

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EL AL ISRAEL AIRLINES, LTD., Petitioner v. TSUI
YUAN TSENG
CASE NO: 97-475 C.2
PLACE: Washington, D.C.
DATE: Tuesday, November 10, 1998
PAGES: 1-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EL AL ISRAEL AIRLINES, LTD., :

4 Petitioner :

5 v. : No. 97-475

6 TSUI YUAN TSENG :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 10, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:05 a.m.

13 APPEARANCES:

14 DIANE W. WILSON, ESQ., New York, New York; on behalf of
15 the Petitioner.

16 JONATHAN E. NUECHTHERLEIN, ESQ., Assistant to the
17 Solicitor General, Department of Justice, Washington,
18 D.C., for the United States, as amicus curiae,
19 supporting the Petitioner.

20 ROBERT H. SILK, ESQ., New York, New York; on behalf of the
21 Respondent.

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1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 97-475, El Al Israel Airlines v. Tsui Tseng.

5 Ms. Wilson.

6 ORAL ARGUMENT OF DIANE W. WILSON

7 ON BEHALF OF THE PETITIONER

8 MS. WILSON: Mr. Chief Justice, and may it
9 please the Court:

10 We are here today requesting the Court to hold
11 that a multilateral treaty of the United States, commonly
12 known as the Warsaw Convention, exclusively governs
13 recovery for passenger injury sustained in the course of
14 international air carriage. We are not contending for a
15 broad right to avoid liability. We are requesting the
16 Court to uphold the faithful reading of the convention.

17 Ms. Tseng is seeking purely emotional distress
18 damages as a result of being subjected to a security
19 search, an integral and vital part of maintaining the
20 safety and security of international air transportation.

21 The legal issue before the Court, however, is
22 not confined to the issue presented in her case. It is a
23 global issue because there are over 120 nations adhering
24 to the Warsaw Convention.

25 QUESTION: May I ask you a preliminary question

1 that is a little confusing? The court below found that
2 this was not an accident. Is that right?

3 MS. WILSON: Yes, Your Honor.

4 QUESTION: And we take the case on that
5 assumption.

6 MS. WILSON: Yes, Your Honor.

7 QUESTION: And there is an article in the
8 convention setting aside limits of liability in the case
9 of willful misconduct, but we don't have that issue before
10 us in this case?

11 MS. WILSON: I would submit, Justice O'Connor,
12 you do not because the trial court found that there was no
13 willful misconduct in the facts of this case, and that
14 finding was not disturbed by the court of appeals, and
15 therefore I do not believe it is before the Court.

16 QUESTION: And if there were a case of willful
17 misconduct, then there -- there would be no limit on the
18 liability, or you would look to the law of the nation
19 trying the case to determine that liability?

20 MS. WILSON: Justice O'Connor, we would submit
21 that you do not reach the issue of willful misconduct if
22 you do not reach the threshold issue of meeting the
23 conditions under article 17. Willful misconduct wasn't
24 intended to be read outside of the convention. If you
25 were to do so, then you would be not reading into the

1 convention the fact that articles 17, 18, and 19 state the
2 instances when the carrier shall be held liable. Article
3 25 -- excuse me -- article 22 limits that liability, and
4 article 25, you lose the limit if you have willful
5 misconduct. But if you read that there's a recovery
6 outside of the convention that your holding is that you
7 have an instance where you have passengers attempting to
8 prove that there isn't an accident so that they are unable
9 to seek damages without limit.

10 QUESTION: So, in any event in this case, we
11 simply don't address the issue of article 25 and how that
12 would bear on it.

13 MS. WILSON: Yes, Your Honor. There's no reason
14 to address that in this case.

15 QUESTION: Except that under your
16 interpretation, we are left with the -- with the surely
17 unusual situation in which if there is a willful tort
18 committed by a carrier, so long as it is not an accident,
19 there is no recovery. That's -- extraordinary.

20 MS. WILSON: Well, it --

21 QUESTION: Isn't that right? I mean, isn't that
22 the consequence of -- of the interpretation you're giving
23 to the -- to the treaty?

24 MS. WILSON: Yes, Your Honor. If you don't
25 satisfy both conditions, bodily injury and an accident,

1 you're not entitled to recover under the convention.

2 QUESTION: Why would anyone write a treaty like
3 that? I mean --

4 MS. WILSON: Well, at the time that the
5 convention was drafted, it was 1929. The carriers were
6 free to disclaim any and all liability, and it was a
7 compromise to have the liability that was created under
8 the convention to be limited except for in the
9 circumstances provided for. So, if you allow the
10 passengers to seek unlimited recovery outside the
11 convention, you're creating an incentive for them to try
12 and prove there isn't an accident so that when they don't
13 have bodily injury, they can seek unlimited damages.

14 QUESTION: But that still doesn't seem to me a
15 good explanation for why the convention would cover
16 accidents that really were no fault of the carrier and
17 exclude liability for something that's intentional
18 wrongdoing on the part of the carrier.

19 MS. WILSON: Well, they -- I don't believe the
20 drafters thought they were doing that because when they
21 drafted the convention, they also had article 20 which was
22 the all necessary measures defense. Although carriers
23 that fly into and out of the United States are not
24 entitled to avail themselves of the all necessary measures
25 defense, that's where the fault issue really came into

1 play. It was the unusual, unexpected occurrence as
2 defined by Saks which would determine whether you have the
3 accident requirement, and even if you did, if the carrier
4 was able to establish that it had taken all reasonable
5 measures that it could take, it wouldn't be liable. And
6 if -- it was only if you weren't able to establish that
7 burden as the carrier, then you would have limited
8 liability.

9 QUESTION: Why isn't it just as fair a reading
10 -- and granted, article 25 is not before us in this case,
11 but when we're construing the convention as a whole, we
12 have to have some mind for the type of thing article 25
13 covers -- just as fair a reading of article 25 to say that
14 the convention does permit recovery, but the limits are
15 off?

16 MS. WILSON: To do that, I believe you have to
17 ignore the scheme as to how the articles under the
18 liability chapter were set forth.

19 QUESTION: Ms. Wilson, it might help if you gave
20 examples of what has been considered willful misconduct.
21 A very recent example is the KAL case; that is, it is an
22 accident, but the conduct was found by a jury to be -- to
23 amount to willful misconduct. So, as far as I know, the
24 cases that have come up under the convention involving
25 willful misconduct have been categorized as accidents, and

1 then the question is, if the conduct was so egregious, the
2 limits on liability are off.

3 Is there any case of willful misconduct other
4 than the KAL pattern?

5 MS. WILSON: Well, there are the willful
6 misconduct instances with respect to, for example, the Pan
7 Am Lockerbie bombing. The terrorist attack of placing the
8 bomb on board the aircraft wasn't what was found to be the
9 willful misconduct, although it clearly was intentional
10 conduct. The willful misconduct on the part of the
11 carrier had to do with their security measures and their
12 program or the lack thereof.

13 And there are other instances in which the --
14 there have been terrorist attacks or hijackings in which
15 the carriers are found to be responsible in damages, but
16 they're not held to the level of willful misconduct.
17 And, therefore, the limit of the passengers is the limit
18 that is applicable.

19 QUESTION: In the Lockerbie situation, would the
20 -- would the carrier's -- let's say it is willful --
21 failure to -- to have adequate security measures -- would
22 that be considered an accident so that you could come
23 under the treaty?

