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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-1785

TITLE AIR FRANCE, Petitioner v. VALERIE HERMIEN SAKS

PLACE Washington, D. C.

DATE January 15, 1985

PAGES 1 - 54



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IN THE SUPREME COURT OF THE UNITED STATES

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AIR FRANCE, :

Petitioner, :

V. : No. 83-1785

VALERIE HERMIEN SAKS :

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Washington, D.C.

Tuesday, January 15, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 o'clock a.m.

APPEARANCES:

STEPHEN C. JOHNSON, ESQ., San Francisco, California;
on behalf of the petitioner.

CARROLL E. DUBUC, ESQ., Washington, D.C.; on behalf of
Republic of France as amicus curiae supporting
petitioner.

BENNETT M. COHEN, ESQ., San Francisco, California;
on behalf of the respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
STEPHEN C. JOHNSON, ESQ.,	
on behalf of the petitioner	3
CARROLL E. DUBUC, ESQ.,	
on behalf of Republic of France	
as amicus curiae supporting petitioner	19
BENNETT M. COHEN, ESQ.,	
on behalf of the respondent	28
STEPHEN C. JOHNSON, ESQ.,	
on behalf of the petitioner - rebuttal	49

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Air France against Saks.

If you will give us a moment or two here.

Mr. Johnson, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN C. JOHNSON, ESQ.,
ON BEHALF OF THE PETITIONER

MR. JOHNSON: Mr. Chief Justice, and may it please the Court, this case turns on the proper construction of a treaty. It also involves important considerations of judicial restraint under our constitutional system in the treatymaking process.

The treaty is the Warsaw Convention, the agreement governing international aviation. This Court considered and enforced the liability ceilings under that treaty last term in its *Franklin Mint* decision. We are asking the Court now to consider and enforce prerequisites for that liability under the Convention.

As the Court has noted this treaty has been in effect now for over 50 years, and has provided stable and internationally uniform rules governing international air transportation. There is, however, now pending a balanced package of amendments to the Warsaw Convention which have not yet been ratified by

1 the U.S. Senate.

2 As the Court noted last term, those amendments
3 remain on a -- calendar. The majority below has
4 nevertheless upon judicial fiat enacted only one of
5 those amendments by removing a prerequisite for carrier
6 liability for personal injuries under the treaty as it
7 now stands.

8 In so doing, the majority has misinterpreted
9 the treaty and has inappropriately interfered with the
10 treaty-making powers of the political branches.

11 In this case we ask the Court to enforce the
12 provisions of Article 17 of the treaty. That article
13 establishes as a prerequisite for carrier liability for
14 passenger injury and death claims the requirement that
15 such injuries or death be caused by an accident.

16 That prerequisite for liability has been
17 universally recognized by the courts. The Third Circuit
18 has properly, in our view, applied that prerequisite in
19 its DeMarines decision by stating its two basic
20 elements, first, that there be an accident, and second,
21 that that accident proximately caused the injury.

22 The majority below has acknowledged the
23 requirement. However, in the guise of treaty
24 construction, their decision would effectively abolish
25 that requirement by allowing recovery where a flight has

1 been normal in all respects and no accident has occurred
2 to cause the injury.

3 QUESTION: Mr. Johnson, the language in
4 Article 18 dealing with property damage uses the word
5 "occurrence" rather than "accident" in Article 18. In
6 Article 17, dealing with personal injury, it uses
7 "accident." Do you think that the recovery standards
8 are different for property damage or baggage than they
9 are for personal injury?

10 MR. JOHNSON: Yes, I do, Your Honor. I think
11 that the --

12 QUESTION: The drafters of the Convention
13 then, did they have greater concern for property damage
14 than for personal injury recovery?

15 MR. JOHNSON: I think you have to look back
16 into 1929, in fact, and still today, I think that under
17 concepts like bailment rules there are generally
18 stricter standards of liability than apply to the
19 handling of baggage than there are to persons. I think
20 when you do look back to the drafters' comments in 1929,
21 it becomes very clear that they intentionally chose
22 those words, "occurrence" for Article 18 and --

23 QUESTION: Is there something in the minutes
24 of the drafting of the Convention to which we might
25 refer that would point to this difference?

1 MR. JOHNSON: Yes, Justice O'Connor, there
2 is. In fact, the president of the drafting committee,
3 Mr. Gianinni, spoke to the Convention just before the
4 vote was taken adopting Articles 17, 18, and 19.
5 Nineteen establishes the basis for delayed claims.

6 And in his comments he stated that because
7 there was a different case for liability in each of the
8 three categories, that was the reason they broke out the
9 three different articles, and he specifically stated,
10 let me quote to you, he told the Conference that their
11 committee "had deemed it would be better to begin by
12 setting out the causes of liability for persons, then
13 for goods and baggage, and finally in the case of
14 delay."

15 And that was what was done by dividing up the
16 three articles and stating the different conditions for
17 carrier liability in each of the three situations.

18 QUESTION: May I ask one question? Do you
19 adopt Judge Wallace's position in dissent?
20 Specifically, he says there is an accident if you are
21 flying along and you hit a little rough air and spill
22 some coffee, that that would be an accident.

23 MR. JOHNSON: I think, Justice Stevens, yes,
24 we probably do, but I think first of all you should
25 realize that in this case I think we are dealing with

1 the two extremes, the air catastrophe and the absolutely
2 normal flight.

3 I don't think under any interpretation can
4 that be considered to be an accident. I think that the
5 dissent below has properly used the DeMarines standard.

6 QUESTION: But you would say then that if
7 during a little bumpy air someone had a heart attack,
8 that that heart attack would be covered; if it was just
9 heart attack because of fear of landing, say, it would
10 not be covered.

11 MR. JOHNSON: It's difficult, isn't it, when
12 you get into the middle area, and in fact I think the
13 parties to the Convention have had difficulty with this
14 themselves. I have some comments to talk about these
15 pending amendments, and even there, when they are
16 talking about expanding the scope of carrier liability
17 to include all events, which is not the current treaty,
18 the treaty parties still hold back an exception for any
19 injuries due to the internal state of the health of the
20 passenger.

21 QUESTION: Well, yes, I guess everyone agrees
22 that the injury must be caused by something related to
23 the flight. In other words, if you had a heart attack
24 in an airplane that you were going to have at home
25 anyway, that would not be covered even under the Ninth

1 Circuit view, as I read it.

2 MR. JOHNSON: I am sorry?

3 QUESTION: I say, I think both sides seem to
4 agree that there must be something connected with th
5 eflight that caused the harm, so that if you had a heart
6 attack in flight that you would have had at home anyway,
7 that would not be covered even under the Ninth Circuit
8 view, as I read it.

9 MR. JOHNSON: That is correct, and I think
10 what you have to focus on is the event outside of the
11 injury which causes it, and it is that event which
12 should be unexpected, under the Third Circuit standard,
13 and, I think, consistently with the Convention.

14 QUESTION: But if you adopt Judge Wallace's
15 view, how do you know whether something is unexpected?
16 Is it unexpected to the passenger or unexpected to the
17 seasoned flier? I am still -- I am not sure your line
18 is bright and clear.

