

No. 17-977

In The
Supreme Court of the United States

ETIHAD AIRWAYS P.J.S.C.,

Petitioner,

v.

JANE DOE & JOHN DOE, husband and wife,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Article 17(1) of the Montreal Convention allows recovery for mental or psychic injuries as “damage sustained,” where an “accident” causes a “bodily injury” but the mental or psychic injuries are not caused by or do not flow from the “bodily injury.”

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INTRODUCTION

Respondents respectfully request that the Court deny the petition for a writ of certiorari for two fundamental reasons. First, the decision below neither conflicts with the two unpublished circuit decisions touching upon Article 17(1) of the Montreal Convention, as argued by the Petitioner; nor does it present a conflict amongst the circuits. Second, the decision below is faithful to the Court's prior decisions, and represents a well-reasoned and careful textual analysis of Article 17(1), properly viewed through the lens of that new treaty.



OPINIONS BELOW

1. The Opinion of the Court of Appeals for the Sixth Circuit, reversing the district court's partial-summary judgment order, and remanding for further proceedings, is officially reported at 870 F.3d 406 (6th Cir., 2017). It is provided in Pet. App. at 5a-64a.

2. The Order of the Court of Appeals for the Sixth Circuit denying rehearing and rehearing *en banc*, entered on October 6, 2017, is not officially reported, but is reproduced in Pet. App. at 1a.

3. The Opinion and Order Granting Defendant's Motion for Partial Summary Judgment in the District Court, unofficially reported at 2015 WL 5936326 (E. D.

Mich., Oct. 13, 2015) is reproduced in the Pet. App. at 65a-70a.

4. The Stipulation and Order of Dismissal with Prejudice of the District Court, entered December 16, 2016, is reproduced in the Pet. App. at 71a-74a.

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TREATY PROVISION INVOLVED

The applicable treaty provision involved is Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 (entered into force Nov. 4, 2003), reprinted in S. Treaty Doc. 106-45, 1999 WL 33292734 (“Montreal Convention”). The full text of the Montreal Convention is reproduced in Pet. App. at 75a-108a.

Article 17(1) of the Montreal Convention reads:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident 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.

Also discussed in the decision below is Article 17 of the Warsaw Convention,¹ whose terms are similar,

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (entered into force 1934) (reprinted in note following 49 U.S.C.A. § 40105 (1997) (“Warsaw Convention”).

but not materially identical, to Article 17(1) of the Montreal Convention.

Article 17 of the Warsaw Convention reads:

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.



STATEMENT OF THE CASE

Jane Doe reached into her eleven-year-old daughter's seatback pocket aboard Etihad Airways Flight 151 and was stuck by a hypodermic needle that lay hidden inside. The needlestick punctured the skin on her finger and drew blood. At the time, Jane Doe was a passenger aboard Etihad's aircraft flying from Abu Dhabi to Chicago. Because the flight represented the final leg of Mrs. Doe's international carriage, beginning and ending in Chicago, with an agreed stopping point in India, the exclusive remedy for any claim for damages against Etihad, as the carrier, is the international treaty known as the Montreal Convention of 1999.

The parties agree that the Montreal Convention governs the liability and provides Jane Doe's exclusive remedy against the carrier. Pet. 3. Moreover, Etihad does not contest that an "accident" on board the

aircraft caused Jane Doe to suffer a “bodily injury.” Pet. App. 7a.

A. Nature of the Case

Proceeding pseudonymously, Jane Doe and John Doe, husband and wife, filed suit against Etihad Airways in the United States District Court for the Eastern District of Michigan under Article 17(1) of the Montreal Convention of 1999. Jane Doe sought damages generally for the physical injury, her medical expenses associated with the post-exposure prophylaxis medication regime and testing for exposure to HIV, hepatitis and tetanus. Mrs. Doe also sought compensatory damages for the mental anguish and emotional distress from the shock, mortification, sickness, illness, outrage and embarrassment of the needlestick injury and the natural sequela of possible exposure to HIV. John Doe’s derivative claim was based upon loss of consortium.

Following the close of discovery, Etihad filed a motion for partial summary judgment alleging Jane Doe’s mental anguish damages relating to her fear of contracting a disease from the needlestick were not recoverable under Article 17(1) because they arose, “not by Doe’s bodily injury (the small hole in her finger) but by the nature of the instrumentality of that injury.” Pet. App. 7a. The motion also requested complete dismissal of John Doe’s derivative claim for loss of consortium. Granting Etihad’s motion for partial summary judgment, the district court reasoned:

Defendant argues and the court agrees that Plaintiff's mental distress damages were not caused by her physical injury. It is not the physical needle prick itself that caused Plaintiff's distress, but the possibility that she may have been exposed to an infectious disease. Pet. App. 68a.

