Maryland Journal of International Law

Volume 4 | Issue 2 Article 9

Warshaw v. Trans World Airlines, Inc.: Aviation - Warsaw Convention - Liability for Routine Repressurization Accidents

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AVIATION — WARSAW CONVENTION — AIR CARRIER'S LIABILITY FOR "ACCIDENTS" UNDER ARTICLE 17 DEFINED TO EXCLUDE INJURY CAUSED BY ROUTINE REPRESSURIZATION OF JET AIRCRAFT

Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400 (E.D. Pa. 1977).

Cyrus H. Warshaw, a passenger on a Trans World Airlines, Inc. (TWA) flight from Philadelphia to London on October 13, 1973 experienced a blockage in his left ear which he was unable to clear during

the course of the flight. After disembarking from the aircraft, Warshaw realized that he had totally lost his hearing in that ear. Warshaw and his wife instituted suit against TWA in the United States District Court for the Eastern District of Pennsylvania, claiming damages in accordance with the Warsaw Convention[1] [hereinafter referred to as the Convention], as modified by the Montreal Interim Agreement.[2] The court found, based on the medical expert testimony introduced at trial, that Warshaw's injury was proximately caused by the cabin repressurization of the aircraft during its descent to Heathrow Airport.[3] The issue of the air carrier's liability depended upon whether cabin repressurization qualified as an "accident" within the context of the Convention, the initial prerequisite for liability. The court declared this as a case of first impression and held that the routine repressurization of a jet aircraft cabin, during the plane's descent from a high altitude to land, is not to be

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1. The Warsaw Convention is officially titled, "The Convention for the Unification of Certain Rules Relating to International Transportation by Air," *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of United States proclaimed Oct. 29, 1934). For a thorough discussion of the Convention, *see* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld & Mendelsohn]. *See* Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968).

2. As originally drafted, article 22(1) of the Warsaw Convention limited the air carrier's liability to approximately $8,300 in American currency. Dissatisfaction with the low liability limits led to the Hague Conference in 1955, where the Hague Protocol was drafted, raising the liability limits to approximately $16,600. The United States, still discontented with the liability limitations, refused to ratify the Protocol. In 1965, a convention was held in Montreal, which again was unsuccessful in establishing liability limitation provisions acceptable to the United States. At that time, the United States denounced the Warsaw Convention under the authority provided by article 39 of the Convention. 53 DEP'T. STATE BULL. No. 924 (1965). With the threat of the United States' denunciation, the International Civil Aviation Organization (ICAO), and the International Air Traffic Association (IATA) immediately proposed new provisions acceptable to the United States in the Montreal Interim Agreement, which led the United States to withdraw its denunciation notice. Agreement CAB 18900, Approved, CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966), *reprinted in* 49 U.S.C.A. § 1502 note. The Montreal Interim Agreement is a contractual modification of the Warsaw Convention which does not have the binding effect of a treaty; it does not amend the treaty provisions until it has been ratified as an amendment to the treaty. The United States Senate has not ratified the Montreal Interim Agreement. The Agreement bypassed the treaty amendment procedures when the carriers changed their tariffs via the article 22(1) provisions. *See* article 22(1), *supra* note 1. *See also* 442 F. Supp. at 406, 407, *infra,* note 3. For a detailed discussion of the Montreal Interim Agreement, *see* Lowenfeld & Mendelsohn, *supra* note 1.

3. 442 F. Supp. at 407.

viewed as an accident which is actionable for purposes of article 17 of the Convention.[4] The holding hinged upon the condition that the descent was accomplished in a normal, customary fashion, without any complications or external disruptions, and in accordance with the customarily anticipated and preplanned manner of execution.[5]