19 MR. JOHNSON: If you look at the event, the
20 two parts of Article 17's requirement, that there be an
21 accident and that that accident in turn caused the
22 injury, then I think if you look at the accident, it
23 doesn't make too much difference from whose perspective
24 you look at it, it is an unexpected event.

25 QUESTION: But if you look at it from the

1 passenger's point of view, you might have a new
2 passenger who didn't expect a dramatic change in air
3 pressure within the cabin. It may well be unexpected
4 that the passenger is going to have a problem with
5 hearing.

6 MR. JOHNSON: I think another way to approach
7 it, Justice Stevens, is to realize what the Warsaw
8 Convention does. The Convention itself is and remains a
9 fault-based system, and the standard under Article 17
10 for carrier liability set up a duty by the carrier to
11 avoid accidents.

12 QUESTION: Then you are departing from the
13 spilling of coffee example of Judge Wallace.

14 MR. JOHNSON: No, I don't think so, because I
15 think you can easily see that a carrier has a duty to
16 retain people that don't go about the airplane spilling
17 coffee. Also in the air turbulence situation, there are
18 regulations that require an airline to take measures to
19 try to avoid air turbulence. So it is something that
20 certainly is within the scope of things that the airline
21 should be avoiding.

22 QUESTION: If I understood Judge Wallace, his
23 example of burning oneself in air turbulence didn't
24 depend at all on any fault by the airline.

25 MR. JOHNSON: That's correct. What we're

1 looking at is the initial accident requirement. Once
2 you apply that test and find that an accident has
3 occurred, then it is like strict product liability.
4 There is no --

5 QUESTION: My question is, how do you know
6 when it occurred under your view? You use the language
7 "unexpected," and I ask, to whom must it be unexpected,
8 the passenger or the pilot?

9 MR. JOHNSON: I think if you go back to the
10 fundamental purposes of the Convention itself, it would
11 be more likely to be from the carrier's standpoint, but
12 I think the primary focus is on the event itself.

13 QUESTION: Well, I am not saying you would
14 have to, but then I think your position is different
15 from Judge Wallace's. That is all I am suggesting.

16 QUESTION: Does the record show here whether
17 any other passengers suffered any ear problems?

18 MR. JOHNSON: I am not sure if the certified
19 record does, Your Honor, but I believe it may well be
20 stated by the plaintiffs in opposition to the motion for
21 summary judgment that there were no other complaints, no
22 other problems on the flight.

23 QUESTION: Well, if there were, I would rather
24 assume that the plaintiff would make it a point of
25 showing that.

1 MR. JOHNSON: Yes, Your Honor, I am sure they
2 would have, and in fact in responding to our motion for
3 summary judgment, they conceded to the Court that this
4 flight had been normal in all respects.

5 QUESTION: What about the terrorist attack
6 causing injuries to a passenger? How does that fit in
7 with your analysis?

8 MR. JOHNSON: Justice O'Connor, I believe
9 those cases are consistent with the analysis here. They
10 are certainly from the standpoint of the carrier
11 unexpected events that do not occur, and they
12 certainly --

13 QUESTION: And you would think there would be
14 liability on the carrier for that?

15 MR. JOHNSON: Yes, I think that has been
16 fairly well established now. The Husserl decision was
17 the first one to reach that point, and it did find some
18 basis in actual discussions among the treaty parties for
19 finding that the accident liability would extend to
20 those incidents, which is quite distinct from our
21 situation here, you realize, where we have a perfectly
22 normal flight, where there is no indication anywhere in
23 the history of this Convention that that should fall
24 within the prerequisites for liability.

25 QUESTION: How about an assault on a fellow

1 passenger in a perfectly normal flight?

2 MR. JOHNSON: I think there again you can view
3 that in terms of the duty of the carrier. It certainly
4 is unexpected from the standpoint of the carrier, and I
5 think that the carrier does have the duty to protect
6 passengers from unexpected events like that, and assault
7 by another passenger would well, I think, fit within the
8 DeMarines definition.

9 QUESTION: What about a passenger who chokes
10 to death on his food? That happens in the best of
11 restaurants. What about that?

12 MR. JOHNSON: It is a bit more difficult,
13 isn't it? I mean, these are not easy questions.

14 QUESTION: I don't know whether it is or not.
15 It doesn't sound like it is for you.

16 MR. JOHNSON: Yes.

17 QUESTION: What about that one?

18 MR. JOHNSON: I am not sure. I think if it
19 was something entirely internal to the passenger, that --

20 QUESTION: But if a passenger drinks too much
21 and gets up and trips and falls because of that, that
22 would be covered because the carrier has a duty not to
23 serve passengers too much to drink?

24 MR. JOHNSON: There has been a case along
25 those lines that suggested that ruling. Yes, Your

1 Honor.

2 QUESTION: Yes. But if a passenger is just
3 cleaning his fingernails and accidentally sticks
4 himself, that wouldn't be covered, I guess.

5 MR. JOHNSON: I think that that's correct,
6 exactly.

7 QUESTION: Well, you refer in several of your
8 comments to the carrier's duty, and then you refer in
9 many of your comments, and of course your position here
10 is that an accident is required. How do those two
11 intermesh?

12 MR. JOHNSON: You have to go back to realize
13 that you are interpreting a treaty. The treaty does set
14 forth the accident requirement. And that original
15 requirement was based on a fault concept. The carriers
16 have a duty to prevent accidents, not all occurrences.

17 QUESTION: Then in the Montreal Convention
18 they in effect bargained away the fault.

19 MR. JOHNSON: Not necessarily. What they
20 bargained away was the due care defense. In other
21 words, once you have an accident, liability is
22 presumed. Article 20 gave a basis to come back with a
23 due care defense and say it wasn't the carrier's fault
24 to avoid liability, but it is absolutely essential to
25 realize that Article 17 was not at all addressed to the

1 Montreal Agreement, as pointed out by the U.S.
2 government's brief to this Court.

3 QUESTION: But once you have this unexpected
4 occurrence, the carrier can't defend by saying we could
5 not have prevented that occurrence by any sort of care.

6 MR. JOHNSON: That's correct, Your Honor. I
7 think the task for this Court is simply to decide what
8 the accident requirement means. That is correct.

9 There is a very good analogy, I believe, to
10 what the majority below has done here. It is the strict
11 product liability doctrine, where a manufacturer is held
12 absolutely liable for the consequences of defects in
13 their products. They are not held liable for all the
14 injuries caused by their products.

15 So the task as I see it under the Warsaw
16 Convention now is to recognize that there must be an
17 accident before the absolute liability doctrine comes
18 into play under the Montreal Agreement.

19 QUESTION: What about if on a landing they
20 slam on the brakes and he gets thrown out of his seat?

21 MR. JOHNSON: If that happened, Justice
22 Marshall, I think it would definitely be an accident.
23 Aircraft are not expected to slam on their brakes and
24 throw passengers out of their seats. It is a broad
25 standard that the Third Circuit has enunciated to try to

1 effect the intention of the parties.

2 I think it is important, though, to come back
3 to the narrow issue presented by this case, and it is
4 whether the respondent's injury in this case was caused
5 by an accident within the meaning of Article 17, and the
6 question is whether the everyday normal conduct of an
7 aircraft, in fact the necessary operation of an aircraft
8 pressurization system can be the independent accident
9 that causes the injury.

