London on a British Airways operated flight. Due to an inoperable jet bridge, the passengers were directed to use a mobile staircase. Upon reaching the last step, plaintiff lost her balance and fell. Plaintiff sued BA under the Montreal Convention.
- Defendants moved to dismiss arguing that, as a matter of law, the plaintiff's injuries did not result from an accident within the meaning of the Montreal Convention because disembarking on a staircase is not "unexpected or unusual."

Outcome/Contentious Issues

- The Court found that whether an event is unexpected should be judged from the perspective of a reasonable passenger with ordinary experience in commercial air travel.
- The Court concluded it is up to a jury to determine whether the plaintiff's injuries resulted from an accident within the meaning of the Montreal Convention.
- This decision does not follow *Saks v Air France*

Case «Weng Ong v. American Airlines, Inc.»

United States District Court for the
Northern District of Texas
February 14, 2022

Brief facts

- Ms. Ong sued American Airlines seeking damages stemming from her being ousted from an international flight. After boarding, but before departure, she attempted to change seats and got into an altercation with another passenger.
- Plaintiff contends AA is liable for race discrimination, breach of contract, false accusation, and mistreatment of elderly persons over 65 years of age.
- AA then moved to dismiss the action as a claim based on discrimination is preempted by and barred by the Montreal Convention in the absence of bodily injury.

Outcome/Contentious Issues

- Liability for passenger-to-passenger assaults
- Court concluded the claim(s) asserted by Plaintiff are preempted, and her alleged injuries are not actionable. Accordingly, the Court granted Defendant's Motion.

Case «Oshana v. Aer Lingus Limited»

United States District Court for the
Northern District of Illinois
12 January 2022

Brief facts

- Plaintiff was a passenger on an Aer Lingus flight from Chicago to Dublin. The plane pushed back from the gate and before it took off, Oshana entered the lavatory. Oshana claims a flight attendant opened the door while her pants were at her ankles. The crew member ordered her to her seat. She claims that before she was able to pull up her pants she was grabbed and pushed into her seat.
- Oshana brought suit under the Montreal Convention for physical and emotional injuries. She claims physical injury from being pushed and emotional injury due to her exposure genitalia.
- Defendants dispute the crew member touched her and filed motions *in limine* to exclude certain evidence including a claim for emotional distress because it was not caused by physical injury as required in Article 17 of the Montreal Convention. Another motion *in limine* was to dismiss plaintiff's physical injury claim as *de minimus*.

Outcome/Contentious Issues:

- The Court rejected the defense causation argument, reasoning that the emotional injury does not have to be a direct result of the physical injury.
- ruled that the extent of a physical injury is an issue to be decided by the jury.
- did not follow *Doe v. Etihad (PTSD)*.

Case C-70/20

YL v. Altenrhein
Luftfahrt

CJEU 12 may 2021

Brief facts

- 20 March 2014 flight from Vienna (Austria) to Sankt-Gallen (Switzerland) “hard landing” and claim for bodily injury (spinal disc injury)
- Request for preliminary ruling: Art. 17 MC notion of “accident”

Outcome/Contentious Issues

- “The concept of ‘accident’ does not cover a landing that has taken place in accordance with operating procedures and limitations applicable to the aircraft in question, including the tolerances and margins stipulated in respect of the performance factors that have a significant impact on landing, and taking into account the rules of the trade and best practices in the field of aircraft operations, even if the passenger concerned perceives that landing as an unforeseen event”

Case C-589/20 Jr v. Austrian

CJEU

(PR Request of 15 Sept 2020)

Brief facts

- Passenger falls on the last third of a mobile-boarding stairway when disembarking from an aircraft – for no ascertainable reason – and sustains an injury.
- Request for preliminary ruling – Notion of Accident Art. 17 MC

Outcome/Contentious Issues

- Art. 20 MC provides that, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger, the carrier is to be wholly or partly exonerated from its liability to that passenger. [Or. 13] In the present case, the applicant failed to hold on to the handrail that was available – despite the fact that she had observed her husband's 'near fall'. It was therefore not possible for her to prevent herself from falling. As a result, the applicant therefore at least contributed to her fall herself.
- In view of the fact that the stairway was in good condition – and therefore did not show any signs of damage or defects and was not slippery either – and that the injuries suffered by the applicant were not caused by an object used when serving passengers, and therefore (irrespective of the fact that the fall occurred when disembarking from an aircraft) there were no grounds for attributing liability to the defendant, or those grounds were only secondary to the applicant's contributory negligence, the question also arises as to whether the applicant's contributory negligence outweighs any liability on the part of the defendant under Article 17(1) MC – which has not breached its duty of care or its safety obligations – in such away that liability ceases to exist.

Liability of passengers for incidents
involving items/baggage falling out
of overhead bins

Highlights

Various claims Overhead bins

Liability of fellow passengers involving bags falling out of overhead bins

Has become a more frequent occurrence

Brief facts

Outcome/Contentious Issues

- Increase of claims, often without the involvement of other passengers or crew.
- Most claims resolved short of a court decision, yet there is a strategic benefit to identify the passengers involved (insured?) and have them included in claims
- There seems to be a reluctance of the airline to claim over against a passenger

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Unruly/Disruptive Passengers

Cases

Unruly Passengers

- **1963 Tokyo Convention** on Offences and Certain Other Acts Committed on Board Aircraft
(in force, 187 States Parties*)
- **2014 Montreal Protocol** to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft
(entry into force 1.1.2020, 44 States Parties*)

**as of 17.4.2023*

Case «Bandary v. Delta Air Lines, Inc.»