24 MS. WILSON: Well, the court didn't address on
25 point, when they reached the Lockerbie decision, the issue

1 of whether the security measures was what triggered the
2 accident requirement.

3 QUESTION: Well, just tell me your view.

4 MS. WILSON: Well, my view is that the --

5 QUESTION: Would that be an accident?

6 MS. WILSON: Well, yes, but -- but it also would
7 have -- the accident also could be the unusual and
8 unexpected event of having the bomb placed on the
9 aircraft, but the conduct of the carrier that rose to the
10 level of intentional, the willful misconduct on the part
11 of the carrier, was their security program.

12 QUESTION: And would that be -- was that an
13 accident in your view?

14 MS. WILSON: Yes, I believe that would -- could
15 constitute an accident. I just don't think that was what
16 the court --

17 QUESTION: I see.

18 MS. WILSON: -- was driving at in that case,
19 Your Honor.

20 QUESTION: You mean in Lockerbie they were found
21 to have willfully defaulted in taking security measures?

22 MS. WILSON: Yes, Your Honor.

23 QUESTION: They said we -- we want no security.
24 We want the risk of bombs. I mean, is that the sort of
25 finding that had to be made?

1 MS. WILSON: No. I believe, Your Honor, that
2 the Lockerbie decision rested more on the fact that Pan Am
3 was charging a \$5 surcharge per passenger for the
4 heightened security that they claimed that they were
5 providing when, in fact, it turned out that the trial
6 showed that they had done such things as taken dogs from
7 the local pound and pretended like they were trained as
8 dog --

9 QUESTION: They were doing nothing for their \$5,
10 in effect.

11 MS. WILSON: Right. In fact, you could say they
12 were misrepresenting the nature of the security they were
13 providing.

14 QUESTION: Do I understand that from your point
15 of view it doesn't matter? If this were an accident, then
16 the district court said, yes, it's an accident, but there
17 was no bodily injury. End of case. So, you're here
18 contesting the Second Circuit decision, but as far as your
19 client is concerned, categorization of an accident -- as
20 an accident would be fine. Is that --

21 MS. WILSON: Well, broadly speaking, that's
22 true, but in the context of international security, to
23 hold that the provision of security services is an unusual
24 and unexpected event, I do not think would be borne out.

25 The -- we didn't need to reach that issue in

1 this case because you need to meet both conditions in
2 order to recover under the convention, and it was
3 undisputed by the respondent that plaintiff did not
4 sustain a bodily injury and that she was in the course of
5 embarkation. So, the only issue that ended up going up
6 insofar as the respondent was concerned when he appealed
7 or, I should say, Ms. Tseng appealed to the Second Circuit
8 was whether the court was incorrect in finding that the
9 search constituted an accident.

10 But for us to bring it up to this level, it's
11 the -- it's the broader issue of whether or not the treaty
12 is exclusive, and if you don't meet both conditions, you
13 don't have a right to recovery. And in this particular
14 case, you didn't have to reach the accident issue because
15 she didn't have bodily injury.

16 QUESTION: I suppose we ought to let you address
17 this case.

18 (Laughter.)

19 MS. WILSON: Thank you.

20 The -- the court did not have squarely before
21 it, until this case, the question of exclusivity, but we
22 believe that the Franklin Mint, Saks, Chan, Floyd, and
23 Zicherman decisions nevertheless issued a -- a line of
24 cases which should have directed the lower court to find
25 that the convention is exclusive.

1 In Franklin Mint, the Court recognized the dual
2 purposes of the convention, which were to create a uniform
3 body of aviation law and to limit the carrier's
4 presumptive liability.

5 In Saks, the Court broadly defined what
6 constitutes an accident contemplated by article 17 and
7 held that the carrier is liable to a passenger only if the
8 passenger proves there was an accident that was the cause
9 of the injury.

10 Then in Chan, the Court enforced the limited
11 liability created by the drafters and looked to the
12 parallel notice provisions with respect to baggage and
13 cargo to interpret the notice provision for the passenger
14 tickets.

15 In Floyd, the Court enforced the article 17
16 bodily injury requirement holding that the carrier cannot
17 be held liable under 17 unless the accident has caused
18 bodily injury.

19 In Zicherman, the Court gave the most natural
20 reading of article 24 and held that in an action brought
21 under article 17, article 24 directs the lower court to
22 look to local law to determine the measure of the
23 passenger's recovery and who may bring a suit.

24 We contend that in this case that the Court once
25 again needs to interpret the convention as a whole and not

1 attempt to divine what article 17 or article 24 means read
2 standing alone. The carrier has created a clear scheme of
3 liability to -- to govern international transportation,
4 and if you read the scheme in terms of the chapter 3
5 liability, the only sensible reading is that the
6 convention was intended to be exclusive, the passenger was
7 entitled to limited -- to limited recovery if the
8 passenger met the conditions under article 17.

9 QUESTION: But is -- do I correctly understand
10 that your position is that it does not matter whether this
11 is a case covered by article 17 or not? All you have to
12 say is something happened during the course of
13 international travel, and that's the end of the ball game
14 unless there's recovery under article 17.

15 MS. WILSON: Justice Stevens, I wouldn't agree
16 with that position because I do not view article 17 as
17 determining the scope of the convention. Article 1
18 determines the scope. Article 17 tells when you're going
19 to be liable --

20 QUESTION: No, but article 17 surely is relevant
21 to deciding whether article 24 applies, or do you think
22 it's not relevant? Because article 24(2) says, in --
23 starts out that in the cases covered by article 17 and so
24 forth. And I -- when I see something like that, I think,
25 well, the first thing I've got to decide is whether or not

1 it's covered by article 17, and I think you're saying it
2 doesn't really make any difference whether it's covered by
3 17.

4 MS. WILSON: Well, I -- I don't in the sense
5 that I say covered by 17 means that they concern passenger
6 injury or death cases, not that it concerns whether or not
7 you have a recoverable claim under article 17.

8 QUESTION: Well, I still -- I'm still not sure.
9 Do you think it makes any difference in -- to your case
10 whether the case is covered by article 17 or not? And if
11 so, is it or is it not?

12 MS. WILSON: It is a passenger injury case, and
13 therefore it falls under article 17, but the passenger in
14 this instance does not state a recoverable claim under 17.

15 QUESTION: But you haven't answered my question.
16 Is it covered by article 17 within the meaning of the
17 treaty?

18 MS. WILSON: This passenger's claim?

19 QUESTION: This case.

20 MS. WILSON: Yes, Your Honor.

21 QUESTION: It is covered by 17.

22 MS. WILSON: Yes.

23 QUESTION: I see.

24 MS. WILSON: It's covered by 17 because it's a
25 passenger claim.

1 QUESTION: Are you saying it's covered by 17
2 because 17 embraces the universe of personal hurt,
3 excluding baggage and delay?

4 MS. WILSON: Yes, I do, Your Honor.

5 QUESTION: In other words, you're saying --

6 QUESTION: It covers the universe and -- and in
7 this case it is inapplicable, but it has sufficient
8 breadth so that 24 kicks in.

9 MS. WILSON: I -- I would not agree that it's
10 inapplicable. I would say the passenger simply cannot
11 meet the conditions that article 17 stipulates.