10 As the Court well knows, the beginning point
11 in the construction of a treaty is, of course, the
12 language of the treaty itself, which should be construed
13 to avoid rendering any word meaningless. This Court has
14 recognized, as it did last term in *Franklin Mint* and
15 long ago in the amiable *Isabella*, that the courts are
16 not at liberty to dispense with any of the conditions or
17 requirements of the treaty.

18 If we adopted the respondent's view of what
19 the Warsaw Convention means, you could simply withdraw
20 that phrase if the accident which caused, and just go on
21 to say that the damage. There is no basis in the
22 history of this Convention to suggest the majority view
23 below is correct, and the decision below has departed
24 from these basic principles by reading the word
25 "accident" to mean any occurrence associated with the

1 operation of the aircraft.

2 Carrier liability under Article 17 requires
3 that the injury be caused by an accident, not by an
4 occurrence, and this should be compared, Justice
5 O'Connor, with the language in Article 18, where the
6 word "occurrence" is used.

7 As I indicated, the Convention's history and
8 the comments of the president of the drafting committee
9 to my mind indicate that that was a deliberate choice.

10 Also, the parties' subsequent construction of
11 the treaty, which is also ignored by the majority below,
12 confirms that the respondent is now asking this Court to
13 amend Article 17 as it now stands. I speak specifically
14 of the proposed treaty amendments adopted in the
15 Guatemala City Protocol of 1971 and included in the 1985
16 protocols, which as this Court recognized still await
17 Senate ratification.

18 Several proposed amendments were adopted in
19 those two diplomatic conferences which constitute a
20 balanced package significantly increasing the carrier's
21 scope of liability, increasing the liability limits in
22 an exchange for more a unbreakable ceiling on carrier
23 liability.

24 Part of the proposed compromise specifically
25 amends Article 17 to change the word from "accident" to

1 "event." If the amendments are adopted, the carriers
2 will become liable for a broader class of injuries not
3 now covered by the Convention.

4 The pending amendment to Article 17 reads
5 exactly like what respondent is proposing this Court
6 should have done. The treaty parties, however, have not
7 yet adopted it. The present treaty is limited to
8 injuries caused by accidents and not by normal events or
9 occurrences.

10 You mentioned the Montreal Agreement. Both
11 the respondent and the majority below assert that that
12 1966 private agreement among international air carriers
13 effectively removed the Convention's act as a
14 prerequisite for liability.

15 The U.S.'s brief explains, as does the
16 history, that that agreement addressed only the due care
17 defense and in no way affected the prerequisites for
18 carrier liability.

19 The task of this Court is to apply the
20 provisions of Article 17 as they now stand. The
21 rewriting and renegotiation of treaties are the tasks of
22 the political branches. You have the amicus briefs of
23 two of the principal acting nations responsible for the
24 Warsaw system.

25 The Republic of France was largely responsible

1 for the creation of the system in the 1920's.

2 QUESTION: Mr. Johnson, your brief mentions
3 one French decision. Are there any, to your knowledge,
4 are there any other foreign courts that have passed down
5 this language?

6 MR. JOHNSON: Your Honor, I don't believe so,
7 because normally in all other countries that are not
8 affected by the Montreal Agreement, they go immediately
9 to the due care defense. So there are some decisions in
10 France, but those are the only ones that we have been
11 able to find.

12 In addition to the Republic of France, you
13 have their amicus brief, the United States, as the Court
14 well knows, has been a most important force in the
15 history of the Warsaw system since this country adhered
16 to the treaty in 1934. Both governments join the
17 petitioner --

18 QUESTION: May I ask about the -- of course,
19 the United States isn't speaking to us, but their brief,
20 they describe a letter that they got from different
21 departments of the government. Do you think it is
22 proper for us to rely on that extra record material?

23 MR. JOHNSON: Your Honor, I would hesitate to
24 say. I would certainly defer to the Court's judgment in
25 that. You certainly do have the views of the Solicitor

1 General which speak for the government.

2 And both governments do join now with the
3 petitioner in asking you to enforce the treaty as it now
4 stands and find that the injury in this case was not
5 caused by an aviation accident.

6 CHIEF JUSTICE BURGER: Mr. Dubuc.

7 ORAL ARGUMENT OF CARROLL E. DUBUC, ESQ.,

8 ON BEHALF OF THE REPUBLIC OF FRANCE

9 AS AMICUS CURIAE SUPPORTING THE PETITIONER

10 MR. DUBUC: Mr. Chief Justice, and may it
11 please the Court, on behalf of the Republic of France,
12 as indicated by Mr. Johnson, one of the principal
13 signatories and one of the initiators of the original
14 Warsaw Convention, we rise to emphasize to the Court on
15 behalf of France and other countries of Western Europe
16 as well as throughout the world the extreme importance
17 to these nations of the continued enforceability,
18 reliability, predictability, and uniformity of result
19 with respect to dealing with matters arising under this
20 treaty until such time as the signatories and the
21 parties have come to a mutual agreement to modify it as
22 might be necessary if desirable.

23 There have been questions from the Court today
24 concerning a number of hypothetical situations and also
25 a question of how other countries would have decided

1 this issue. The Haddad case is cited in our brief in
2 two or three opinions. There is an Air Intere case in
3 France which is cited in our brief. There is also some
4 commentary as to a Polish case by Razinsky, a commentary
5 by the Societe Du Francaise Arien in France, the French
6 Legal Society.

7 The thrust of those decisions is that an
8 accident must be unpredictable and sudden in some
9 aspects. They have accepted to some extent the
10 hijacking circumstance. Haddad was in fact a case
11 arising out of the infamous Entebbe hijacking, and the
12 liability in that case, as Mr. Johnson mentioned, went
13 off on the issue of Article 20, Sub 1, which provides
14 the due care defense.

15 But the term "accident" as encompassing a
16 hijacking in that case and in the Air Intere case where
17 liability was established, that was recognized
18 consistent with the meaning of Article 17.

19 QUESTION: The Entebbe case involved people
20 who weren't parties to the Montreal Convention -- the
21 Montreal Agreement. Is that right?

22 MR. DUBUC: Oh, no, Justice Rehnquist. The
23 Entebbe case involved parties -- Air France was the
24 carrier. There were two or three Montreal tickets which
25 had been issued and delivered in the United States, and

1 for the most part the rest of the tickets had no
2 stopping place or destination here.

3 The issue didn't come up because there were
4 some cases settled on behalf of the Americans. The
5 Israeli cases were settled, and a large number of cases
6 went off to decision. Lawsuits were brought here in the
7 United States, and as to the carrier dismissed under
8 Article 28, because there was no jurisdiction over the
9 lawsuit here.

10 QUESTION: Why was the due care defense
11 available if the carrier was of a nation who was a party
12 to the Montreal --

13 MR. DUBUC: It was not available in the cases
14 which were brought in France, so it did not come up, but
15 the issue of whether accident qua accident encompasses a
16 hijacking as opposed to the coffee spill, as opposed to
17 the heart attack which was preexisting and long
18 existing, as opposed to the problem with the fingernail,
19 as opposed to flebitis, for example, or as opposed to
20 Mr. Abramsom's hietal hernea, which was preexisting,
21 these consistently would not be included in the term
22 "accident" in other countries.

