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Evangelinos v. Trans World Airlines: Aviation - Warsaw Convention - Liability of Airline Carrier

AVIATION — WARSAW CONVENTION — AIRLINE CARRIER IS LIABLE FOR INJURIES SUSTAINED BY PASSENGERS PRIOR TO BOARDING DURING TERRORIST ATTACK — *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975).

In *Evangelinos v. Trans World Airlines, Inc.*[1] and *Day v. Trans World Airlines, Inc.*,[2] the United States Courts of Appeals for the Third and Second Circuits held that under Article 17 of the Warsaw Convention,[3] as modified by the Montreal Agreement of 1966,[4] an airline carrier was liable for the injuries suffered by its passengers prior to the actual boarding of the aircraft once those boarding procedures were substantially under way. The litigation in *Day* and *Evangelinos* arose out of the tragic events which took place at Hellenikon Airport in Athens, Greece on August 5, 1973.[5] At approximately 3 p.m. on that day, 89 passengers holding tickets for TWA Flight 881/5, scheduled to fly from Athens to New York, were awaiting final boarding instructions[6] in the airport transit lounge. After seven passengers had completed routine pre-boarding inspections, two Arab terrorists,

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1. Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977).

2. Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975).

3. The official title of the Warsaw Convention is "The Convention for the Unification of Certain Rules Relating to International Transportation by Air." It is reproduced at 49 Stat. 3018. Article 17 provides that: "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."

4. 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 Agreement provides in part that: "By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention . . . providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees. . . . The parties further agree to provide in their tariffs that the carrier shall not, with respect to any claim arising out of the death, injury, or wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention."

5. Evangelinos v. TWA, 396 F. Supp. 95; Day v. TWA, 393 F. Supp. 217.

6. 393 F. Supp. at 221. *See* note 37 *infra*.

members of the infamous Black September terrorist organization, opened fire on the crowd, killing three and injuring an additional forty persons.[7]

The surviving passengers and the personal representatives of the deceased victims of the Athens attack brought separate actions against TWA in the United States District Courts for the Western District of Pennsylvania[8] and the Southern District of New York.[9] Plaintiffs sought to recover damages under the provisions of Article 17 of the Warsaw Convention.[10] In both cases the plaintiffs and defendant TWA moved for summary judgment on the issue of liability.[11] The plaintiffs contended that the airline was absolutely liable under the Convention; the defendants, on the other hand, argued that Article 17 of the Warsaw Convention was not applicable to the facts of the case on the grounds that even if an "accident" had transpired, liability could not attach because the damage sustained had not occurred on board the aircraft or "*in the course of any of the operations of embarking* or disembarking."[12] (emphasis added) The district courts in *Evangelinos* and *Day*, on the same facts, reached contrary results. In *Evangelinos v. TWA*,[13] Judge Snyder of the Western District of Pennsylvania granted the defendant's motion for summary judgment and dismissed the plaintiffs' complaint on the grounds that the plaintiffs were not "within the course of any of the operations of embarkation" and that as a result their injuries were not incurred "as a result of an accident actionable under the Warsaw Convention."[14] However, in *Day v. TWA*,[15] Judge Brieant of the Southern District of New York ruled in favor of the plaintiffs, finding that the plaintiffs were plainly engaged in embarkation inasmuch as they had completed five out of a total of the eleven steps in the airline's mandatory preboarding procedures at the time the accident occurred.[16] On

7. 396 F. Supp. at 96.

8. *Id.* at 95.

9. 393 F. Supp. 217.

10. *Supra* note 3.

11. TWA did not contend that the terrorist attack did not constitute an accident within the meaning of Article 17. 393 F. Supp. at 220.

12. *Id.*

13. 396 F. Supp. 95.

14. *Id.* at 103.

15. 393 F. Supp. 217.

16. *Id.* at 221.

appeal the Second Circuit Court of Appeals adopted the rationale of the lower court's opinion and affirmed the judgment for the plaintiffs.[17]

In *Evangelinos v. Trans World Airlines*, the district court granted the defendant's motion for summary judgment on the issue of liability.[18] In reaching its conclusion that the airline was not liable for the injuries suffered by its passengers as a result of the terrorist attack, the court relied extensively upon its interpretation of the "legislative" history of Article 17.[19] The court discussed the divergent treatments accorded to baggage and passengers under the Warsaw Convention.[20] In an early draft, the provisions concerning passengers and baggage were combined and coverage was extended to both passengers and baggage "from the time when the passengers, goods or baggage enter the airport of departure until the time when they exit from the airport of arrival."[21] The delegates rejected this proposal, and Draft Article 20 was split into what became Article 17 to cover passengers and Article 18 to cover baggage. Article 18(2) retained the broad coverage of the Draft Article as it pertained to goods and baggage.[22] Article 17 covered damages pertaining to passengers within a notably narrower sphere; that is, "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."[23] By distinguishing the terms of coverage extended to passengers on the one hand and baggage on the other, it seems clear that the delegates intended to restrict the scope of carrier's liability for injuries suffered by passengers. The district court then scrutinized the discussions of several delegates to the Con-

17. 528 F.2d 31 (1975), *cert. denied*, 429 U.S. 890, 97 S. Ct. 246 (1976).