12 QUESTION: See, the problem I have, this is -- I
13 want to get it on the table so you have an opportunity to
14 -- is that if you say the universe covered by article 17
15 is all cases, it's a little tension with the language of
16 article 17 which describes the universe of cases in which
17 the carrier shall be liable. But you're suggesting
18 article 17 also covers cases in which the -- the carrier
19 shall not be liable.

20 MS. WILSON: I do suggest that, Your Honor,
21 because I suggest that article 1 is intended to provide
22 for all of international air transportation for passengers
23 for hire, and article 17 I do not believe should have to
24 have a subparagraph 2 saying that unless you meet these
25 conditions -- if you don't meet these conditions, you're

1 entitled to sue outside the convention. I believe that if
2 you read the language fairly, that -- and you read that in
3 relation to all the other provisions under article --
4 excuse me -- chapter 3 --

5 QUESTION: Yes, but the mere fact that article 1
6 says the convention shall apply doesn't necessarily mean
7 -- maybe it did -- doesn't necessarily mean it shall
8 preempt every other source of recovery. It just doesn't
9 -- in plain language, it doesn't say that.

10 MS. WILSON: I -- I believe that it does when
11 you read the -- the articles in succession, and I believe
12 that if you -- although I -- I don't believe you need to
13 refer to the drafting history, if you do refer to the
14 drafting history, I don't -- I don't think that you can
15 sensibly read the articles to mean that the -- the
16 drafters thought they were leaving a category of cases
17 with respect to passenger injury outside of the
18 convention.

19 QUESTION: Well, to make that clear, don't we
20 really look outside the text? I mean, you can -- you can
21 go back to the introductory sentence of article 1.1 and I
22 suppose still theoretically have a question open as to
23 whether, given the applicability of the convention to --
24 to all possible instances here, the convention may still
25 allow, in effect, by reference to outside law, the

1 possibility of -- of a claim under domestic law. And to
2 answer that question definitively, don't we have to look
3 outside the text of the convention and -- and consider the
4 -- the intentions that were expressed at the time this
5 language was -- was proposed and adopted?

6 For example, the -- the statement of the British
7 representative to the Warsaw Convention, that there's no
8 more common law. Don't we have to look to things like the
9 no more common law statement in order to get to a
10 definitive answer to the question that we have?

11 MS. WILSON: I believe that because treaties
12 should be faithfully upheld, that it is appropriate to
13 look to the drafting history in respect of the Warsaw
14 Convention, in particular the Warsaw minutes which were
15 transcribed by Horner and Legrez, and if you read them in
16 total, including the comments of Sir Alfred Dennis and the
17 reporter and various other delegates, it's clear that they
18 were intending it to be all-encompassing with respect to
19 passenger claims. But I -- I do believe that you'd be
20 doing so to confirm the reading, which is that if you read
21 the articles and read the structure in the scheme of the
22 convention, the conclusion should be that the convention
23 is exclusive.

24 QUESTION: I'm surprised that you don't put
25 weight on article 24 because I thought it was that article

1 that clarifies that the convention is meant to be
2 exclusive for these categories, personal injury, baggage
3 delay, exclusive of any other actions of tort -- whatever
4 it may be. And you don't get it just from article 17 in
5 the Gestalt of the convention, but you have an exclusivity
6 article written right into the convention.

7 MS. WILSON: Justice Ginsburg, I -- I do take
8 the position that article 24 is telling the courts that
9 you are not permitted to look outside the convention for
10 causes of action. I -- I believe that 24 has to be read
11 in conjunction with 17 and with 1, and -- and the articles
12 all interrelate under chapter 3, including articles 17 and
13 24, to reach the conclusion that you cannot have a
14 recovery outside the convention.

15 If there are no further questions, I would like
16 to reserve rebuttal.

17 QUESTION: Very well, Ms. Wilson.

18 Mr. Nuechtherlein.

19 ORAL ARGUMENT OF JONATHAN E. NUECHTHERLEIN

20 FOR THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

22 QUESTION: Mr. Nuechtherlein, do you know, going
23 to Justice Stevens' question, I think we would have less
24 trouble with article 17 if instead of beginning, the
25 carrier shall be liable for damage sustained in the event

1 of the death or wounding of a passenger or any other
2 bodily injury suffered by a passenger, if the accident,
3 blah, blah, blah -- I think it would be easier to sustain
4 your case if it read instead, in the event, if it began
5 with in the event of the death or wounding of a passenger
6 or any other bodily injury, the carrier shall be liable
7 if. Because then, you know, the introduction says, in the
8 event of that's the situation covered, in the event of the
9 death or wounding.

10 Do you happen to know whether the French version
11 of the treaty is structured the same way? Does it begin,
12 the carrier shall be liable? Or does it begin, in the
13 event of the death or wounding of a passenger?

14 MR. NUECHTHERLEIN: The grammatical structure of
15 article 17 is very similar in the French as in the
16 English.

17 I think Justice Stevens' question turns on the
18 interpretation of the introductory clause of article 24
19 which, as Justice Ginsburg points out, is the focus of the
20 exclusivity analysis here. And Justice Stevens was
21 concerned that because the language in the cases covered
22 by article 17 doesn't explicitly say in all personal
23 injury cases, the convention is not exclusive as to some.

24 QUESTION: That's the core.

25 MR. NUECHTHERLEIN: As an initial matter, I

1 should point out the House of Lords also thought that that
2 was in fact the appropriate language to focus on in -- in
3 this circumstance and determined, as we believe is
4 correct, that the framers of the convention intended that
5 introductory clause as a shorthand to denote the class of
6 personal injury cases generally as opposed to the class of
7 cases involving damages --

8 QUESTION: The introductory clause for which
9 article?

10 MR. NUECHTHERLEIN: For article 24.

11 But I think the more important point --

12 QUESTION: Do you read article 17 as saying --
13 for purposes of article 24, as saying something like in
14 all cases covered by article 17, excluding or including
15 liability, the provisions of the preceding paragraph
16 apply?

17 MR. NUECHTHERLEIN: I think the introductory
18 clause of article 24, even in its original form, was a
19 shorthand denoting all personal injury cases.

20 But from the Government's perspective, the more
21 important point is this. Last week the United States
22 ratified Montreal Protocol No. 4.

23 QUESTION: Well, we're aware of that, but just I
24 want to be quite sure of your interpretation of the first
25 phrase of paragraph -- subparagraph 2 of article 24. In

1 the cases covered by article 17, what -- what does that
2 mean?

3 MR. NUECHTHERLEIN: That means in the class of
4 cases to which article 17 is addressed, which is personal
5 injury cases.

6 QUESTION: Whether or not liability --

7 MR. NUECHTHERLEIN: Exactly.

8 QUESTION: -- exists.

9 MR. NUECHTHERLEIN: The premise of this is that
10 if the -- if a passenger cannot satisfy the conditions of
11 liability under article 17, that passenger should not, for
12 that very reason alone, be able to disqualify the carrier
13 from invoking the limits of the -- of the convention.

14 QUESTION: How many smart people from how many
15 countries came up with this -- with this formulation?

16 (Laughter.)

17 QUESTION: You think they --

18 MR. NUECHTHERLEIN: Well --

19 QUESTION: -- could have said it more clearly.

20 MR. NUECHTHERLEIN: Again, I think it's very
21 relevant that in Montreal Protocol No. 4, smart people
22 from a lot of countries got together and decided to
23 clarify the language that is in article 24. As amended by
24 Montreal Protocol No. 4, which is about to go into effect
25 in the United States, the introductory clause that we've

1 all been focusing on in article 24 no longer says, in the
2 cases covered by article 17. It now says, in the -- in
3 the carriage of passengers and baggage.