23 QUESTION: How do you apply the
24 unpredictability to the loss of hearing, a person who
25 has never had any problem flying before, but he suddenly

1 has a very unpredictable ear problem?

2 MR. DUBUC: I think, Mr. Justice White, I
3 think and submit that on behalf of the government of
4 France and other governments, the definition of accident
5 would be something akin to the sudden, unpredictable
6 mechanical failure or external means, external --

7 QUESTION: So there must be something else
8 besides unpredictability, I would think.

9 MR. DUBUC: Yes, because the --

10 QUESTION: There has to be something that is
11 connected with, what, flying, or --

12 MR. DUBUC: With either mechanical failure,
13 human failure.

14 QUESTION: What about weather?

15 MR. DUBUC: Unpredictable weather which was
16 not anticipated --

17 QUESTION: Weather is always unpredictable.

18 MR. DUBUC: You are correct.

19 QUESTION: And which was improperly --

20 QUESTION: Just say sudden turbulence, severe
21 turbulence, unexpected.

22 MR. DUBUC: Sudden turbulence, yes.

23 QUESTION: And heart attack or swallow food or
24 something. Is that covered or not?

25 MR. DUBUC: I don't think heart attack would

1 be. There is a case which we -- of course, we did not
2 submit a reply amicus brief, but I submit to the Court
3 the case of Dalman against Pan American World Airways,
4 249 F 2nd 493, a heart attack case which occurred after
5 the flight from -- alleged fright during the flight and
6 there was no recovery.

7 QUESTION: But I am asking under your view if
8 it were proven or stipulated that some harm resulted to
9 a passenger as a result of turbulence in flight that
10 might well have been predicted, but just very rough
11 there.

12 MR. DUBUC: And provided the passenger was
13 injured, I would assume the passenger probably failed to
14 fasten his seatbelt when requested to do so, and if that
15 was the case we go on to another regime.

16 QUESTION: No, let's make it a proven that he
17 swallowed his food and some injury, something -- the
18 causal connection is strictly caused by unexpected
19 turbulence in flight.

20 MR. DUBUC: I think if it is proximately
21 caused by an unforeseen outside force or mechanical
22 defect or failure to --

23 QUESTION: No, no mechanical -- it is a very
24 simple case, very simple case. The pilot is expecting
25 turbulence. The passengers don't know how rough it is

1 going to be. It is much rougher than they expect, and
2 as a result of the turbulence, spill coffee, have heart
3 attack, bump head, anything, but any of those, are they
4 accidents or not?

5 MR. DUBUC: No, I would say that is not an
6 accident.

7 QUESTION: Under your view they are not.

8 MR. DUBUC: I think that would be the view
9 that we support, at least that we represent before the
10 Court.

11 QUESTION: But that wouldn't necessarily be
12 the view of even the cases that have gone in the
13 direction you are urging us to take, is it?

14 MR. DUBUC: I believe --

15 QUESTION: Wouldn't there be some dispute
16 about that response --

17 MR. DUBUC: Yes, there would be.

18 QUESTION: -- in the cases that we have?

19 MR. DUBUC: I am sure there would be, I am
20 sure, and there are plaintiff's theories, and the
21 plaintiff is very imaginative where they would come up
22 with a theory of recovery on that, and if we were
23 dealing with a jury and the proof balanced out in favor
24 of the plaintiff, they might well recover.

25 I think we are making a very simple example of

1 a complex case of proximate cause, and proximate cause is
2 a factor in this recovery --

3 QUESTION: The Solicitor General's brief
4 argues that the Montreal Agreement was designed to
5 provide prompt resolution of claims against airlines. I
6 am not sure that I understand how your view of this
7 complicated litigation of proximate cause is going to
8 achieve that end. And how is the average passenger in a
9 position to establish these things that you think have
10 to be established to impose liability?

11 MR. DUBUC: Ms. Justice O'Connor, I believe
12 that we already are seeing, this Court is seeing a
13 number of cases in the last couple of years dealing with
14 interpretations of this treaty which is under revision
15 and which is spawning a lot of litigation to interpret
16 some esoteric terms that have existed for 40 or 50 years
17 and have been interpreted that way worldwide.

18 The uniformity of this interpretation is
19 important. The decisions of this Court are very
20 important. The fact that we are getting lots of
21 challenges at this point is spawning litigation, because
22 not only in the area of personal injury or death, but in
23 the area of commercial matters, baggage, cargo, this is
24 a commercial code, so to speak, a partial uniform
25 commercial code worldwide for aviation matters.

1 And when we disturb the balance, when we
2 disturb the balance of interpretation, particularly in a
3 treaty which is under dynamic reconsideration by 120
4 parties, I believe we are creating litigation.

5 QUESTION: Well, quite apart from your concern
6 about the adoption of a new treaty or amendments to the
7 Warsaw Convention, I asked you about the effect of the
8 Montreal Agreement as modifying the treaty that we have
9 before us today, and the purpose of that, according to
10 our Solicitor General, was to facilitate prompt
11 resolution of claims.

12 And I don't see how your view moves in that
13 direction.

14 MR. DUBUC: Ms. Justice O'Connor, the prompt
15 resolution of claims anticipated by the Montreal
16 Agreement was part of a quid pro quo which came as a
17 result of the United States denunciation of the entire
18 Warsaw Treaty in 1966. There was a balance and a quid
19 pro quo between the other signatories in the United
20 States to do two things only, only two things.

21 One was to increase the limitation as an
22 interim measure while this negotiation in Tokyo,
23 Guatemala City, Mexico City, and Paris went on driving
24 toward a potential amendment.

25 The second was to eliminate the defense of due

1 care, but not to make an absolute liability. Even
2 absolute liability has a proximate cause inferring an
3 accident as an element. Even in California. Even in
4 the Ninth Circuit.

5 To make this an absolute, the interpretations
6 of commentators are not the interpretations of
7 signatories. We submit to change a treaty definition or
8 intent, you have to have the signatories agree. The
9 United States agrees that it requires an accident.
10 France agrees it requires an accident.

11 Most of the 120 signatories, virtually all of
12 them, although we haven't polled them all, but we
13 certainly haven't seen any opposition, agree with that
14 accident interpretation.

15 So, the Montreal Agreement is still
16 interpreted to require an accident with a presumption of
17 responsibility, but not automatic liability. I suppose
18 the plaintiff's --

19 CHIEF JUSTICE BURGER: Your time has expired
20 now, counsel.

21 MR. DUBUC: I am sorry. I was just answering
22 -- are there any other questions?

23 CHIEF JUSTICE BURGER: I think you have
24 answered the question, unless Justice O'Connor wishes
25 you to pursue it.

1 QUESTION: No, it was non-responsive to my
2 question, and I am satisfied.

3 CHIEF JUSTICE BURGER: Very well.

4 Mr. Cohen.

5 ORAL ARGUMENT OF BENNETT M. COHEN, ESQ.,

6 ON BEHALF OF THE RESPONDENT

7 MR. COHEN: Mr. Chief Justice, and may it
8 please the Court, the issue presented is whether a total
9 hearing loss suffered by an airline passenger through no
10 fault of her own is a compensable injury under the
11 Warsaw Convention as modified by the Montreal Agreement
12 where her hearing loss was proximately caused by the
13 operation of the aircraft, and was a risk inherent in
14 and peculiar to air travel.