The district court also dismissed John Doe's derivative claim.

Recognizing that the *gravamen* of Jane Doe's claims were the now-dismissed mental anguish type damages sustained by Jane Doe, and that a trial for only the pain and suffering of the physical injury from the needle prick and medical expenses "would not materially advance [the] ultimate termination," the parties reached a settlement for the remaining *de minimis* damages. In their Stipulation and Order of Dismissal with Prejudice and Without Costs, the parties so advised the district court. Pet. App. 71a.

Respondents timely appealed the district court's partial summary judgment to the Sixth Circuit Court of Appeals. In a comprehensive Opinion and Order, the unanimous panel of the Sixth Circuit, per Judge Boggs, reversed the district court's grant of partial summary judgment and remanded for further proceedings consistent with its decision. Pet. App. 5a. Etihad unsuccessfully sought both Rehearing and Rehearing *En Banc* (Pet. App. 1a) and their petition to this Court followed.

B. Statement of Relevant Facts

Jane Doe and her eleven-year-old daughter were passengers aboard Etihad Airways' Flight 151. A short time after takeoff, Jane Doe's tray table fell into the extended (down) position. Pet. App. 6a. Unable to locate the small knob used to hold it in place, the tray table remained extended in her lap. *Id.*

During the flight, Jane Doe's daughter, sitting in the window seat immediately to her mother's left, came across the tray table knob on the floor of the aircraft and gave it to her mother. *Id.* Because her own tray table was still in the extended position, Mrs. Doe placed the knob in the seatback pocket located directly in front of her daughter's seat. *Id.*; R. 1, Page ID 4.

Shortly before the aircraft began its descent into Chicago, a flight attendant requested Mrs. Doe place her tray table in the upright and locked position. Pet. App. 6a. Informing the flight attendant that she had located the knob and would be willing to hold it in place to secure the tray table through landing, she reached into her daughter's seatback pocket to retrieve the knob and unexpectedly felt a sharp pain in her finger. *Id.* Mrs. Doe looked in her daughter's seatback pocket and determined the source of her injury was a hypodermic needle attached to an insulin-sized syringe. Pet. App. 8a. A passenger seated to the right of Mrs. Doe heard her make a verbal exclamation and saw blood on her finger when she removed her hand from the seatback pocket. *Id.*

Etihad's flight attendant summoned the cabin manager, who provided an antiseptic wipe and a Band-Aid to Mrs. Doe. *Id.* Etihad did not offer any further medical assistance to Mrs. Doe, even an offer to contact medical personnel. *Id.* One crewmember informally told Mrs. Doe to see a physician soon, but she was not told just how soon or provided with any further assistance. *Id.* Upon arrival in Chicago, Etihad personnel disposed of the syringe in an empty water bottle and gave it to the cleaning crew to dispose. *Id.* No testing was performed on the hypodermic syringe. *Id.*

Mrs. Doe saw a physician in her primary care physician's office on the following day and related the events of the day before. Pet. App. 8a. After consulting with an infectious disease specialist, her physician immediately ordered tests for exposure to HIV, hepatitis and tetanus. Pet. App. 8a. The physician also prescribed two medications for possible exposure to HIV to be taken for thirty days. *Id.*

Responding to an email Mrs. Doe wrote two days following the flight in which she requested a copy of the incident report, Etihad wrote that it would consider "possible reimbursement" of her medical expenses, as a "purely goodwill gesture." Pet. App. 9a.

Over the next year, Mrs. Doe underwent several additional tests ordered by her physician to determine if she had developed the presence of HIV antibodies in her body. Pet. App. 8a. Fortunately, all of the testing over the year came back negative. *Id.*

In her deposition testimony, Mrs. Doe described some of her emotions; including her fear and anxiety over the results of testing, and a feeling of sadness for a time. R. 22-4, Page ID 472. She described being upset about having to take medications. *Id.* Mrs. Doe also felt what she described as guilt, given that her father, who had passed away from cancer approximately two months after her injury, continued to be worried about her health despite his own considerable medical battle. *Id.*

Mrs. Doe sought the advice and care of a psychologist specializing in traumatic injuries and was diagnosed with mood disturbance, displaying elements of both depression and anxiety originating from the needlestick injury. R 22-9, Page ID 634, 639-641. The psychologist described Mrs. Doe's continuing intrusive thoughts such as "thank God it was me and not my daughter" and noted her anxiety about the final HIV test. *Id.* at 641.