Prior to the court's determination of the proximate cause of the injury, the defendant had stipulated that the cabin pressure system operated in the normal fashion and that no other malfunctions existed on board the aircraft at the time of the plaintiff's injury.[6] It was further established, based on a medical expert's testimony that, "[T]he cause of deafness was a traumatic injury to the inner ear nerves, which was caused by the unequalized pressure change displacing the eardrum, attached bones and prosthesis so that the prosthesis penetrated into the inner ear."[7] Warshaw's hearing was found to be within the normal range upon boarding the aircraft albeit he had undergone a stapedectomy to the left ear thirteen years prior to this occurrence and was suffering from a cold at the time of the flight. Judge Fogel determined that while the plaintiff's physical predisposition may have been one factor contributing to the injury, it was not the sole cause and that the injury could still have occurred in the absence of such a condition.[8] In its holding, the court thus relied exclusively upon the cabin repressurization as the sole proximate cause of Warshaw's injury.[9]

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4. *Id.* at 412.
5. *Id.*
6. *Id.* at 404.
7. *Id.* at 405.
8. *Id.*
9. *Id.* Perhaps the physical predisposition of the plaintiff should not have been dismissed by the court since it might have been an important consideration in determining the cause of plaintiff's injury for purposes of determining if an accident occurred. One author who discussed a similar factual situation, approached the analysis from a different perspective, stating:

> [T]he carrier is liable for damage sustained as a result of an *accident,* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. There must be a causal relation between the "accident" and the damage and when the Warsaw Convention is correctly interpreted only such a harmful event may be deemed an "accident" which is not only in connection with carriage by air but directly results from it. Undoubtedly the carrier will not be liable for an injury caused by a passenger to another passenger, e.g. in the course of a flight. The carrier is equally not liable if the damage arose from an event which cannot be deemed an "accident" in air traffic [an acute illness, e.g., a heart attack, a cerebral stroke or a miscarriage during the flight, etc.]. From this angle, it is possible to consider very problematic the decision rendered by the American City Court of Queen's County, New York, in June, 1951, *in re* H.G. Philios v. TWA: the court awarded damages to the plaintiff who

Warshaw's contention that his injury was an "accident" within the ordinary usage of the word[10] was undeniably valid, however, the issue posed by the court was, whether this "accident" or occurrence was the type of "accident" covered by the terms of the Convention. Recovery under the Convention is dependent on the initial invocation of article 17, which requires that an "accident" has occurred on board an aircraft or during embarking or disembarking.[11] Since the word "accident" was not defined within the context of the Convention, the court followed the established route for treaty interpretation by examining the legislative history of the treaty, pertinent legal interpretations employed by other courts and subsequent acts of the contracting parties.[12]

The Warsaw Convention was designed to create uniformity in dealing with passengers and airline carriers engaged in international air travel by limiting the international carrier's liability for damages sustained by passengers during the course of a flight or during embarkation or disembarkation.[13] To protect the carrier from the economic consequences of a catastrophic accident, its liability was limited to approximately $8,300 in U.S. currency, with a two-year statute of limitations.[14] The injured passenger has the burden of proving the invocation of the

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> during a flight from Rome to Athens on board an aircraft without a pressurized cabin, suffered a rupture of the ear-drum and bleeding from the ear; none of the passengers suffered a similar injury and an expert ascertained that the plaintiff had been ill with a bad inflammation of the upper respiratory organs. It is impossible to agree with this decision, because no "accident" within the meaning of the Warsaw Convention was concerned and in addition the plaintiff was predisposed to an injury of the ear-drum and her condition was not good enough for carriage by air.

M. MILDE, THE PROBLEMS OF LIABILITIES IN INTERNATIONAL CARRIAGE BY AIR, A STUDY IN PRIVATE INTERNATIONAL LAW, 58-59 (Albert Kafka, transl. 1965).

10. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1976) which defines "accident" as:

> an event or condition occurring by chance or arising from unknown or remote causes; a lack of intention or necessity; chance often opposed to design; an unforeseen, unplanned event or condition; a sudden event or change occurring without intent or volition through carelessness, unawareness, grievance, or a combination of causes and producing an unfortunate result.

See also THE OXFORD ENGLISH DICTIONARY, vol. 1 at 55 (1933) which defines "accident" as "anything that happens. An occurrence, incident, event. Anything that happens without foresight or expectation; an unusual or known cause; a casualty, a contingency."