15 I would like to make three factual points at
16 the outset. Number One, if this Court were to affirm
17 the Ninth Circuit's decision and return this case to
18 trial, a one-day court trial would consist in part of
19 the testimony of a board certified ear, nose, and throat
20 specialist who would testify to a reasonable medical
21 certainty that but for those pressure changes in that
22 aircraft, the microhemorrhaging and consequent hearing
23 loss in Ms. Saks would not have occurred, and that this
24 hearing loss closely resembles other hearing losses he
25 has treated due to pressure changes in aircraft.

1 QUESTION: Were there any other hearing losses
2 of any other passengers on that day and on that flight?

3 MR. COHEN: None that we know of, Your Honor.

4 QUESTION: Wouldn't you think that is a
5 somewhat important predicate for your case?

6 MR. COHEN: No, Your Honor, we do not --

7 QUESTION: Suppose, then, suppose that she was
8 the only one out of 225 passengers, she is the only one
9 that suffers this. You are suggesting that would stand,
10 that would be a compensable injury?

11 MR. COHEN: Yes, Your Honor, if she is the one
12 out of 200, yes, and I think to answer the Court's
13 question, we should look to the intent of the original
14 framers and as the Republic of France stresses, we
15 should look at the intent of the framers in light of the
16 conditions and circumstances which existed at the time
17 the treaty was drafted.

18 If we could imagine ourselves back in 1929,
19 when aviation was admittedly and according to a CAE memo
20 we cited an extremely risky mode of transportation, and
21 imagine ourselves at an airport where we are watching
22 passengers embark and disembark onto prop planes which
23 today would be museum pieces, and say on Day One,
24 because of the normal routine spinning of the prop, a
25 boarding passenger has a piece of glass or a particle or

1 something flung into his eye, causing blindness.

2 The next week, a passenger is boarding, and
3 due to the normal, routine noise made by the prop on the
4 plane he is boarding or one nearby, he suffers a total
5 hearing loss. The next week, we are on the plane
6 itself, and due to the normal, routine noise inside this
7 insulated passenger cabin, another passenger suffers a
8 hearing loss.

9 Wouldn't the original framers have intended,
10 and their primary purpose was to protect these fledgling
11 airlines with a liability ceiling, wouldn't they have
12 intended to have this ceiling protect these airlines
13 from potentially ruinous liability to allow these
14 airlines to not only have their operating costs, but to
15 channel money into research and development to correct
16 these types of deficiencies, or, as petitioner suggests,
17 would the framers have intended that these injuries,
18 that the airlines be exposed to unlimited exposure.

19 If we imagined back in 1929 that at year's end
20 there are not just these three people but a half-dozen
21 more or 30 more lined up at the county clerk's office,
22 complaint in hand, alleging \$50,000 each in provable
23 damages, surely the original framers would have wanted
24 these fledgling, financially insecure airlines protected
25 in those situations.

1 Now, Justice Stevens raised an important point
2 with regard to air turbulence, because the entire thrust
3 and common thread throughout the cases dealing with the
4 Warsaw Convention is the interest to protect both the
5 airline and the passenger from risks inherent in air
6 travel.

7 The petitioner stressses that the common
8 thread is really a sudden, unexpected occurrence, but
9 let's look at air turbulence. When you board the plane,
10 the pilot says to you, fasten your seat belt and keep it
11 fastened when you are seated. The pilot may thereafter
12 come on the intercom and say, we can expect to
13 experience turbulence at this time, over this state, and
14 it is going to be this rough.

15 Yet no court has questioned the right of the
16 passenger to recover in that situation where due to the
17 totally anticipated usual and expected turbulence he
18 suffers some kind of injury.

19 QUESTION: Well, to pose a more extreme
20 example, I suppose if the pilot announces that all the
21 engines are gone, we are going to crash in two minutes,
22 the fact that you then crash does not make it not an
23 accident just because you expected it for the last two
24 minutes.

25 MR. COHEN: Correct, Your Honor, that would

1 certainly be an accident under the Third Circuit's
2 formulation or under the formulation we are urging,
3 which is an injury proximately caused by the operation
4 of the aircraft and risk inherent in flight.

5 QUESTION: But how does that incorporate the
6 word "accident?"

7 MR. COHEN: Well, long ago, Your Honor, the
8 word "accident" -- I guess I am not understanding the
9 Court's question.

10 QUESTION: Well, you just gave two tests, I
11 guess, for imposing liability, neither of which seem to
12 me to deal at all with the word "accident" which you
13 find in the language of the convention.

14 MR. COHEN: That is because, Your Honor, the
15 original framers intended either the word "accident" or
16 "occurrence" to be comprehensive words, as comprehensive
17 as possible.

18 QUESTION: Why did they use two different
19 words then?

20 MR. COHEN: There is a good reason for that.
21 Number One, in the preliminary draft of the treaty,
22 there was no -- they weren't distinguished. They were
23 all listed under the same article. However, as Daniel
24 Goodhice, who will be cited in our brief, who was a
25 highly respected aviation expert back in the thirties,

1 states, the word "accident" was used because the
2 airlines should not be responsible for intentional
3 wrongdoing by passengers.

4 In other words, if one passenger stood up and
5 decided to strike a fellow passenger, that is not
6 something for which the airline should be responsible.
7 The term "occurrence" was meant to cover, since the
8 baggage was totally in the custody and control of the
9 airline, it was meant to cover such things as theft or
10 perishable goods going bad, which would not necessarily
11 be accidents.

12 QUESTION: Well, then, you agree that accident
13 and occurrence mean two different things in the
14 convention.

15 MR. COHEN: They mean -- the distinctions are
16 slight, Your Honor, and let me give you one example why
17 we should not make much of that distinction. If on an
18 airline you have in the baggage compartment a dog with
19 his owner traveling above, and due to the normal,
20 routine pressure changes or noise levels in this
21 airplane both suffer hearing losses, under petitioner's
22 view, the dog, or I should say the owner of the dog can
23 recover for the hearing loss of the dog, while he
24 himself is foreclosed. The dog is entitled to a
25 presumption of liability to which the owner is not.

1 QUESTION: That is because the word
2 "occurrence" is a good deal broader than the word
3 "accident." That doesn't shock me, your example.

4 MR. COHEN: Well, if we look at both what Mr.
5 Goodhice says and also what a 1949 ICAO convention, a
6 committee which met to consider revisions of the Warsaw
7 Convention, they reiterated, and this is cited by Air
8 France and, I believe, the U.S. government, they
9 reiterated Mr. Goodhice's explanation that the word
10 "accident" was used to ensure that the airlines were not
11 held responsible for an irate passenger giving another
12 passenger a black eye, because that is not a risk
13 inherent in air travel. However --

14 QUESTION: How about terrorist attacks?

15 MR. COHEN: Yes, Your Honor --

16 QUESTION: Under your view, then, there would
17 be no airline liability for injuries caused to
18 passengers by terrorists?