4 QUESTION: It makes perfect sense. Now the
5 question is whether they did that in order to change what
6 the original treaty said or in order to correct or to make
7 more clear what the original treaty said. How do we know
8 that it was in order to make it more clear?

9 MR. NUECHTHERLEIN: Well, the -- there -- there
10 is no indication in the proceedings that led up to the
11 change in language that anyone contemplated that this
12 would make any difference in the exclusivity analysis.
13 And as we point out, even under the original language of
14 article 24, the House of Lords was correct in interpreting
15 the introductory clause as meaning precisely what -- the
16 significance that we give it, which is that in personal
17 injury cases, if you cannot satisfy the important
18 conditions for liability set out in article 17, then you
19 may not use your very failure to satisfy those conditions
20 as a basis for seeking unlimited liability under local
21 law without regard to the convention.

22 QUESTION: But is it correct that the conditions
23 for liability under 17, as you view the treaty, are simply
24 physical harm and being in the course of international
25 travel? There's no fault requirement, or is there a fault

1 requirement?

2 MR. NUECHTHERLEIN: Under the convention there
3 is not a fault requirement.

4 QUESTION: So, the only conditions you're
5 talking about is somebody got hurt while he was on an
6 airplane -- in international travel.

7 MR. NUECHTHERLEIN: If there was an accident,
8 and that is also an important requirement. In Saks, this
9 point -- this Court pointed out that the framers of the
10 convention deemed it essential to confine the class of
11 cases in which passengers can recover for injuries
12 incurred within the scope of the convention to cases in
13 which there was an -- there was an unexpected or unusual
14 event that was external to the passenger. The framers did
15 not want to create a liability for cases where, for
16 example, someone has a peculiar medical reaction to the
17 ordinary circumstances of air travel.

18 Under the court of appeals' reading of this
19 convention, it is precisely a passenger's failure to
20 satisfy that important threshold requirement for recovery
21 under the convention that entitles the passenger to escape
22 the convention scheme of limited liability and sue for
23 potentially unlimited liability under local law without
24 regards to the convention. In our view, that would be
25 very anomalous.

1 The -- the court of appeals' reasoning would
2 also appear to apply in cases where a passenger suffered
3 purely psychological injuries as opposed to physical
4 injuries. Again, in Floyd, this Court determined that the
5 framers of the convention meant to -- to withhold
6 liability in cases where a passenger could claim only
7 psychological injury.

8 To hold, as the court of appeals did, that a
9 failure to satisfy article 17's liability conditions takes
10 you outside the scope of the convention creates the
11 following anomaly. It would mean that if you were a
12 passenger on an airplane who was merely traumatized when
13 the airplane drops suddenly 2,000 feet in altitude, you
14 could sue potentially for unlimited liability without
15 regard to the convention. Whereas, another passenger on
16 the same airplane could -- if that passenger also bumped
17 her head, in addition to being traumatized, would be
18 confined by -- by the convention's liability caps, and
19 that result we suggest would make very little sense.

20 QUESTION: Do you have any -- I couldn't find
21 anywhere -- I'll get it, but I haven't read it yet. The
22 House of Lords says that if you look at the language of
23 this, there -- you just can't apply it literally. I mean,
24 you lose if you apply it literally. You have to really
25 look beyond that language and say does it forbid an

1 interpretation that is required, says the House of Lords,
2 by looking at the treaty as a whole.

3 So, I don't find in one of these briefs,
4 anywhere in an appendix, the treaty as a whole, which
5 isn't that long. So, I don't know yet. I'll have to get
6 it. It would have been simpler, since that's their
7 reasoning, if I could have somewhere looked at the treaty
8 as a whole. Am I right? Maybe hidden --

9 MR. NUECHTHERLEIN: Well, the treaty as a whole
10 is reproduced in the United States Code, and petitioner
11 has reproduced the most important provisions --

12 QUESTION: But if you look at just provision by
13 provision, you lose, don't you?

14 MR. NUECHTHERLEIN: I --

15 QUESTION: I mean, 17 says -- we're talking
16 about instances where the carrier is liable for a -- for
17 physical injury. And then 24 says, in cases that are
18 foreseen by -- if you want to be loose about it, that's
19 fair enough -- in cases foreseen by article 17, et cetera.
20 And in cases foreseen, well, or covered, however you want
21 to put it, those seem to be cases of injury, physical
22 injury.

23 Now -- now, to get out of that, there must be
24 some flavor for the statute as a whole or something, or
25 the treatise as a -- the treaty as a whole.

1 MR. NUECHTHERLEIN: To begin with, Justice
2 Breyer, I do not think the House of Lords viewed the text
3 as going the other way. I think the House of Lords viewed
4 that particular phrase as ambiguous, and that ambiguity we
5 would point out is resolved, at least prospectively, by
6 Montreal Protocol No. 4, which again I believe establishes
7 the sense of the international community as to what the
8 original language meant. The framers --

9 QUESTION: I thought -- what I was thinking of
10 is the exact words. He says, in my opinion, says the
11 judge, the answer to this question is to be found not by
12 an exact analysis of the particular words used, but by a
13 consideration of the whole purpose of the article. And
14 then he spent three pages trying to set out the treaty and
15 how you look at the whole thing and then you understand
16 that what 17 is talking about is personal injury cases.
17 Period.

18 MR. NUECHTHERLEIN: I think the House of Lords
19 recognized that it would, in fact, be anomalous to allow
20 passengers to disqualify carriers from invoking the --

21 QUESTION: It would be. It would be. That's
22 right.

23 MR. NUECHTHERLEIN: Yes.

24 QUESTION: But we have some language.

25 MR. NUECHTHERLEIN: And I think the House of

1 Lords also recognized that that language was not
2 dispositive because it was ambiguous and you do, in fact,
3 need to look at the drafting history and the convention as
4 a whole. But I do not think the House of Lords viewed
5 that language as pointing in the opposite direction --

6 QUESTION: Are there any other cases from other
7 jurisdictions of member nations to the Warsaw Convention
8 that we can look to besides Abnett from the House of
9 Lords?

10 MR. NUECHTHERLEIN: To my knowledge, Abnett is
11 the only decision of the highest court of a sister
12 signatory.

13 QUESTION: I take it then you -- you disagree
14 with your fellow counsel here that the language of the --
15 of the convention requires your result. I take it your
16 position is that the language of the convention is
17 ambiguous, but if you take into consideration anomaly,
18 drafting history, and so on, your result is the -- is the
19 -- is the reasonable result.

20 MR. NUECHTHERLEIN: I do not think that the
21 convention read as a whole is ambiguous. I think the
22 introductory clause of article 24, which was amended by
23 Montreal Protocol No. 4 to reveal its original intent,
24 could be construed as ambiguous.