18. 396 F. Supp. at 103 (1975). The court had subject matter jurisdiction under 28 U.S.C. § 1331 which provides: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws, or treaties of the United States."

19. *Id.* at 100. The district court deems this to be a well-established practice repeating the dictum of Wisdom, C.J., in Block v. Compagnie Nationale Air France, 386 F.2d 323, 336 (1967): "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the Convention."

20. *Id.* at 101.

21. *Id.* at 100.

22. 49 Stat. at 3018–19.

23. *Id.*

vention and concluded that the broadest interpretation conceived of by the delegates would have covered passengers from the time they left the terminal and entered the traffic apron. Moreover, the court found that the delegates intended to define limits based upon geographical factors, not on the passengers' activities.[24]

The *Evangelinos* decision of the district court rests on an interpretation of the Warsaw Convention which is in conformity with the earlier interpretations of the First Circuit. In *In Re Tel Aviv*, the carrier was held not liable for the injuries suffered by disembarking airline passengers who were attacked by terrorists after they had entered the terminal.[25] The district court granted defendant carrier's motion for summary judgment on the ground that the plaintiff's post-flight activities did not fall within the scope of activities covered by the Warsaw Convention.[26] The passengers had completed their transportation by air since they were far removed from the operation of the aircraft. Consequently, Article 17 of the Warsaw Convention was deemed inapplicable because the plaintiffs were not "in the course of any of the operations of disembarking." The passengers on TWA Flight 881/5 were equally far removed from the operation of the aircraft, gathered in the terminal building. Hence, under the rationale of *In Re Tel Aviv*, the defendant TWA would not have been held liable for the injuries suffered by its passengers within the terminal. In *MacDonald v. Air Canada*,[27] the plaintiff was an arriving international airline's passenger who fell while waiting for the delivery of her luggage in the baggage area of an airport. The Court of Appeals for the First Circuit unanimously upheld a directed verdict dismissing her complaint on the ground that the plaintiff's fall had not occurred in "the course of any of the operations of disembarking."[28] The Court of Appeals for the First Circuit found that "the operations of disembarking" had certainly ended once the passenger was safely within the terminal building.[29] The court justified its construction of Article 17 by examining the purposes underlying the Warsaw Convention. The court emphasized an intention of the delegates to shift the burden

24. 396 F. Supp. at 102.
25. 405 F. Supp. 154, 158 (1975).
26. *Id.*
27. 439 F.2d 1402 (1971).
28. *Id.* at 1405.
29. *Id.*

of proof to the airline when there was an air transportation accident since a plaintiff would have practical difficulty in proving that an accident resulted from the airline's negligence.[30] Under the circumstances of this case where the plaintiff fell in a public area, the rationale that difficulties of proof impose an unfair burden on a plaintiff had no bearing.

Several foreign jurisdictions have also interpreted Article 17 with the same result that was reached by the district court in *Evangelinos v. TWA*. In *Maché v. Air France*[31] the French court limited the scope of the term "in the course of operations of embarking" to refer only to those activities which took place on the traffic apron. In *Maché*, the plaintiff was being led by two stewardesses from the airplane to the terminal when he was injured. The injury was sustained in a "customs area" located outside the traffic apron but not within the terminal itself. The Court of Cassation held that Article 17 did not apply to the plaintiff's accident because the Warsaw Convention regulates ground accidents "in the course of any of the operations of embarking" only to the extent that such accidents occur in a place where passengers are exposed to the risks of aviation.[32] In the more recent French case of *Forsius v. Air France*,[33] the plaintiff was injured while in a lounge used by the passengers of various airlines who had passed through customs. In terms of plaintiff's location at the time of the accident, the circumstances are virtually the same as those in *Evangelinos v. TWA*. In *Forsius*, however, the Tribunal held that the plaintiff was not involved in any of "the operations of embarking." In *Blumenfeld v. BEA*,[34] a West German court held a carrier liable for the injuries suffered by the plaintiff in falling on a staircase leading from the terminal to the traffic apron. The court reasoned that the carrier assumed responsibility for the care of its passengers when it requested them to depart from the waiting room for the aircraft. While the Berlin Court of Appeals read Article 17 more expansively

30. *Id.*

31. Maché v. Air France, judgment of April 12, 1967, Cour d'Appel de Rouen, [1968] D.S. Jur. 515, *aff'd*, judgment of June 3, 1960, Cass Civ. Ire, [1960] D.S. Jur. 373. *See Annot.*, P. Chauveau, [1968] D.S. Jur. 517; *Annot.*, P. Chauveau, [1970] D.S. Jur. 374.