11. *See supra* note 1.

12. Block v. Compagnie Nationale Air France, 386 F.2d at 337.

13. *See* Lowenfeld & Mendelsohn, *supra* note 1, at 498-99.

14. *Id.*

Convention, via article 17, which creates a separate cause of action.[15] And in negligence actions, while there was a presumption of fault on the carrier, it was free to raise the defenses of due care and contributory negligence.[16]

The Montreal Interim Agreement was later designed to raise the limits of liability under article 22(1) of the Convention to approximately $75,000 in U.S. currency.[17] In addition, absolute liability standards were created under article 17 of the Convention, thereby eliminating the carrier's defense of due care under article 20(1).[18] The carrier's defense of contributory negligence under article 21 of the Convention was retained.

The Guatemala Protocol of 1971, a relatively recent conference proposing to amend the Convention, raised the issue of whether an air carrier must become the absolute insurer of the health of its passengers.[19] The adopted version of the Guatemala Protocol, which the United States Senate has not ratified, would change article 17 to read:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the *event* 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger (emphasis added).[20]

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15. 442 F. Supp. at 405. The parties to this action stipulated that article 17 of the Convention gives rise to a cause of action and establishes a basis of liability. *See supra* note 13. In MacDonald v. Air Canada, 439 F.2d 1402, 1404 (1st Cir. 1971), the United States Court of Appeals stated that the first requirement for the invocation of the Convention is to find an accident under article 17.

16. *See supra* note 1, article 20(1), 49 Stat. at 3019 (defense of due care) and article 21, 49 Stat. at 3019 (contributory negligence defense).

17. *See* Lowenfeld & Mendelsohn, *supra* note 1 at 596-99. *See supra* note 2.

18. *See supra* note 1, at 599-601.

19. The official title of the convention is, "A Protocol to Amend the Convention for the Unification of Certain Rules Pertaining to International Carriage by Air," March 1971, ICAO Doc. 8932. The Protocol of Guatemala City, signed March 8, 1971 has contractually modified the Warsaw Convention and interim agreements by raising the liability limits for death or personal injury to $100,000 and makes this limit "unbreakable" with the option of supplementary indemnity for the contracting country. By establishing an "unbreakable" limit, article 25, which allows unlimited liability for acts of wilful misconduct by the carrier or its agents was discarded. The only defenses available to the carrier are contributory negligence and the state of health of the passenger or the latent defect of his baggage. *See* 442 F. Supp. at 410-412. For a detailed discussion of the Guatemala Protocol, *see* Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972).

20. Guatemala Protocol, *supra* note 19.

Although the Guatemala Protocol does not have the authority of a modification or amendment to article 17 of the Convention, thus not controlling law in this case, it serves as an important tool of legislative interpretation of those matters arising *in futuro* which were not contemplated by the original drafters.[21]

Unable to glean sufficient interpretational guidance from the textual language or the legislative history of the Convention, the court addressed the case law, limiting its inquiry to that of the United States.[22] It was found that no American court has confronted a factual situation in which an injury was caused during the course of a normal, routine flight.[23] Two cases cited by the court, *Berguido v. Eastern Airlines, Inc.*,[24] and *Block v. Compagnie Nationale Air France*,[25] involved airplane crashes and dealt only with the issues of the carrier's defense of due care under article 20(1) of the Convention, and the applicability of the Convention to charter groups, respectively. In both cases, no one disputed that airplane crashes were accidents under article 17 and the issue of the interpretation of "accident" was never raised. Airplane crashes and unexplained disappearances would undisputedly be risks of air travel within the context of "accident" under article 17, for which the air carrier would be liable should injuries to passengers ensue, unless the passenger contributed to his own injury by an intentional or negligent act.[26]

The court then examined a set of cases involving injuries occurring during situations which arose in what would have to be called nonroutine, abnormal flights, such as hijacking, sabotage and terrorist

