

Flying Through Squabbles of the Turbulent

Despite strict liability governed by the Montreal Convention, airlines have options to minimize passenger-on-passenger torts.

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We have all been through it: extended waits at the check-in counter; overworked and discourteous airline personnel; intrusive and rude security guards; "sardine can" cabins with seats so close together you can barely lower your tray; screaming babies in the row next to you. There is no doubt that air travel has become a highly stressful and sometimes emotionally charged experience.

As a result, there appears to be an upswing in incidences of passengers getting into fights with each other for one reason or another, what we call in the law "passenger-on-passenger torts."

Despite a strict liability, several recent cases in this area suggest that there are actions airlines can take to avoid liability for injury resulting from fights between passengers.

Air-carrier liability for personal injury or death is governed, as a general matter, exclusively by the Convention on the Unification of Certain Rules for International Carriage by Air. The agreement, known as the Montreal Convention, entered into force in 2003. Under Montreal and its predecessor, the Warsaw Convention, the carrier is strictly liable, without a showing of negligence, for personal injury or death of a passenger while embarking, transiting or disembarking, up to a maximum limit of approximately \$160,000.

The only defense available to such a claim is contributory negligence. Above the limit, airlines are liable if negligent in their conduct.

Two U.S. Supreme Court cases have determined that death or injury must be caused by an "accident" as that term is defined in the convention. In the well known case of *Air France v. Saks*, the Supreme Court in 1985 defined an accident as an "unexpected or unusual event or happening that is external to the passenger."

Thus, where an injury on board an aircraft or while a passenger is embarking or disembarking is the result of the passenger's own internal reaction to the usual, normal or expected operation of the aircraft, the event is not considered an accident under the Montreal Convention and no liability can be imposed on the airline.

The Saks case involved a passenger who lost hearing in one ear as a result of pressurization on board the aircraft. However, the evidence established that the aircraft's pressurization system was operating normally, and that the passenger's loss of hearing was an unusual or abnormal reaction to a normal condition, hence no "accident."

More recently, the Supreme Court in 2004 reconfirmed its view of the term "accident" in *Olympic Airways v. Hussein*. In that case, a passenger who was highly allergic to cigarette smoke asked to be moved from a seat which, although in a nonsmoking section, was very close to the aircraft's smoking section.

A flight attendant refused to relocate him on three separate occasions, and he subsequently suffered a severe allergic reaction and died on the aircraft.

The Supreme Court held that the airline's refusal to relocate him constituted an accident, as a consequence of which the airline was liable for loss of consortium and other damages incurred by his survivor.

The question then becomes whether a passenger-on-passenger tort is a form of accident. There is somewhat of a split of authority on the issue. Several courts have held that injury caused as a result of being punched without provocation by another passenger does not constitute an accident, primarily because a fracas is not characteristic of air travel, nor are carriers easily able to guard against such a risk through employment of protective security measures.

There is support in the Second Circuit, which governs New York, that an unprovoked attack may trigger airline liability. In *Wallace v. Korean Airlines*, a passenger was sexually assaulted while sleeping on a Korean Airlines flight. According to

the facts, the passenger awoke in the darkened cabin to discover one of her neighbors had unbuckled her belt, unzipped and unbuttoned her jean shorts, and had placed his hands into her underwear to fondle her. The airline argued that it would have been impossible to monitor all the passengers during such a flight and that there had been no "accident" under the Montreal Convention because the incident did not arise from the risks of air travel.

The Court of Appeals rejected the argument, finding that sexual molestation was in fact an "accident." As the court held, **when the passenger took her seat in economy class, she was "cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator.** The lights were turned down, and the sexual predator was left unsupervised in the dark." Holding this to be an unexpected or unusual event or happening under Saks, the court found the airline liable.

However, this ruling, issued in 2000, does not mean that airlines are helpless to avoid liability for passenger assaults by other passengers. In *Zarlin v. Air France*, **the passenger, Shelby Greene Zarlin, started arguing with the passenger in front of her due to the passenger's insistence on reclining his seatback after take off, which supposedly left no room for Zarlin's legs.**

At some point following the argument, a flight attendant was summoned and decided to move the plaintiff, reseating her away from the passenger in front of her, to a seat in the last row of the aircraft which had no occupant in front of it. The plaintiff subsequently returned to her original seat, entered into another argument with the other passenger, following which, it was claimed, the passenger in front forcefully slammed his seat back, causing the plaintiff serious injury to her knees.

In granting summary judgment in 2007 favoring the airline, the District Court first discussed the question of whether the **violent reclining of the passenger seat constituted an "accident."** The court held **it was unlikely such an action did because** it was admitted that the passenger in front of the plaintiff did have a right to recline his seat and that, given the previous words exchanged between the two passengers, the physical and forceful confrontation involving the seat might not have been "unusual" or unexpected.

However, the court found this was not the determinative factor, but that the plaintiff had failed to establish causation because she was 100 percent responsible for her injury. She decided, after being moved to another seat, to put herself back in harm's way, thereby breaking any chain of causation that might have existed between any airline conduct and the plaintiff's injury.

Where altercations are suspected or occurring between passengers, a carrier would be wise to intervene at the earliest possible moment and do its best to separate the squabblers.

It would also behoove airlines to have stress-management education programs and training and written protocols covering guidelines for dealing with disruptive passengers.

Those protocols should advise when to cut off alcohol to passengers who are acting out and procedures for separating passengers by force and restraining those who are violent where necessary. Taking such reasonable steps to avoid further argument and possible consequence of physical injury bolsters the defense that any incident is wholly the result of a passenger's contributory fault--and that there is nothing more the airline could have done to avoid the injury claimed.

Given the stress on passengers and crew due to cramped quarters, delays and other incidents of air travel, it's reasonable to assume that claims involving passengers injured by other passengers will continue to challenge the courts and expose air carriers to liability in situations where it may be difficult to avoid it. However, sound policies--minimizing the chances of a tiff becoming a full-blown air-rage incident--can prevent such claims from taking off.

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