REASONS FOR DENYING THE WRIT

I. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND THE TWO UNPUBLISHED DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS.

Etihad first claims that the decision of the court below creates a conflict with two unpublished circuit decisions of the Fifth and Eleventh Circuits. *Bassam v. Am. Airlines*, 287 Fed. Appx. 309 (5th Cir. 2008); *Jacob v. Korean Air Lines Co.*, 606 Fed. Appx. 478 (11th Cir., 2015). For several reasons, this argument is fatally flawed. First, in stark contrast to the decision below, neither *Bassam* nor *Jacob* analyzed the plain text of Montreal Article 17(1), nor was that article central to the resolution of a disputed question in those decisions. Second, the two unpublished decisions are materially and factually distinguishable from the facts before the court below. Third, the court below thoroughly analyzed and properly considered both *Bassam* and *Jacob* in undertaking its rigorous analysis of sister-circuit decisions as part of interpreting Article 17(1). Finally, under the rules of both circuits, these two unpublished decisions do not constitute binding legal precedent and thus cannot create the claimed conflict. 5th Cir. R. 47.5.4; 11th Cir. R. 36-3-2.

Bassam was a lost luggage case, in which the appellant sustained no bodily injury under Article 17(1). In the course of the litigation, Ms. Bassam filed an amended complaint seeking additional damages for “embarrassment and upset for not being able to dress and appear in public.” *Bassam* 287 Fed. Appx. at

311. The legal analysis in *Bassam* centered on Montreal Articles 17(2), 22(2) and 22(5) rather than 17(1). *Id.* at 312-316.

Despite determining the appellant waived appeal of the summary dismissal of her emotional distress claim, the *Bassam* panel briefly discussed Article 17(1) in the context of an alternative argument. It noted that, “even if her claim of ‘embarrassment and upset’ could be construed a physical injury, the injury was not caused by an accident on board the aircraft.” *Id.* at 317. The decision below properly considered this statement, determining that the circuit court was merely using it to show Bassam could not even demonstrate the prerequisite of an accident on board the aircraft. Pet. App. 53a-54a. The court below thus properly determined Etihad’s reliance on *Bassam* to be “unfounded.” Pet. App. 54a.

The court below also fully considered Etihad’s other allegedly conflicting Montreal decision, *Jacob*, *supra*, where the Eleventh Circuit determined the appellant failed to prove an “accident” occurred on board an aircraft that caused him “bodily injury.” *Id.* at 481. Like *Bassam*, *Jacob* provided no textual or historical analysis of Montreal Article 17(1).

Etihad’s contention that the decision below conflicts with *Jacob* and *Bassam* because “there was no need for the Courts [in *Jacob* and *Bassam*] to re-analyze an issue they clearly deemed already decided under the Warsaw Convention,” clashes directly with the starting point of the legal analysis undertaken by the distinguished panel in the case below. Pet. 17.

The Montreal Convention is a new treaty. Standing on its own, it must be interpreted beginning with the “text of the treaty and the context in which [its] written words are used.” *Air France v. Saks*, 470 U.S. 392, 397 (1985); Pet. App. 13a. The claimed conflict does not exist.

II. THE DECISION BELOW IS FAITHFUL TO THIS COURT’S WELL-SETTLED WARSAW CONVENTION PRECEDENTS.

The decision of the court below is entirely consistent with this Court’s Warsaw Convention precedents in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). The court below acknowledged that the drafters of the Montreal Convention intended that Article 17(1) be construed “consistently with well-settled Warsaw Convention precedents of the United States Supreme Court.” Pet. App. 28a.

Further, the court below properly considered the judicial precedent developed under the Warsaw Convention and determined that its interpretation of Article 17(1) did not disturb those precedents. In its own words, the decision below does not alter the plain text of Article 17(1) of the Montreal Convention, which “also makes clear . . . that a passenger cannot recover damages for mental anguish if there is no requisite accident or if the accident does not cause a bodily injury.” Pet. App. 25a.

In regard to the claimed conflict with *Floyd*, Etihad asserts that the court below “ignored the textual

analysis required by *Floyd*.” Pet. 19. But, *Floyd*’s textual analysis of the original 1929 French legal meaning of “lésion corporelle,” viewed through the shared expectations of the state parties to the Warsaw Convention, resulted in only one holding: that purely mental injuries were not compensable under the Warsaw Convention. This holding remains undisturbed by the decision below.