25 QUESTION: Thank you, Mr. Nuechterlein.

1 Mr. Silk, we'll hear from you.

2 ORAL ARGUMENT OF ROBERT H. SILK

3 ON BEHALF OF THE RESPONDENT

4 MR. SILK: Mr. Chief Justice, may it please the
5 Court:

6 Montreal No. 4 was enacted 5 or 6 years after
7 this incident occurred. Montreal No. 4 is prospective, as
8 the Solicitor General pointed out in his brief. Montreal
9 No. --

10 QUESTION: But Mr. Silk, in the Senate report on
11 what the -- what our Senate voted on, it says in the -- in
12 the article-by-article explanation of Montreal 4, it says,
13 article 24 clarifies that any action for damages, whether
14 based on the convention or in contract or in tort or
15 otherwise, can only be brought subject to the conditions
16 and limits set out in the convention. That's this August,
17 a Senate report saying that this change is merely
18 clarifying.

19 MR. SILK: Well, the Senate report may have said
20 that, but the Senate report was not in effect at the time
21 this particular incident occurred.

22 QUESTION: I guess your position is the treaty
23 meant what it meant, and the Senate --

24 MR. SILK: My position --

25 QUESTION: -- cannot, by later saying it meant

1 something else, cause it to have meant something else. It
2 either meant that or it didn't mean that.

3 MR. SILK: Exactly.

4 QUESTION: It seems reasonable to me.

5 MR. SILK: My -- my contention is that the
6 treaty says -- means what it says, and what it means is
7 that article 1, which defines the scope and the breadth of
8 the convention as dealing with international air
9 transportation, does not preclude or preempt anything,
10 that article 20 -- if it did preempt everything, then
11 article 24 would be unnecessary. Article 24 is the only
12 preemption or the only exclusive provision for convention
13 exclusivity that there is, and article 24, as applicable
14 in this situation, refers only -- in personal injury
15 cases, refers only to cases covered by article 17.

16 QUESTION: But you must admit it produces
17 results that make the whole treaty seem quite pointless.
18 I mean, the whole purpose of the treaty was to come to
19 some common agreement as to the liability of carriers, and
20 the -- and the agreement that you say they signed says
21 that in the event of personal injuries in the narrow
22 situation where it's caused by an accident and there is
23 physical injury, you can sue under the convention and
24 you're limited, and in all other situations, you're
25 remanded to whatever the local law is so that there will

1 be innumerable divergent judgments in all sorts of
2 different jurisdictions.

3 MR. SILK: Article 24 preempts only accident
4 cases. This was not an accident case. This was not a
5 case in which --

6 QUESTION: So, your answer is yes, that's --
7 that's a result and too bad.

8 But, you know, I'm not inclined to interpret it
9 that way if I'm dealing with -- with a phrase that is --
10 is merely ambiguous, in the cases covered by article 17.
11 Does that mean in the cases in which article 17 gives
12 relief, or does it mean in -- in the cases -- in the cases
13 in which -- which article 17 addresses?

14 MR. SILK: I think the cases in which article 17
15 addresses. And the cases which article 17 addresses are
16 cases which are resulting from accidents. It's so stated
17 very explicitly in article 17.

18 Counsel, I believe, has admitted in response to
19 Your Honor's question that she is -- agrees that this case
20 does not involve an accident. This case does not involve
21 an accident. That's also assumed by the questions
22 presented for review.

23 QUESTION: Well, sure, but why can't I say that
24 article 17 -- what it addresses is damage sustained in the
25 event of death or wounding of a passenger or any other

1 bodily injury suffered by a passenger? That, it seems to
2 me, is the general subject of 17.

3 MR. SILK: Except that's only true if the
4 accident that caused the damage took place on board an
5 aircraft in the course and so on.

6 QUESTION: That's necessary for liability, to be
7 sure.

8 MR. SILK: But that's -- that's -- that's --
9 that modifies the entire first sentence and first clause
10 of article 17 because the first clause says that it shall
11 be liable for damages sustained for bodily injury if the
12 accident which caused the damage. So, the existence of an
13 accident is critical under the Saks case, and under --
14 under -- under all of these cases, it's a critical
15 element.

16 QUESTION: So, do you lose if I think there was
17 an accident?

18 MR. SILK: There was no accident.

19 QUESTION: I know that's your opinion, and --
20 and this is disputed. But if I thought that there -- this
21 is an accident, that accidents refer to intentional torts
22 as well, then do I have to decide against you in your
23 opinion?

24 MR. SILK: I -- I believe that if this was an
25 accident, if this was an accident, which would be contrary

1 to all --

2 QUESTION: I know you don't agree with that.

3 MR. SILK: -- to the meaning of an accident, if
4 this was an accident, that's true. We would not -- would
5 not be in court.

6 QUESTION: So, you would not be arguing --

7 QUESTION: Because there was no physical injury.

8 MR. SILK: Yes, there was no physical injury.
9 That's correct.

10 QUESTION: Because the -- article 17 requires
11 accident plus bodily injury. So, you're not making the
12 argument -- you wouldn't be making the argument that even
13 if this were an accident, it's still subject to State law
14 because there's no bodily injury. Bodily injury is all
15 that the convention covers.

16 MR. SILK: Well, I would agree that if this was
17 an accident and not an intentional tort, that the article
18 17 would apply and article 24 would apply, and it would
19 preclude the accident -- anything from happening because
20 of Floyd because the fact that the injuries were psychic
21 and were not bodily injuries, if this was an accident.

22 QUESTION: Mr. Silk, does that mean that your -
23 - your -- I'm just trying to think this thing through --
24 response to Justice Scalia about the anomaly is that there
25 is total preemption of State law causes of action in

1 accident cases that do not result in physical harm?

2 MR. SILK: Yes.

3 QUESTION: So, there would be -- a category of
4 common law causes of action would be -- would be preempted
5 by the treaty.

6 MR. SILK: Oh, yes.

7 QUESTION: Even though there's no recovery in
8 those cases.

9 MR. SILK: Oh, yes, I would certainly agree with
10 that. But the critical question is the one that was
11 decided by the Second Circuit that this was not an
12 accident. And the Second Circuit based its decision on
13 -- on the -- on the Saks case principally and on all of
14 the cases --

15 QUESTION: Why do you -- why do you insist that
16 only the necessity of an accident is part of the -- of the
17 limitation in 17? Why not also death, wounding, or other
18 bodily injury? I mean, isn't that a condition just as
19 much as the existence of an -- of an accident?

20 MR. SILK: It's only a condition if it's an
21 accident caused it.

22 QUESTION: Well, I can --

23 MR. SILK: And that's what it says in article
24 17.

25 QUESTION: -- I can also say the -- the -- the

1 accident is only a condition if -- if there's death or --
2 death or wounding or any other bodily injury. I mean,
3 they're -- they're parallel conditions, it seems to me.

4 MR. SILK: Well, if that was intended to be the
5 case, then the convention would have been written in a
6 different way. Article 17 was not written that way.
7 Article 17 predicated liability for death or wounding or
8 bodily injury only if there was an accident.

9 QUESTION: That's right, but it also -- it also
10 only predicated liability for death or wounding or other
11 bodily injury. So, you could say it's only limited to
12 that too. So, if it isn't death, wounding, or bodily
13 injury, if it's just -- just psychic injury, even in the
14 event of an accident, you can sue under State law.

15 MR. SILK: Well, I believe that the convention
16 intended to include only accidents in article 17 and
17 intended to include everything else under article 18,
18 which is exactly what the Saks case said, and it's exactly
19 what the Solicitor General argued in the Saks case in the
20 Solicitor General's brief amicus.