USDC Central District of
California
26 August 2022

Brief facts

- On the flight, after the flight attendants told Bandary to return to his seat after repeatedly getting up to use the lavatory, an altercation ensued resulting in the plaintiff being put in cuffs to restrain him. Plaintiff showed photographs of bleeding wrists and claimed the incident was reminiscent of previous events experience by Bandary resulting in a diagnosis of PTSD.
- Bandary sued Delta under Art. 17MC for bodily injury and emotional distress. The case went to trial and a jury awarded \$2.5 million for physical injury and \$6 million for emotional distress.
- Delta appealed and argued Bandary's bodily injuries were *de minimis*; lack of proximate cause, i.e. plaintiff's mental and emotional injuries were not proximately caused by his bodily injuries.

Outcome/Contentious Issues

- The Court held the question of emotional damages arising from bodily injury is a jury issue. The Court rejected the *de minimis* argument and left this as a question for the jury. The Court reasoned that the plaintiff's emotional damages must flow from his bodily injuries and, in light of the evidence it is not unreasonable that the jury found some of the emotional injury flowed from the physical restraint. However, the Court agreed the evidence suggested the award was excessive and ordered a new trial.
- Did not follow Doe v. Etihad (PTSD)
- Mediation
- Delta wanted to dismiss the case

Case
«Berlin v. JetBlue
Airways Corp et al»

United States District Court
Eastern District of New York

5 May 2022
2022 WL 1423695

Brief facts

- Incident occurred aboard a JetBlue flight from Mexico City to Orlando, Florida, on March 22, 2016.
- Plaintiff's first language was not English. He was dehydrated during the flight and requested ice by asking for "Ices" to the flight attendants. Plaintiff claimed Berlin claims that he was assaulted by members of the JetBlue staff.
- After the flight landed in Orlando, plaintiff was arrested; plaintiff was then indicted in the Middle District of Florida for interfering with a flight crew member under 49 U.S.C. § 46504.
- Claim remaining that defendants are liable for causing an "accident" under the Montreal Convention.

Outcome/Contentious Issues

- Physical injuries that were inflicted on an unruly passenger by the cabin crew using reasonable (for the circumstances) force under the 1963 Tokyo Convention were not caused by an accident.
- Immunity conferred by Art. 10 Tokyo Convention
- Incident is not an accident, not unexpected/unusual.

Case
«Semira Adamu»

Brussels Court, Belgium
12 December 2003

Brief facts

- Deportation case, illegal immigrant 1998
- On 6th attempt to deport her, as she refused to be deported back to Nigeria and intervention of passengers on board to block the deportation, PIC requested assistance of airport police.
- Passenger suffocated resulting in her death as a result of the intervention of the police, which put a pillow on her face to stop her from screaming.

Outcome/Contentious Issues

- Police violence condemned: 4 police officers sanctioned
- Belgian State condemned to pay damages to the family of Mrs. Adamu

Case
«Semira Adamu»

Brussels Court, Belgium
12 December 2003

Outcome/Contentious Issues (cont'd)

- On 12 December 2003 a Brussels court found four (4) former Belgian police officers guilty of assault, battery and negligence.
- Five police officers appeared before the court, one was acquitted; three were given one year suspended sentences, and the fourth, the unit's chief, got a 14-month suspended sentence.
- The presiding magistrate said in his ruling that regulations had not been followed, excessive force had been used, and that police chiefs and the government shared responsibility for Semira's death.
- The court also ordered the Belgian state to pay 20,000,-€ damages to her family. Semira's death in 1998 led to the resignation of the then Interior Minister Mr. Louis Tobback.

Case Case Josef Chovanec

Brussels Court, Belgium
August 2020

Brief Facts

- Passenger refused to embark for flight to Bratislava and became aggressive, bumped a female crew member, PIC requested assistance from airport police.
The man then was detained in cell at Charleroi Airport

Outcome/Contentious Issues

- Death of passenger in cell caused by police violence or self-inflicted wounds? Security camera showed that one of the police officers made a Hitler salute while others were joking while restraining the passenger.
- Parliamentary enquiry on police violence
- Final report concluded on death cause: heart failure caused by stress and self inflicted violence

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2. Panel Discussion

Where are we heading now?

Discussion Points

- **Uniformity issue:**
Variations among courts in determining the concept of accident gives rise to a discussion of whether Montreal 99 should be revised to be more exact and detailed and, whether this would provide for a greater coherence in international case law.
There seems to be an erosion from the intention of the drafters of MC99.
- **Connection to Saks: erosion?**
- **Pro-consumer approach regarding the courts interpretation of WC29 and MC99**
- **In the US, tendency to go to jury**
(idea: MC99 was not drafted to go before jury).
- **A certain reluctance of airlines to bring claims against passengers has been observed lately.**
Particular attention is brought to the instructions of the crew.
- **As a follow-up to the above, general considerations when drafting treaties and the rules governing this specific work.**

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3. Conclusion

Take Away?