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21. 442 F. Supp. at 411.
22. *Id.* at 408.
23. *Id.*
24. 369 F.2d 874 (3rd Cir. 1966), *cert. denied*, 390 U.S. 996 (1968).
25. 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 965 (1968).
26. *See* Lowenfeld & Mendelsohn, *supra*, note 1, at 519–22, where it was explained that the Warsaw Convention applied the doctrine of *res ipsa loquitur* to airplane crashes. The doctrine created a presumption of carrier liability upon the occurrence of any airplane crash, subject to the defense of due care and contributory negligence. As the knowledge and experience in the field of aviation grew in the 1950s and 1960s, Professor W. Prosser was able to conclude that the safety records established for aviation justified a blanket application of *res ipsa loquitur*, or the presumption of the carrier's negligence to all unexplained airplane crashes or disappearances of aircraft. The Warsaw Convention went one step further than *res ipsa loquitur* by shifting the burden of persuasion upon the carrier to prove non-negligence. *Id.* With the advent of the Montreal Interim Agreement, absolute liability standards placed liability on the carrier for all airplane crashes or airplane disappearances, regardless of fault, unless the carrier raised the defense of contributory negligence or intentional acts of sabotage of the party bringing the action.

attacks.[27] These cases held that such events were "accidents" within the context of article 17. The United States District Court of the Southern District of New York in *Husserl* held that a "hijacking" was an "accident" stressing that acts of sabotage, intentionally performed by third parties, were contemplated at the Montreal Convention and were later incorporated within the Agreement by the carriers.[28] The Montreal Agreement expressly reserved the carrier's rights and liabilities against wilful acts of others causing injury to any passengers.

Two final cases discussed in *Warshaw,* exemplifying accidental injuries sustained in a nonroutine manner involved falls. In *Chutter v. KLM Royal Dutch Airlines,*[29] the plaintiff had boarded the aircraft and had been escorted to her seat by the stewardess. The plaintiff then decided to return to the entrance doorway of the plane to wave a final farewell to her family. Stepping out on the entrance ramp, at the exact moment that the ramp was being removed, she fell. In *Chutter,* the United States District Court for the Southern District of New York concluded that this occurrence was an "accident" within the context of article 17 of the Convention, but dismissed the action based on the carrier's article 21 defense of contributory negligence and on the running of the statute of limitations under article 29(1) of the Convention.[30]

In *MacDonald v. Air Canada,*[31] an elderly lady fell unwitnessed at the baggage section of an airport terminal. The United States Court of Appeals for the First Circuit dismissed the suit, holding that there was no "accident" established in the absence of evidence regarding the circumstances of the fall.[32] The *MacDonald* court stated that it was just as reasonable to assume that some internal condition caused the fall as that the latter was the result of an accident. The *Warshaw* court further construed the *MacDonald* holding as rendering *res ipsa loquitur* inapplicable in situations where proof of an abnormal external factor

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27. Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972); Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95 (W.D. Pa. 1975). For a detailed discussion of *Evangelinos* and other cases involving the application of article 17 to accidents caused during embarking and disembarking, *see* 3 INT'L. TRADE L. J. 299 (1977).

28. 351 F. Supp. at 707.

29. 132 F. Supp. 611 (S.D.N.Y. 1955).

30. Although the carrier may have been negligent in failing to block off the doorway prior to removing the ramp, negligence per se does not make the flight or the manner of flight operations nonroutine or abnormal. The circumstances of this case do not appear to fit neatly within the *Warshaw* court's analysis of incidents which are "accidents" under the Convention.

31. 439 F.2d 1402 (1st Cir. 1971).

32. Id. at 1404-05.

causing or contributing to the injury is absent.[33] The district court concluded that the *MacDonald* holding "would not, given its most generous limits, sustain recovery in the case at bar," since the plaintiff would necessarily have to prove the existence of an abnormal external event as the cause of his injury. The proximate cause of Warshaw's injury, which the court had established as the cabin repressurization, was functioning in a normal, preplanned manner.