19 MR. COHEN: No, Your Honor. With the advent
20 of international terrorism, and that is the context in
21 which the Guatemala Convention met and urged that the
22 word "event" be substituted for the word "accident,"
23 people were beginning to realize that the airlines could
24 be subject to ruinous exposure due to these terrorist
25 attacks. Also --

1 QUESTION: Well, if I understand your view,
2 injuries inflicted intentionally by another person upon
3 a passenger do not impose liability on the airline, so I
4 assume that under your present view there would be no
5 liability for the terrorist attack.

6 MR. COHEN: No, Your Honor.

7 QUESTION: What do you mean, no? You don't
8 agree with that?

9 MR. COHEN: I don't agree that that is the
10 ramification of the position we are advocating. Number
11 One -- there are two reasons for it -- the Montreal
12 Agreements deprive the airlines of all due care
13 defenses.

14 Number Two, the cases dealing with terrorism,
15 such as the Day case and the Evangelino case, all state
16 that terrorism should come within the definition of
17 accident because now in the present day world they are
18 risks inherent in air travel.

19 And that is what I meant originally when I
20 said the common thread throughout these cases was not
21 something sudden, unexpected, and unusual, but rather
22 risks inherent in air travel.

23 QUESTION: Mr. Cohen, is there anything in the
24 record that shows how many occurrences just like this
25 happen without anybody claiming loss of air problems?

1 MR. COHEN: How many --

2 QUESTION: How many times a plane has landed
3 and had the same problem with the reduced pressure and
4 nobody made any claims.

5 MR. COHEN: And nobody made any claims? We
6 have been unable to find that. However, Your Honor,
7 during World War Two, and this is well substantiated by
8 a cite in -- it is either DeMarines or Warshaw, the
9 primary occupational hazard for pilots was temporary
10 deafness due to the same types of pressure changes.

11 There may be, and I can't say for sure, plenty
12 of claimants out there who suffer problems who never --
13 redress.

14 QUESTION: I have done a lot of problems, and
15 I have an ear problem. I mean, I have done a lot of
16 traveling by air, and I've got ear problems. Should I
17 sue?

18 MR. COHEN: Your Honor, you would be --

19 QUESTION: I would sue all the airlines. I
20 have been on most of them. Including this one.

21 MR. COHEN: I feel hesitant giving legal
22 advice to the Court.

23 (General laughter.)

24 MR. COHEN: However, Your Honor, if you did
25 suffer a hearing loss due to the pressure changes in the

1 plane proximately caused by the plane and the type of
2 injury that is intimately associated with the operation
3 of airlines, yes, you would be entitled to compensation,
4 we feel, in conformity with the intent of the original
5 drafters.

6 QUESTION: Let me put this one to you.

7 Suppose someone comes on board, a lawyer, and puts his
8 briefcase with five heavy books in on the open overhead
9 rack, and the general practice of airlines is that they
10 don't let you put heavy things up there. Then some
11 turbulence occurs, whatever degree, and the briefcase,
12 with five or six or seven U.S. Reports in it, falls on
13 the head of a passenger.

14 Now, that is an accident, isn't it?

15 MR. COHEN: Yes, Your Honor, it's an
16 accident --

17 QUESTION: And it's an accident that could
18 have been prevented if the airline had enforced its own
19 rules.

20 MR. COHEN: Probably, Your Honor.

21 QUESTION: So the injured fellow who got these
22 books on his head, this briefcase on his head, has got a
23 case, hasn't he?

24 MR. COHEN: He has a case either under the
25 Third Circuit's formulation or under the formulation we

1 urge today.

2 QUESTION: But then to go to one of the recent
3 questions, you do not claim that any other person on
4 this plane suffered any hearing problem.

5 MR. COHEN: Yes.

6 QUESTION: Do we know how many people were on
7 the plane? Was that alleged in the pleadings?

8 MR. COHEN: No, but it was a 747, and I think
9 we could safely assume it was several hundred. We don't
10 know exactly how many.

11 QUESTION: Well, I suppose -- Justice
12 Rehnquist asked you what content do you give to the word
13 "accident." I suppose at least you give it a meaning of
14 there being an unintentional injury. That is one of the
15 definitions of accident, I suppose.

16 MR. COHEN: That is one of the definitions,
17 Your Honor. There are many definitions of accident, some
18 which may support petitioner. Many of them support us.
19 And the interchangeability of the word "accident" and
20 "occurrence" cannot be denied. For example, if Your
21 Honor were to go home tonight and look at his own
22 accident insurance policy, and look at his coverage, he
23 would probably see --

24 QUESTION: Would the Warsaw Convention limit
25 the liability of a carrier if one of its employees

1 deliberately assaulted a passenger?

2 MR. COHEN: Under the present system, it would
3 not, because wilfull misconduct gets you around the
4 liability limits.

5 QUESTION: Exactly. Because it is no longer
6 an accident.

7 MR. COHEN: No, Your Honor.

8 QUESTION: Because of some other provision in
9 the convention?

10 MR. COHEN: The wilfull misconduct exception
11 applies only to acts by agents or employees of the
12 airline.

13 QUESTION: Is that in the convention?

14 MR. COHEN: Yes, it is now, and that raises an
15 important point. The Senate bill, the bill currently
16 before the Senate to which I believe both Air France and
17 Republic of France cited, would substitute the word
18 "event" for "accident," and would, as counsel states,
19 and he states in his brief, reply brief, on Page 6,
20 produced the result respondent seeks.

21 If it would produce the result respondent
22 seeks, then it would necessarily work a radical
23 departure from the present scheme and bring with it the
24 parade of horrors they say the Ninth Circuit's
25 decision causes.

1 And I ask the Court why, then, would President
2 Gerald Ford, a conservative Republican, President Jimmy
3 Carter, and President Ronald Reagan all give their full
4 support to such a system which would open the floodgates
5 and cause all these problems?

6 Additionally, in the letter of transmittal
7 cited by the United States and the Senate hearings and
8 the report of the Senate Foreign Relations Committee,
9 there is absolutely no mention of any intent to change
10 the scope, the meaning, or do any type of historic
11 reform of Article 17, the accident causing injury.

12 Rather, and the most sensible interpretation
13 is that the change in language was rather intended to
14 better express what the Warsaw drafters originally
15 intended.

16 There are consequences of finding this case
17 not to be under the Warsaw system, which I think are
18 worth discussing in the few minutes left. As the cases
19 uniformly state, if this case does not come within the
20 Warsaw system, this or ones like it, then it is back
21 under common law negligence, and duty of the common
22 carriers we know since the late 1800's has been that of
23 the utmost care and diligence.

24 Again, let's imagine we are back in 1929, and
25 these types of incidences are not covered by the Warsaw

1 Convention. We have a skilfull plaintiff's attorney who
2 goes into court, and blessed by a jury instruction of
3 the utmost care and diligence, obtains a jury verdict of
4 \$100,000 or more, well in excess of the carrier's
5 ability to pay.

6 There we have a situation where the principal
7 purpose of the Warsaw Convention, which was to invoke a
8 liability shield or ceiling for the airline, is totally
9 defeated.

10 QUESTION: Are you suggesting that if
11 something is not an accident within the meaning of the
12 convention that we are talking about, then one can sue
13 the carrier under state common law?