32. *Id.*

33. Rev. Fr. Droit Aerien 216 (Tribunal de Grande Instance de Paris, 1973).

34. Judgment of March 11, 1961, Kammergericht Berlin, [1961] N.J.W. 1170.

than the French courts, an essential element of its holding that the plaintiff was "in the course of the operations of embarking" was that she sustained the injury in a location outside the terminal. Foreign courts have been notably reluctant to construe "the operation of embarking or disembarking" so broadly as to apply to the injuries suffered within the terminal. There is, however, one significant feature that distinguishes the cited foreign cases from the *Evangelinos* case. The injuries suffered by the various plaintiffs in the French and West German cases were not at all extraordinary; quite simply, each one fell and was injured. The injuries suffered by the plaintiffs in *Evangelinos* were perpetrated by terrorists engaged in an activity that could reasonably be viewed as a risk that inheres in modern aviation. The interpretation of Article 17 of the Warsaw Convention of the district court in *Evangelinos v. TWA* conforms with the prevailing authority of other signatories to the treaty and with American authority prior to the decision in *Day v. TWA*.

In *Day v. TWA*[35] the United States Court of Appeals for the Second Circuit diverged from the traditionally narrower constructions of Article 17 and found that the injuries sustained by the passengers during the terrorist attack took place "in the course of the operations of embarking." The court focused its analysis on three factual issues: (1) the passengers' activities at the time of the accident, (2) the degree of control exercised by the airline over these activities, and (3) the location of the passengers at the time of the accident.[36] The Second Circuit adopted the factual analysis of the lower court which found that the passengers had to follow eleven steps in order to board the aircraft.[37] The passengers had gone through five of the enumerated steps when the terrorists struck. The court concluded that the passengers were "in the course of the operations of embarking" at the moment of attack. Significantly, the pas-

35. 528 F.2d 31.

36. *Id.*

37. 393 F. Supp. at 221. The eleven enumerated steps were (1) the presentation of the passengers' tickets at the TWA check-in-desk, (2) obtaining boarding passes, (3) obtaining baggage checks, (4) obtaining a seat assignment, (5) passing through passport and currency controls of Greek authorities, (6) submission to a personal search for explosives and weapons by Greek police, (7) submission of carry-on baggage to a similar inspection, (8) passing through Gate 4 to a bus, (9) boarding the bus, (10) riding the bus to the airplane, (11) leaving the bus and entering the airplane.

sengers had not yet submitted to a search of their persons and hand baggage for weapons, nor had they passed through the gate leading to the bus which they were scheduled to board for the short ride to the airplane. The Second Circuit viewed these eleven steps as involuntary acts which gave the defendant control over the passengers' activities and concomitant responsibility for any injuries they suffered.[38]

The court discussed the legislative history of the Warsaw Convention to substantiate its construction of Article 17 and its ultimate finding of liability. The analysis of the various proposals for Article 17 during the drafting stages helped the court to go beyond the traditional location-based test proposed by the defendant.[39] As adopted, the language of Article 17 represented a rejection by the delegates of more radical proposals concerning the scope of liability of the carrier for accidents sustained by its passengers.[40] The court inferred from the adoption of this moderate view that the delegates did not intend a rigid rule based exclusively on the passengers' spatial location to determine the carrier's liability.[41] The court concluded that the legislative history of Article 17 did not preclude the application of a tripartite test which would allow the court to consider whether the high degree of control exercised by the airline over the passengers coupled with the adherence of the passengers to the

38. 528 F.2d at 33–34.

39. *Id.* at 33. The defendant unsuccessfully argued that the applicability of Article 17 depended solely upon the passengers' location at the time of the accident. Traditionally courts had not considered passengers within the terminal to be engaged in "any of the operations of embarking or disembarking."

40. *Id.* at 35. In the Court's view, the Convention adopted the moderate position proposed by Prof. George Ripert, the French delegate. The Comite Internationale Technique d'Experts Juridique Ariens (CITEJA) had prepared a draft at the Paris Convention of 1925 which would have extended coverage to passengers "from the time when [they] enter the Airport to departure until the time when they exit from the Airport of arrival." Against this far-reaching proposal, was a severely constrictive proposal promulgated by the Brazilian delegate, A. Pecanha; in which liability did not attach until the passengers had boarded the aircraft. Between these two poles stood Ripert's suggestion that the Convention should adopt language of sufficient latitude to allow for the diverse cases that would confront courts in applying the provisions.