The *Warshaw* court then concluded that all of the cases cited with the exception of the *MacDonald* case, involved " 'out-of-the-ordinary' unanticipated incident[s] as the immediate proximate causes of injur[ies]."[34] The "common thread" which was stated to tie these cases together was the occurrence of a happening or event which was beyond the normal and preplanned manner of operation for the flight.[35] Based on the district court's analysis of the United States case law, the circumstances surrounding Warshaw's injury as applied to the law were not accidental or abnormal, and the proximate cause of his injury was an ordinary, normal, preplanned incident, and therefore, not an "accident."

Finally, the district court reviewed the post-Montreal Agreement documentary material and acts of the contracting parties to aid in the interpretation of the Convention.[36] Statements made during the subcommittee conference by the drafters of the Guatemala Protocol were discussed in detail by the *Warshaw* court. These statements included expressions that "accident" does not include death or illness from natural causes,[37] and that in reference to persons, baggage and cargo, absolute liability provisions should be limited to "airplane accidents" or "risks of the air."[38] The court then discussed a statement raised by a delegate to the Guatemala Conference from the United Kingdom, who commented that in a hypothetical case where a heart attack is brought about by

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33. 442 F. Supp. at 410,

34. *Id.*

35. *Id. But see, supra* note 29.

36. 442 F. Supp. at 410. *See supra* note 12.

37. 442 F. Supp. at 411. In addition, the *Warshaw* court stated that it would recognize as authoritative one of the reporter's statements to the Guatemala subcommittee to the effect that "accident" under the Convention should be interpreted in its ordinary or common-sense meaning of "an untoward event, out of the ordinary, triggered by some external event, in contrast to an occurrence which may come about under conditions of normal operation because of inherent weakness or disability, notwithstanding the absence of any extraordinary external force or event. *But see, supra* note 10, for several different definitions of "accident." *Id.* at 412.

38. 442 F. Supp. at 412.

fright from sudden, severe turbulence, the carrier should be liable.[39] He referred to an injury caused by the combination of a physical infirmity and an external event as a "borderline" case, which is similar to the analysis the *Warshaw* court applied to *MacDonald.* Based on this legislative history, the *Warshaw* court concluded:

> [I]t is clear under Article 17 that if the hypothetical passenger's heart condition were to have been aggravated by the acceleration required on take-off, or by the deceleration which occurs when landing, such an occurrence would not be an injury as the result of an "accident," even under the expanded provisions of Article 17.[40]

The District Court concluded that had plaintiff's injury occurred during a flight which had an abnormality or malfunction in the operation of the aircraft the court might have decided differently, but that under the circumstances the plaintiff was prevented from invoking the Convention.[41] Recovery was thus denied Warshaw, and the suit dismissed.

Alternative routes of analysis which the district court might have employed to reach its conclusion will be briefly discussed. In the previously decided terrorist and hijacking cases, "accident" was extended to include intentional acts of third parties. This result was brought about by liberalizing the traditional rules of construction and focusing not only on the specific terms involved in the treaty text but also on underlying policy considerations and the legislative intent of the contracting parties as expressed *in futuro* regarding incidents not originally anticipated in the Convention.[42] In *Husserl,* for example, the court stated that the basis for a liberal construction of article 17 stems from the absolute liability system established by the Montreal Interim Agreement.[43] With an absolute liability system, recovery by those parties needing it most would be maximized and the process expedited. The carrier was recognized as the party most capable of assessing and insuring against air transportation risks, and of efficiently distributing costs for injuries sustained.[44] The subsequent 1971 Guatemala Convention followed this view, replacing the term "accident" with "event."[45]

The *Warshaw* court, however, rejected this approach, perhaps on the grounds that the liberal construction approach was to be utilized only in

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39. *Id.*
40. *Id.*
41. *Id.* at 413.
42. *Id.* at 411.
43. *See supra* note 28.
44. 351 F. Supp. at 707.
45. *See supra* at 285 and note 19.

those cases involving specific acts of terrorism and hijacking, which have underlying policy considerations unique to those limited situations. In these types of cases, the carrier is the party best able to take preventative measures to avoid terrorist activities. For example, the carrier may install metal detection devices in airport terminals to eliminate the carriage of weaponry onto the aircraft. The underlying policy consideration for requiring a carrier to bear this risk of loss is different, however, from a policy requiring it to be a "blanket insurer" of all possible mishaps aboard the aircraft. By distinguishing the situation in *Warshaw* from those which existed in the hijacking and terrorism cases, the court avoided the result of forcing air carriers to become blanket insurers.