14 MR. COHEN: Absolutely, Your Honor, and that
15 is what the Abramson case says, the Husserl case, and
16 all the other cases we have cited towards the end of the
17 brief, and it is not subject to serious dispute, though
18 petitioner attempts to distinguish those cases.

19 Article 24 of the Convention says for cases
20 covered by Article 17, the limitations and conditions
21 apply, meaning the liability ceiling. The courts have
22 clearly said in the Abramson case, and the Third Circuit
23 said it in 1984, that if Article 17 doesn't apply, in
24 other words, if there is no accident, you are allowed --

25 QUESTION: Does that make any sense to you? I

1 mean, the air carriers got absolutely nothing then by
2 this convention, if you are right, because every time
3 the convention gives them a beneficial interpretation,
4 the plaintiff says, well, it is outside the convention
5 so we sue at common law. Does that make sense to you?

6 MR. COHEN: Not, Your Honor, respectfully, not
7 as phrased. We are asking for a broader interpretation
8 which would allow the airlines to have a liability
9 ceiling applied to more situations. The consequences of
10 not allowing a plaintiff to sue at common law, assuming
11 grievous negligence on the airline, would be to in
12 effect insulate the airline, provide him an immunity for
13 what could be routine negligence.

14 For example, take the Abramson case, facts
15 where the man got on the plane with a hernea condition,
16 and he told the stewardess that he needed to lie down.
17 Knowing, aware of his problems, having the ability to
18 correct the problem, she nevertheless declined to do
19 so. And she may have violated TWA or whatever it was
20 express policy.

21 There was a wrong. If he is not allowed --
22 and the court clearly held it was not an accident and
23 not an accident in part because it was not -- that type
24 of injury was not a risk inherent in flight, and
25 therefore not an accident. If there is no remedy, then

1 Mr. Abramson has no chance of recovery --

2 QUESTION: Well, if the Warsaw Convention is
3 modified by the Montreal Agreement, says an airline is
4 to be liable to a passenger in a case of accident, and
5 this is not an accident, then you have to ask yourself,
6 was this meant to be the exclusive liability for
7 international carriers, and I dare say a lot of airlines
8 probably thought it was. I mean, the fact that one
9 particular person can't recover for some kind of
10 peculiar situation isn't a denial of justice across the
11 board.

12 MR. COHEN: I think the Court is correct that
13 originally the -- and that was my argument at the outset
14 when I cited those examples from 1929 with the ear
15 injuries due to the normal rotation of the prop, the
16 airlines and the countries probably wanted this to be
17 extremely comprehensive, indeed, the sole exclusive
18 remedy.

19 However, if we are allowed to interpret the
20 word "accident" narrowly as petitioner contends, then
21 the inevitable effect under all the cases will be, we
22 will be back in state law court with unlimited exposure
23 and seven-figure verdicts against the airlines.

24 QUESTION: Do you think that modifies the
25 Warsaw Convention somehow?

1 MR. COHEN: Does what --

2 QUESTION: That the convention is modified by
3 virtue of the holding that we would potentially make in
4 this case?

5 MR. COHEN: Not at all, Your Honor. I believe
6 that this Court --

7 QUESTION: It sounds like that is your
8 argument.

9 MR. COHEN: No, no, Your Honor, I respectfully
10 urge that this Court adopt the formulation I expressed
11 in the issue presented, which --

12 QUESTION: Suppose we don't. It sounds like
13 you are arguing then that the result of that is a
14 modification of the Warsaw Convention itself.

15 MR. COHEN: I believe that it would -- rather
16 state it this way, that it would not be achieving the
17 intent of the framers in light of the conditions and
18 circumstances in which the treaty was drafted.

19 QUESTION: May I see if I understand your
20 argument, which I frankly hadn't entirely before? What
21 you are saying, as I understand it, is, if the normal
22 operation of an aircraft in a few seconds is to change
23 cabin pressure by increasing it from -- the equivalent
24 of 6,000 feet change in altitude immediately, that is
25 normal, and if that frequently and repeatedly caused

1 hearing loss to passengers, normally did so, you might
2 say that is not an accident under their definition. It
3 is nevertheless negligence to continue to do this, and
4 you have a common law remedy.

5 MR. COHEN: It may very well be negligence,
6 Your Honor.

7 QUESTION: That is your theory.

8 MR. COHEN: Yes, and if this case were
9 returned --

10 QUESTION: So if it is not an accident it is
11 just outside of the treaty entirely.

12 MR. COHEN: Absolutely, and if this case were
13 returned to trial to the District Court and not under
14 the Warsaw Convention, what we would have to embark upon
15 as any plaintiff would would be a massive discovery
16 program to the FAA, the NTSB to see whether there has in
17 fact been a tradeoff between cost and safety.

18 QUESTION: May I ask if under normal operation
19 -- I am just not quite clear. Do they mean by the
20 particular airline or by the airline industry? In other
21 words, I could imagine that pressure changes could
22 differ from airline to airline.

23 QUESTION: And plane to plane.

24 MR. COHEN: Yes, that is correct, and
25 petitioner's argument would have the following effect if

1 you assumed you had a new airline which had a much
2 better pressure system than Air France's, and Air France
3 continued to fly its own planes.

4 The pressure system in this new airline
5 malfunctioned so as to achieve the same type of pressure
6 changes in Air France's 747. The incongruous situation
7 would be that you could recover against this superior
8 airline that had the slight malfunction so as to
9 function like the Air France plane, yet Air France would
10 be immunized or would be not subject to the Warsaw
11 Convention.

12 QUESTION: Mr. Cohen, do I understand --
13 suppose this were an accident. Would your client
14 nevertheless have had the option to sue in state court?

15 MR. COHEN: Well, the complaint was filed in
16 the state court and quickly removed to federal court,
17 and all parties agreed that the Warsaw Convention
18 applied. No, we would not, Your Honor, have the right
19 to -- we could file in state court under the Warsaw
20 Convention if it were not against a foreign airliner.

21 QUESTION: What I am trying to get to is, as I
22 understood your colloquy with Justices O'Connor and
23 Stevens earlier, you said that if this is not an
24 accident, then your client may be relegated to a state
25 court suit --

1 MR. COHEN: I really mean common law.

2 QUESTION: -- with a possible -- common law.

3 MR. COHEN: Yes. I am sorry.

4 QUESTION: With a possible recovery in six or
5 eight figures.

6 MR. COHEN: Or more. Well, not for this case
7 necessarily, but --

8 QUESTION: I can't understand if that is
9 available to you why you would want to press a Warsaw
10 Convention suit where you are limited to \$75,000.

11 MR. COHEN: If this case were a case of total
12 deafness in both ears, like the rest -- but the
13 plaintiff part does not support us in our position here
14 because they want accident construed as narrowly as
15 possible to allow them to get those large verdicts.
16 However, in a case such as this, with the hearing loss
17 in one ear, the damages are not that high.

18 The discovery involved in this case alone to
19 prove negligence on the part of the airline in using
20 this type of pressure system or not improving it would
21 be \$30,000, \$50,000 by the time we recovered, all our
22 costs would eat up the recovery. So under this case as
23 practical matter, the Warsaw Convention will not only
24 save everybody money, but it would mean that the Court,
25 the District Court would --

1 QUESTION: Now, if it is an accident, what is
2 there about the Warsaw Convention that bars your suing
3 in state court under common law?