21 And the brief amicus of the Solicitor General,
22 which I would recommend to this Court as a good text for
23 this subject matter -- in the Solicitor General's brief
24 they emphasized the importance and the critical necessity
25 that there first be an accident, and an accident is

1 defined as something which is unforeseen, which is --

2 QUESTION: Where is accident defined in -- in
3 the treaty, Mr. Silk?

4 MR. SILK: Accident -- accident is not defined
5 in the treaty, but accident is defined in the treaty, if
6 you look at the French, which means -- which is the
7 original language of the treaty, and they use the word
8 l'accident or -- I don't know if I'm pronouncing it right.

9 QUESTION: Well, neither do I.

10 (Laughter.)

11 QUESTION: Close enough.

12 MR. SILK: And -- and I'll give you another one.
13 They -- they use the word l'evenement, which means an --
14 an incident or an occurrence, in article 18. An incident
15 or occurrence could include an intentional wrong, but an
16 accident excludes an intentional wrong. And therefore
17 intentional wrongs were not intended to be covered by
18 article 17, and therefore --

19 QUESTION: You know, I -- I wish -- I -- I want
20 to join -- was it Justice Breyer who complained about the
21 fact that both sides are arguing all different sections of
22 the treaty, and the only ones that are reproduced in the
23 materials we have in front of us are 1, 17, and 24. I
24 don't know why they -- it's not that long a treaty. The
25 whole thing could have been reproduced so that we could

1 have seen it in its -- in its entirety. I really -- sure,
2 it's in the United States Code. I don't have the United
3 States Code at home when I'm reading the briefs. I assume
4 that all of the essential materials are going to be in
5 front of us.

6 MR. SILK: Well, I -- I --

7 QUESTION: We're talking about 18. We're
8 talking about a lot of other provisions, and I -- you
9 know, that's very interesting. Where do I look them up?

10 QUESTION: But on the other hand, you benefit
11 somewhat --

12 MR. SILK: Article 17 is in -- is in the
13 petitioner's supplemental brief. Article -- article 24 is
14 in the petitioner's supplemental brief.

15 QUESTION: Oh. 1, 17, and 24 are in the
16 petitioner's brief.

17 MR. SILK: Right.

18 QUESTION: At the beginning, and 18 is
19 somewhere. I'm not sure where it is, but --

20 QUESTION: You agree that an important class of
21 -- of injuries, of torts, are excluded by this treaty and
22 that there can be no State cause of action. What would be
23 the purpose of a treaty under your interpretation if this
24 really relatively less consequential kind of tort was --
25 was not also excluded? How do you respond, in other

1 words, to Lord Hope's opinion that the whole structure of
2 the treaty dictates a holding against you?

3 MR. SILK: Because I see nothing in the
4 structure of the treaty that says that the -- that a --
5 that would indicate that a willful tort, an assault and
6 battery and a false imprisonment, committed by an airline
7 against a passenger is something which is inconsequential
8 or which could be included or excluded. It doesn't even
9 touch the subject. There is not a word in the convention
10 that I know of which speaks of the type of tort and the
11 type of willful wrongdoing which occurred in this case.

12 Now, article 1 says that the convention covers
13 the whole area of space, but it -- it preempts nothing.

14 QUESTION: Article 25.

15 MR. SILK: Article 25, but article 25 is good
16 for the respondent in this case.

17 QUESTION: You said that nothing in the
18 convention covered --

19 MR. SILK: I will withdraw. You're right, Your
20 Honor.

21 The only place in the convention where willful
22 wrongs are -- such as the kind which occurred in this case
23 is mentioned is article 25. Article 25 doesn't give a
24 right to a cause of action but it says nothing in the
25 convention shall restrict and prevent a cause of action.

1 QUESTION: But I thought, as the case came to
2 us, we had to assume that article 25 isn't before us, that
3 we take the case as though it isn't willful misconduct
4 under article 25. Am I wrong?

5 MR. SILK: As the case came before this Court,
6 the petitioner did not mention article 25 in the petition.
7 That's correct. And in opposition to the petition, there
8 was particularly no reason to address article 25 --

9 QUESTION: Well, and there was a finding below
10 that it wasn't willful misconduct?

11 MR. SILK: No. The finding below was that it
12 was not such willful misconduct -- such willful misconduct
13 as to come in under article 25, which is a conclusion of
14 law. This is not a statement of fact, and this is not a
15 fact-finding --

16 QUESTION: Okay, but there was no cross-petition
17 on that.

18 MR. SILK: We weren't aggrieved. The -- the
19 respondent was not aggrieved at all by the final ruling,
20 and there was really no need to -- to burden this Court
21 with a cross-petition on an academic subject.

22 QUESTION: Well -- well, but as the case comes
23 to us, willful misconduct is definitely excluded by the
24 treaty. Serious accidents are sometimes limited because
25 of 17 and -- and Saks and Floyd. But you have this narrow

1 class of cases which you say is not -- is not covered by
2 the treaty.

3 MR. SILK: Well, willful misconduct --

4 QUESTION: And it seems to me that that's
5 inconsistent with the whole design of the treaty to limit
6 the liability.

7 MR. SILK: Willful misconduct is covered by the
8 convention only to the extent that nothing in the
9 convention shall limit or exclude -- exclude such a case.

10 QUESTION: But that isn't this case.

11 MR. SILK: Well, we're talking about excluding
12 such a case, and if there's nothing in the convention to
13 exclude my case, then I go ahead.

14 QUESTION: Yes, but --

15 MR. SILK: Article 25 is fine.

16 QUESTION: Let me ask you about -- because I've
17 now seen the whole treaty, as Justice Thomas had the -- if
18 you look at the treaty as a whole -- and I think this is
19 what the English court was doing -- it's saying, look,
20 there's one section here, section 3, which says, airlines,
21 you cannot limit your liability in a contract and you give
22 that up. And then section 4 says, but in return for that,
23 you're going to be liable in the following ways, and then
24 it lists a whole bunch of them with qualifications. And
25 in that context, all that article 24 meant was it meant to

1 refer to the three kinds of liabilities or situations you
2 may have, to people, to luggage, and for delay.

3 MR. SILK: Yes.

4 QUESTION: And that's all it meant. And if you
5 don't read it that way, you get into a terrible mess. You
6 get into the mess, for example, that a flight attendant
7 who hits somebody in the face and she says it was an
8 accident or the -- the passenger says, no, no, she did it
9 on purpose, or -- or you have somebody suing in a State
10 court because the air that's recirculated has germs in it
11 and they know that the germs will, in fact, give colds to
12 a certain percentage of people, or they serve coffee
13 that's too hot and they know that a certain percentage of
14 people are going to get sore throats because the coffee is
15 too hot. I mean, there could be millions of cases, and
16 you're very -- you know, the bar is very imaginative, and
17 they'll find terrific cases.

18 (Laughter.)

19 QUESTION: And so our choice is you either read
20 it vaguely to just refer to passengers, luggage, and
21 delay, or you read it precisely by the language and we get
22 into the situation with your case and many such others are
23 allowed.

24 But the English court says, that's the choice.
25 We think really the language isn't perfect, but you --

1 they took that choice.