Finally, because allocation of risks and insurance coverage requirements were indeed major underlying policy considerations at the time the Convention was being drafted,[46] the *Warshaw* court might have discussed article 17 coverage in terms of basic insurance principles and considerations. Two distinctions that have been made traditionally in standard liability insurance policies grew out of the variations in the ordinary definition of the term "accident." The clearest example of this variation is found in the *Oxford English Dictionary,* which defines the term "accident" as "Anything that happens; an occurrence, incident, event. Anything that happens without foresight or expectation; *an unusual event, which proceeds from some unknown cause, or is an unusual effect of a known cause.*"[47] (emphasis added) The distinction between an accident as a cause of injury or as a result of injury, led to standard insurance coverage forms for "unexpected loss" and "accidental means."

Unexpected loss coverage was created to exempt from a policy's coverage "nonaccidents," or losses which occur with such frequency that they become normal business costs, or which are so foreseeable as to become calculated risks.[48] The determination of what constitutes an "unexpected loss" under insurance coverage varies with the individual circumstances involved, including the foreseeability of the loss, its recurrence rate, and the risks taken by the insured.[49] For example, in the area of product liability insurance, a standard form may cover liability for "occurrences," which are defined as "accidents, including injurious exposure to conditions, which result, during the policy period, in bodily

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46. *See generally* Lowenfeld & Mendelsohn, *supra* note 1.

47. *See* THE OXFORD ENGLISH DICTIONARY, *supra* note 10.

48. *See generally,* R. KEETON, BASIC TEXT ON INSURANCE LAW, ch. 5, §§ 5.4(c) and (e) (1971).

49. *Id.* at 299.

injury or property damage neither expected nor intended from the standpoint of the insured."[50]

Accidental means insurance coverage limits liability to losses caused by "accidental means."[51] This type of coverage was often used in life insurance policies and was narrowly enforced. The distinctions between cause and effect occasionally produced inequitable results, and have since been abolished in most areas of insurance law.[52] Article 17, which states that an air carrier is liable for personal injuries and damages sustained "if the accident which caused the damage so sustained took place on board the aircraft" clearly appears to be drafted in a form analogous to accidental means insurance coverage. The intent of the original drafters of the Convention, and the intentions of subsequent contracting parties to the Convention appear to support imposition of liability in situations which involve accidental causes of injury, and not accidental results of ordinary events and operations. The parties to the Guatemala Protocol specifically drafted an additional limitation in article 17 to preclude an air carrier's liability as a "blanket insurer" for physical infirmities of passengers unrelated to "risks of the air." Based on the analysis of article 17 under basic insurance principles, further support is provided for the *Warshaw* holding.

As long as the contracting parties refrain from amending the treaty to provide otherwise, the result reached in *Warshaw* appears to be the most equitable one possible under all the circumstances. The burden of coming forward with some evidence of an unusual event which caused the passenger's injury is not to be considered lightly. The modern rules of discovery, however, should make a potential plaintiff's fact-gathering responsibilities a manageable task. The advantages which inure to the benefit of the airlines and thus to all passengers because of this interpretation are significant. This is particularly true when one realizes that certain "risks" of air travel, most notably cabin pressurization, cannot be removed given the present state of technology. The interpretation of the word "accident" in this case is well reasoned and should be followed in subsequent litigation.[54]

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50. *Id.* at 300.
51. *Id.* at 302-03.
52. *Id.* at 303-04.
53. 442 F. Supp. at 411. *See supra* note 19.
54. To date at least one court has applied the reasoning of *Warshaw* to a similar set of circumstances. *See* DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1197 (3rd Cir. 1978).