4 QUESTION: The limitation.

5 MR. COHEN: Article 24 specifically.

6 QUESTION: But your earlier answer in effect
7 would repeal the Warsaw Convention so far as the limits
8 are concerned. The whole purpose of the Convention is
9 to put a limit which initially was \$8,333 translated
10 from French francs, but if you say that you can go in
11 with common law action, then you might as well tear the
12 treaty up.

13 MR. COHEN: Then I misspoke, Your Honor. What
14 we are saying is that these types of injuries should
15 come under the Warsaw Convention, so they will be
16 necessarily subject to the \$8,300 limit. However, if
17 the Court were to find that all these hypotheticals I
18 have postulated are not accidents, then we are totally
19 outside the Warsaw Convention. The liability ceiling
20 does not apply, and the airlines are exposed to --

21 QUESTION: It is as though the Warsaw
22 Convention had never been adopted.

23 MR. COHEN: Yes. If it is not an accident, it
24 is as if it had never been adopted.

25 And I may have a minute left, Your Honor, and

1 I wish to make a couple of comments with regard to the
2 uniformity issue raised by the Republic of France.

3 There are values higher than uniformity. It
4 is better for this Court to be out of step with the
5 Republic of France and right than to be in step with the
6 Republic of France and wrong. Years ago segregation was
7 the uniform law of the land, and that was changed
8 despite the fact that it was uniform because our value
9 system said it was wrong. We are not asking this Court
10 to change the Warsaw Convention or make a modification
11 in it. Rather, you are asking the Court to recognize
12 the original intent of the framers in an attempt to
13 achieve its underlying purpose as conceived in 1929.

14 Thank you.

15 CHIEF JUSTICE BURGER: Do you have anything
16 further, Mr. Johnson?

17 MR. JOHNSON: Yes, Mr. Chief Justice, I do.

18 CHIEF JUSTICE BURGER: You have two minutes --
19 you have two minutes remaining.

20 ORAL ARGUMENT OF STEPHEN C. JOHNSON, ESQ.,

21 ON BEHALF OF THE PETITIONER - REBUTTAL

22 MR. JOHNSON: Thank you, Your Honor.

23 The short answer to the question of remaining
24 state law claims is very simple. It is on the face of
25 the treaty itself. There were two purposes in that

1 treaty. One was to establish some limits for
2 liability. The other was to provide uniform rules
3 governing international air transportation, as stated in
4 the preamble to the convention, and Article 1 states
5 that the treaty applies to all international aviation
6 persons and aircraft for hire.

7 Article 24 in the convention states that all
8 the claims brought under that treaty shall be subject to
9 the conditions and terms of the convention. That does
10 make the convention the exclusive --

11 QUESTION: What of the case where it is not an
12 accident? Does that preclude the common law suit?

13 MR. JOHNSON: No, Your Honor, it does not.
14 Article 17 sets the prerequisites for injury liability,
15 18 for baggage liability --

16 QUESTION: What would be the theory of the
17 case?

18 MR. JOHNSON: I am sorry?

19 QUESTION: What would be the theory of the
20 case if it isn't an accident?

21 QUESTION: On what theory would the pleading
22 asserted?

23 MR. JOHNSON: If there was a negligence
24 claim? If it was not an accident?

25 QUESTION: Yes. You say then the common law

1 claim would arise.

2 MR. JOHNSON: No, I am saying that there would
3 be -- if there was any conceivable -- and I have some
4 problem conceiving of it -- conceivable other cause of
5 action or claim, it would be subject to the Warsaw
6 requirement that there first be an accident before you
7 have liability.

8 QUESTION: I know, but there isn't any. Then
9 what happens to common --

10 QUESTION: Suppose there is no accident. Then
11 you say that it is as though the treaty hadn't been
12 adopted. You just sue the airlines in a garden variety
13 negligence suit.

14 MR. JOHNSON: No, I don't, Your Honor.

15 QUESTION: I thought you said that.

16 MR. JOHNSON: I am sorry, I misspoke. If it
17 is an injury claim or a death claim, it is subject to
18 Article 17's prerequisite for liability, and the second
19 purpose of this treaty was to establish uniform rules.
20 The Second Circuit in its Benjamins decision has
21 recognized that --

22 QUESTION: So you are saying that before an
23 airline can ever be liable for anything there has to be
24 an accident.

25 MR. JOHNSON: If there is an injury --

1 QUESTION: And if there is an accident, it is
2 then subject to limitation.

3 MR. JOHNSON: Yes.

4 QUESTION: May I ask, I want to be sure, there
5 is quite a wide difference of opinion between you and
6 your opponent on the fundamental of the treaty. Assume
7 you are right, that this is not an accident because it
8 is the normal operation of the aircraft, and you are
9 therefore not within Article 17.

10 Are you saying that even though this happened
11 to thousands of people in normal operation, it could
12 therefore be proved to be negligence, and I am not
13 suggesting it could, but this I am on a hypothetical,
14 that they would not then be able to sue you in
15 negligence for saying that you normally operate your
16 aircraft in a negligent way even though there are no
17 accidents caused by it?

18 Couldn't they sue you at common law?

19 MR. JOHNSON: Your Honor, I think you are
20 talking about the airline not under the Warsaw
21 Convention --

22 QUESTION: Correct.

23 MR. JOHNSON: -- because -- that liability is
24 not established.

25 QUESTION: His theory is, if you get outside

1 of accidents, you also get outside of the liability
2 limitation.

3 MR. JOHNSON: Yes, Your Honor, and --

4 QUESTION: That is correct, is it not?

5 MR. JOHNSON: No, it is wrong.

6 QUESTION: So the liability limitation applies
7 even if there is no accident, is your view.

8 MR. JOHNSON: The liability limit applies to
9 claims for injury and death in international air
10 transportation under the convention.

11 QUESTION: Other than Article 17, something
12 other than Article 17?

13 MR. JOHNSON: That is correct, Your Honor.
14 Most of the cases that have said there are remaining
15 state law claims apply to incidents that occurred
16 outside the course of the transportation. The
17 convention doesn't apply at all. Here we have a case
18 where an injury occurred on board the flight. It is dead
19 center in the convention, and the convention's own
20 language makes it clear that that is --

21 QUESTION: Is a liable limitation found in
22 Article 17?

23 MR. JOHNSON: No, it is a later article, I
24 think, Article 23, under the convention sets limits.

25 QUESTION: And that applies even though the

1 incident is not one described in Article 17?

2 MR. JOHNSON: Well, in a sense it wouldn't
3 apply because you have to have a direct -- for liability
4 first under the convention's uniform rules before you
5 begin to consider a limit on liability.

6 I refer the Court to the Benjamin decision in
7 the Second Circuit where they address this issue and
8 also discuss the uniformity aspect, looking to some
9 legislation outside of this country on the exclusivity
10 question.

11 Thank you very much.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.
13 The case is submitted.

14 (Whereupon, at 11:05 a.m., the case in the
15 above-entitled matter was submitted.)
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CERTIFICATION

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#83-1785 - AIR FRANCE, Petitioner v. VALERIE HERMIEN SAKS

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BY Paul A. Richardson

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