Etihad also argues that the court below based the “recovery of mental injuries on the term ‘damage sustained,’” thus ignoring *Zicherman*’s rejection of that argument. Pet. 20. But, in fact, the decision below honors *Zicherman*, as the court wrote, recognizing that Michigan damages law will ascertain the measure of recoverability of the mental damages:

Lower courts have consistently applied *Zicherman* to hold that the measures of damages is to be fixed according to whatever law . . . would apply in a domestic-law case, and *Zicherman* is one of the Warsaw Conventions ‘precedents’ that guides our interpretation of the Montreal Convention. Pet. App. 61a.

* * *

On remand, assuming Doe wins a judgment, the district court is free to determine, within the bounds of what Michigan damages laws allow, what specific kinds of damages – such as emotional distress, mental anguish, fear of contagion, loss of consortium, and so on – Plaintiffs are entitled to recover. Pet. App. 63a.

III. THE DECISION BELOW IS CORRECT.

The decision below was correctly reached based on its own facts. The immediacy between the admitted accident and the admitted bodily injury creates difficulty with Etihad’s attempt to separate the source of Jane Doe’s mental damages from what could also be characterized as a singular event meeting the definition of both an accident and a bodily injury.

Even assuming, for sake of argument, this matter was to be decided under Article 17 of the Warsaw Convention, *and Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), Etihad would still be foiled by the particular facts here, as the court below also recognized that Mrs. Doe’s mental anguish damages are “traceable” to her bodily injury. Pet. App. 21a. For this reason alone, the decision below is also correct without regard to the question presented by the Petitioner.

A. The Plain Meaning of Article 17(1) Supports the Decision Below.

The court below methodically refuted Etihad’s claim that the plain text of Article 17(1)² requires a direct causal connection between Jane Doe’s bodily injury and her mental distress in order for her to

² The French text of Article 17 of the Warsaw Convention is reproduced in the decision below. Pet. App. 17a, n.6 As noted, only the French text is authoritative; however, this Court has utilized the official English translation in *Olympic Airways v. Husain*, 540 U.S. 644, 649 n.4 (2004) and *Saks*, 470 U.S. at 397.

recover her damages. Pet. App. 14a. In rejecting Etihad’s construction of Article 17(1)’s phrase “in case of” to mean “caused by,” it properly referenced a contemporary understanding of what the delegates to the Montreal Convention would have understood the plain meaning of “in case of” to be, and determined that the phrase is conditional rather than causal. Pet. App. 16a-17a.

Next, the court below properly determined that the entirely new phrase, found only in the Montreal Convention, “upon condition only” directly supports the premise that “recovery is conditioned *only* on the occurrence of an accident that causes death or bodily injury.” Pet. App. 18a. As additional evidence of the intent of the Montreal Convention delegates, the court below cited to Article 17(1)’s sole causal language:

Surely, the drafters of the Montreal Convention could have used a word or phrase with causal meaning instead of ‘in case of’ if they wanted to impose such a causal restriction on the kinds of ‘damage sustained’ that are recoverable when an accident on board an aircraft causes a passenger to incur a bodily injury. Indeed, the drafters *did* impose such a causal requirement in stating that the accident must have ‘caused’ the death or bodily injury. Pet. App. 18a.

Finally, the court below properly recognized that Etihad’s reliance on *Ehrlich* was misplaced on several levels. *Ehrlich* recognized ambiguity in the original French text of the Warsaw Convention and looked to

the purpose of that treaty to answer the question to determine whether mental injuries accompanying but not caused by bodily injuries were compensable. *Ehrlich* 360 F.3d at 385. In resolving their inquiry, the Second Circuit turned to the primary purpose of the Warsaw Convention as “limiting the liability of air carriers in order to foster the growth of the fledging commercial aviation business.” *Id.* at 385, quoting from *Floyd*, 499 U.S. at 546.

Because it was dealing with an entirely new treaty, the court below properly looked at the Montreal Convention’s own plain text, then moved to its drafting history and the shared expectations of the parties, in support of its decision. As the court wrote:

But what that should mean for us is *not*, as Etihad would have it, that we should blindly adopt *Ehrlich* as the law of our circuit for claims under Article 17(1) of the Montreal Convention, but rather that we should grapple with the text of the Montreal Convention itself, and then, to the extent we find any ambiguity therein, look to the relevant persuasive authority – which may include evidence of the purpose of the Montreal Convention, but almost certainly not the nearly century-old purpose of the Warsaw Convention – to assist in resolving that ambiguity. Pet. App. 23a.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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