2 So, now, what is your -- your -- your response?

3 MR. SILK: My view on the Abnett case, or the
4 English case, the House of Lords case, is that the House
5 of Lords case did not deal with the kind of willful
6 problem that we have in my case. The House of Lords was
7 dealing with a situation which was completely accidental
8 to the airline and it was -- it was a breach of contract
9 of passage or negligence in landing in Kuwait at the time
10 that the plane did land in Kuwait, but it did not deal at
11 all with the kind of common law tort -- willful torts,
12 that we have in this case. It just wasn't dealing with
13 it. So, the English court can go ahead and say whatever
14 it wants with respect to the kind of cases that they were
15 dealing with, but the fact problem before that court is
16 totally different from the fact problem before this Court.

17 QUESTION: Oh, but there's no doubt at all in
18 reading that opinion that, faced with this case, they
19 would have come out the same way. There's -- I mean,
20 that's how they construed the treaty is to be an overall
21 -- overarching purpose to govern exclusively liability of
22 international air.

23 MR. SILK: My only answer to that would be that
24 the treaty governs what it governs, and the treaty -- the
25 language of the treaty spells out what it does govern.

1 It's true that the treaty could govern an intentional
2 wrongdoing such as we have in my case, but it doesn't. It
3 uses the word accident deliberately and it uses the word
4 event or occurrence in article 18 in a deliberate way as
5 this Court pointed out in the Saks case.

6 I do not see anything in the treaty which
7 anywhere near -- comes near to governing this case. It's
8 certainly not an accident. The very question before this
9 Court right now, which -- upon which the Court granted
10 certiorari, the very question is assuming this is not an
11 accident, if it's not an accident, then is it covered?
12 So, we can't assume that it's covered in any way by
13 article 17.

14 QUESTION: That was the same assumption that the
15 House of Lords made, and I think that they felt a certain
16 discomfort in that too because they said, we have to take
17 this case on the basis that it was no accident. It wasn't
18 an accident, and so then what follows?

19 You keep characterizing this as an intentional
20 tort and clearly not an accident, and yet not only -- was
21 it Judge Gleason? There was another earlier case
22 involving a misfired security check, and district judges
23 said, yes, that sounds like an accident to us. They went
24 through their routine security procedure. They -- it
25 misfired in this case. The profile indicated the wrong

1 person. Why is it so clear that that isn't an accident,
2 that picking -- going through the normal procedures but
3 having the procedure misfire isn't an accident?

4 MR. SILK: But this procedure in my case did not
5 misfire. The procedure in my case went precisely the way
6 it was intended. It was a routine. It was intended. It
7 was a security check. And I will say that the airline had
8 a right to conduct the security check. They had a right
9 to do it, but they didn't have a right to do it without
10 the consent of my client. And without the consent of my
11 client, just as a doctor has a right to perform surgery,
12 he doesn't have a right to do it without the consent of
13 his patient, the airline here did not have a right to
14 conduct a security check without the consent of my client.
15 If my client didn't want to consent, then my client would
16 have been barred from boarding the plane by the Federal
17 regulations.

18 QUESTION: Is that a fact question? Does the
19 airline dispute that?

20 MR. SILK: No. The airline does not dispute
21 anything at all. The issues in this case are free of
22 factual problems or factual complications. The airline
23 does not dispute it.

24 The -- in -- in my -- in the respondent's brief,
25 in the statement of the case, it was pointed out -- the

1 testimony was even gone through, I believe, verbatim as
2 part of the -- of the statement of -- of the case. And it
3 pointed out that my client didn't consent. She wasn't
4 asked to consent. She was overwhelmed and so on by the
5 authority which was exhibited by the security people, and
6 they didn't ask her consent. The Federal regulation says
7 that if she doesn't consent, then she cannot board the
8 plane. All the security problems are taken care of.

9 QUESTION: I thought that would be kind of
10 something to which the airline would demur in the district
11 court because the airline's case in the district court
12 was, no bodily injury, end of case.

13 MR. SILK: They didn't. They had factual
14 testimony and their factual testimony was to the effect
15 that what they did in her case was part of their routine
16 and --

17 QUESTION: Was there a trial in this case?

18 MR. SILK: Was there what?

19 QUESTION: A trial.

20 MR. SILK: Yes, there was a trial in this case.
21 There was a trial in this case before Judge Stanton in the
22 Federal District Court in the Southern District of New
23 York. And in that trial, the liability issues were proved
24 and part of the damage issues were proved, that is, to the
25 extent that my client testified to the suffering and to

the --

QUESTION: When you said proved, were there findings of fact?

MR. SILK: No, no. When I say proved, I mean prima facie proof. There was testimony. There was testimony concerning all of these things, cross examination, testimony, cross examination. El Al put on witnesses, and -- and the judge said -- I think he said, do you have anything else, and I said, yes, I have psychiatric testimony to put on to show psychiatric injury and causal relationship and so on and so forth. And the trial judge said, you don't need to do it because if the only problem is psychic, it's being dismissed under Floyd.

And I said, but -- and I argued there that -- that this was not an accident and Floyd applies only to accidents under article 17, and the judge said, yes, it was an accident because she turned out not to be a terrorist. So, what the judge did was saying because she was innocent, she therefore cannot prevail because that was an accident that she was examined like that.

QUESTION: I thought Judge -- the -- I'm not sure of this factual thing. That's what I want. El Al says, look, she didn't object to the search and she never asked to leave the room, and anybody would know that if you want to go home, you go home. It's only if you want

1 to go on the flight that you have to be searched. So,
2 that's their position.

3 MR. SILK: Yes.

4 QUESTION: And I take it your position was that
5 they had a legal duty to say to her, now, if you object to
6 the search, you can go and leave the room.

7 MR. SILK: Yes.

8 QUESTION: Is that -- was that --

9 MR. SILK: Yes.

10 QUESTION: And is there a finding on whether --
11 I guess that's a legal question.

12 MR. SILK: There was no finding.

13 QUESTION: There's no finding.

14 MR. SILK: There was no finding at all.

15 QUESTION: So, is that relevant at all to us? I
16 mean, what are we supposed to take? I -- I -- we have to
17 take that she never objected to the search. We have to
18 take that she never asked to leave the room. We have to
19 take that they didn't tell her she could object to the
20 search, and then where are we? What are we supposed to
21 do?

22 MR. SILK: Well, I think that that is not the
23 question before this Court. I think that that is not the
24 question before this Court. And I just want to say that
25 that question was not raised really in the petition for

1 certiorari and is not a question before this Court.

2 In the Phillips case, which this Court recently
3 decided, I believe the Phillips court said that -- this
4 Court said that only questions set forth in the
5 petition --

6 QUESTION: I agree with you. I agree with you
7 on that.

8 MR. SILK: -- may properly be used.

9 QUESTION: It's irrelevant.

10 MR. SILK: It's only relevant when -- when I
11 think they raised the red flag that this involves a
12 security problem and -- and they have to be able to
13 protect their security, which I think is -- is a sham
14 argument because they could easily have protected their
15 security by giving her a choice.

16 QUESTION: Mr. Silk, on the question Justice
17 O'Connor asked earlier in the argument, is there any
18 precedent from other -- another court other than the House
19 of Lords that interprets article 17 in context of article
20 24 in context of the whole treaty?

21 MR. SILK: Justice Ginsburg, I have tried to
22 find any other precedents. I don't think the House of
23 Lords precedent is a precedent because I don't believe
24 that it deals with --

25 QUESTION: Just let me amend the word to be

1 decisions, court decisions.