41. *Id.* Whether this was the intent of the delegate is difficult to say. Prof. Ripert suggested that they intended to leave the resolution of the issue to the courts on the basis of a factual inquiry in each case.

airline's pre-boarding procedures placed them within the ambit of Article 17.[42]

The plaintiffs in the *Evangelinos* litigation appealed to the Third Circuit Court of Appeals which reversed in favor of the plaintiffs, relying heavily on the Second Circuit's opinion in *Day v. TWA*, handed down six months earlier. The extensive control of the airline over the passengers brought them within the meaning of Article 17.[43]

The emerging American construction of Article 17 is typified by the opinions of the United States Courts of Appeals for the Second and Third Circuits in the *Day* and *Evangelinos* decisions.[44]

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42. *Id.* The Second Circuit Court of Appeals also took into account considerations of public policy. The court articulated three reasons why the cost of the injuries suffered by the passengers are more justly borne by the carrier than by the passengers themselves. First, the carrier may adjust its tariff so as to spread the costs of such accidents among the larger class of airline passengers. The distribution of such costs alleviates "what would otherwise be a crushing burden to those few unfortunate enough to become accident victims." 528 F.2d at 34. Secondly, the prevention of such accidents can be economically accomplished by the airlines rather than the passengers. See G. CALEBRESI, THE COSTS OF ACCIDENTS 152 (1970). Of the involved parties, the carrier is in the best position to contribute directly to the deterrence of terrorist attacks. Thirdly, the administrative costs to the plaintiffs to maintain an action against the owner of an airport in another nation would be prohibitive. To disallow a suit against the carrier under Article 17 would leave to the plaintiffs this costly alternative.

43. Evangelinos v. Trans World Airlines, Inc., 550 F.2d at 155.

44. There remains, however, some judicial reticence to adopt the more expansive judicial construction of liability under the Warsaw Convention. In the recent case of Hernandez v. Air France, 545 F.2d 279 (1st Cir., 1976), the First Circuit Court of Appeals upheld the decision in In re Tel Aviv, 405 F. Supp. 154, 155 (D.P.R. 1975). The passengers had descended the airplane's stairs and then proceeded by bus or on foot to the air terminal situated more than one-third of a mile from the airplane. Immigration authorities inspected the passengers who then awaited the arrival of their luggage. As they stood in the main baggage area, three terrorists fired submachine guns into the crowd causing the deaths and injuries giving rise to the plaintiffs' cause of action. The plaintiffs sued Air France under Article 17 of the Warsaw Convention as modified by the Montreal Agreement claiming that the carrier was liable since the passengers were allegedly "in the course of the operations of disembarking." The appellate court rejected the plaintiffs appeal and affirmed the lower court's decision, concluding that the passengers were entitled to recover damages.

The court attempted to reconcile its holding, namely, that passengers who are simply awaiting the arrival of their luggage have severed their relationship with the air carrier for the purposes of Article 17, with the test adopted by the Second and Third Circuits in the *Day* and *Evangelinos* cases on factual grounds. First, the passengers were not engaged "in any activity relating to effecting their separation from the aircraft." *Id.* at 282. Secondly, the airline did not exercise the requisite

The United States Supreme Court has denied TWA's petition for certiorari in *Day v. TWA*.[45] Previously, no court, domestic or foreign, had found passengers within an airport's terminal to be within the ambit of Article 17 of the Warsaw Convention. While American and foreign courts may eventually reach uniform results, there is presently some uncertainty as to the extent of the coverage of Article 17. If greater uniformity in the application of Article 17 is desired, the signatory nations might consider amending the Warsaw Convention in order to clarify the standard which courts should apply in incidents such as those in *Day* and *Evangelinos*. Amendment of the treaty would, however, involve substantial practical and diplomatic difficulties. It is not at all clear that all nations would favor the expansive formula laid down by the United States Circuit Courts. If uniformity is not attainable, or if it is not deemed to be desirable, the question becomes whether the results of an expansive construction of Article 17 are equitable. By assuming an active role, American courts may prove capable of adapting to the rapidly evolving problems of aviation and encouraging airlines to insure the safety of their passengers more effectively.[46]

William Helfand

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degree of control over the passengers' activities; Air France did not prescribe procedures which the passengers were obliged to follow in retrieving their luggage. *Id.* Finally, the court did not concur in the policy judgments made by the courts in *Evangelinos* and *Day* that the airline should be liable for injuries suffered at the hands of terrorists. In support of its position, the court pointed out that there was no logical nexus between the injury and air travel itself since terrorist attacks occurred in a multitude of circumstances. Furthermore, the court stated that the remedies provided by local law would usually suffice to allow persons injured by terrorist attacks to recover for their injuries.

45. *Supra* note 17.

46. *See generally,* Comment, *An Interpretation of the "Embarking" and "Disembarking" Requirements of Article 17 of the Warsaw Convention,* 16 COLUM. J. INT'L L. 705 (1977).