2 MR. SILK: I know of none which involve this
3 kind of situation. And I -- I -- in security checks or in
4 any other -- in any other context where an assault and
5 battery or a false imprisonment was the subject of the
6 action, of a common law action, and the question of the
7 convention arose.

8 QUESTION: There was a New Zealand case --

9 MR. SILK: I just didn't know --

10 QUESTION: -- was there not, but it involved
11 goods not a passenger, and the New Zealand case took the
12 same position as the House of Lords?

13 MR. SILK: I don't know.

14 QUESTION: I think so.

15 MR. SILK: I just don't know.

16 Incidentally, if the New Zealand case would --
17 would involve baggage and not passengers, security, then
18 24(1) and not 24(2) would apply, and 24(1) does not refer
19 to -- under article 17. It refers to article 18 --

20 QUESTION: No, but the question was the
21 exclusivity of the treaty. And I think there was also a
22 case from Singapore.

23 MR. SILK: But article --

24 QUESTION: 24(1) uses the same critical phrase,
25 in the cases covered by, in the English version.

1 MR. SILK: Right, but by article 18 and 19.

2 QUESTION: Right, but the same issue would
3 arise. Does in the cases covered by mean in those cases
4 where there is liability under or does it mean in the
5 universe of situations envisioned by? And these cases, as
6 Justice O'Connor suggests, say that it means the latter.

7 MR. SILK: I -- I would like to suggest, if I
8 may, that article 17 is a liability provision. It is
9 dealing with liability. Its whole focus is liability.
10 Its focus is not just passengers. Its focus is liability.

11 QUESTION: What about 18? Does 18 begin the
12 same way, the carrier shall be liable for damage, or does
13 it begin differently? We don't know.

14 MR. SILK: Article --

15 QUESTION: It's in the United States Code, I
16 guess, somewhere.

17 (Laughter.)

18 MR. SILK: Article 18 --

19 QUESTION: Yes, yes.

20 MR. SILK: I believe it does then, overhearing
21 counsel here saying yes, so it probably does.

22 QUESTION: Well, it does but the difference in
23 17 and 18 is 18 doesn't refer to an accident.

24 MR. SILK: It refers to an occurrence.

25 QUESTION: Yes.

1 MR. SILK: And it's much broader, and it would
2 include -- if that word were used in article 17 --

3 QUESTION: Which, it seems to me, helps you.

4 MR. SILK: If that word were included in article
5 17, it would -- it would hurt me because article 17 would
6 be -- would -- would say that -- that -- if it was an
7 occurrence, it would fall under article 17, and if it fell
8 under article -- if article 17 used the word occurrence,
9 this event would have fallen under article 17. And
10 therefore it would have been precluded by article 24 too.
11 It would have been precluded. But article 17 does --

12 QUESTION: Right.

13 MR. SILK: -- not say occurrence, and that is
14 very helpful --

15 QUESTION: Which is what helps you.

16 MR. SILK: That helps me, right.

17 And the Saks case points out the very important
18 difference of language between article 17 and article 18,
19 and in Saks and also -- not only in Saks, but the
20 Solicitor General and the Solicitor General's brief amicus
21 in the Saks case. It writes practically a textbook on
22 this subject in which he points out the difference between
23 the usage of -- of the word for occurrence in article 18,
24 the French word for occurrence in article 18, and the
25 French word for accident in article 17. They make a world

1 of difference.

2 QUESTION: Mr. Silk, you started your argument
3 by saying the Montreal Protocol is prospective.

4 MR. SILK: Yes.

5 QUESTION: Do you think it changes anything with
6 respect to a case like yours?

7 MR. SILK: Well, it would change it if my case
8 had occurred 6 years after it occurred and Montreal
9 Protocol No. 4 was in effect at the time.

10 QUESTION: Suppose we had a case identical to
11 yours that happens today. What is the result?

12 MR. SILK: Well, if it happened after Montreal 4
13 became effective --

14 QUESTION: Yes.

15 MR. SILK: -- which would be in a few months, I
16 think --

17 QUESTION: Yes.

18 MR. SILK: I mean, if that's what Your Honor
19 means.

20 QUESTION: Yes.

21 MR. SILK: Okay. My case would be out the
22 window, I think.

23 QUESTION: Thank you.

24 MR. SILK: But my case cannot be out the window
25 because Montreal 4 is prospective and it's not

1 retroactive, and has practically been conceded by
2 everybody, nobody has really claimed that it's
3 retroactive.

4 QUESTION: The question is whether it's
5 something new or whether it's clarifying.

6 MR. SILK: Well, it's clearly new because in
7 article 24 as it was, it says, in cases covered by article
8 17. Now, article 24 under the Montreal Protocol says, in
9 the carriage of passengers and baggage, any action for
10 damage, however founded, can only be brought subject to
11 the conditions of this -- of this convention. And the
12 words under article -- covered by article 17 are
13 completely out.

14 QUESTION: So, for the future, there's no
15 problem. So, you're -- you're saying that your case is
16 one of these prior law cases and there are too many of
17 them. Is that your view?

18 MR. SILK: I don't know of any of them.

19 QUESTION: We should just leave them alone and
20 stop worrying about it all. Right?

21 QUESTION: Did I understand that your --

22 (Laughter.)

23 QUESTION: Did I understand you to suggest that
24 the Government's position in its brief in Saks is
25 inconsistent or at least in tension with what it's arguing

1 here?

2 MR. SILK: I -- I believe so because the
3 Government in this case has been arguing that this is some
4 kind of an accident, and accident can be broadly
5 interpreted. They have done so in their brief. The word
6 accident can be very broadly interpreted to include a
7 multitude of sins, whereas in the -- in the brief in the
8 -- in the Saks case, they very -- they say accident is
9 very narrow. And I'm answering your question, but --

10 QUESTION: Yes, but I think you've -- you've
11 answered it.

12 MR. SILK: All right.

13 QUESTION: Thank you, Mr. Silk.

14 MR. SILK: Thank you, Your Honor. Thank you.
15 Thank you.

16 QUESTION: Ms. Wilson, you have a little more
17 than a minute remaining.

18 REBUTTAL ARGUMENT OF DIANE W. WILSON
19 ON BEHALF OF THE PETITIONER

20 MS. WILSON: Your Honors, I would just like to
21 make two brief points.

22 One is that the court below specifically found
23 that there was no willful misconduct in this case, and
24 that's referenced at page 27 of the appendix to the
25 petition.

1 And also that accident can encompass intentional
2 torts. That's what article 25 can look to. It is only if
3 you have willful misconduct that you get an unlimited
4 recovery. Accident wasn't ever meant to mean unintended.

5 I also would note that you should meet the terms
6 and conditions of article 25. You have to meet the terms
7 and conditions of article 24. There is a symmetry there.

8 And with respect to the issue of article 18, I
9 believe that the fact that the liability is broader in
10 scope with respect to baggage and cargo should not mean
11 that if -- where you have a narrower scope of liability
12 under the convention, you then get to get recovery outside
13 of the convention.

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Wilson.

16 The case is submitted.

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

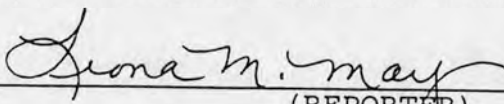
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EL AL ISRAEL AIRLINES, LTD., Petitioner v. TSUI YUAN TSENG
CASE NO: 97-475

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