**Hardy v. SAS: the Relationship Between Airlines, International Law,**

**and Personal Injury Lawsuits**

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Photography of an airplane owned and operated by Scandinavian Airlines System, *in* Jerod Morales, *Scandinavian Airlines Leaving Star Alliance for SkyTeam, With Help From Air France-KLM*, Forbes (Oct. 5, 2023, 8:15 AM), https://perma.cc/N8AS-NNNM.

1. **Background**

Several incidents involving Boeing airplanes have spotlighted the relationship between international law, liability concerns for passengers injured in plane crashes, and procedures for pursuing legal action against foreign airlines.[[1]](#endnote-1) Although the Boeing cases remain prominent in public discourse, the Fifth Circuit recently ruled on a case involving a U.S. citizen injured while disembarking from a plane operated by Scandinavian Airlines (SAS), which may affect how personal injury claims are tried both domestically and internationally.[[2]](#endnote-2)

In *Hardy v. SAS,* the plaintiff, Susan Hardy, flew from New Jersey to Oslo, Norway, to visit her daughter.[[3]](#endnote-3) Upon exiting the aircraft, Ms. Hardy fell after encountering an unusually steep drop between the exit door and the jet bridge, causing her to fracture her leg.[[4]](#endnote-4) Consequently, Ms. Hardy filed a negligence claim against SAS in the federal court located in the Eastern District of Louisiana.[[5]](#endnote-5) While state courts hear most personal injury claims in the U.S., the fact that this injury occurred in a different country while disembarking from an airplane meant that the lawsuit fell under the complex and often misunderstood provisions of the Montreal Convention.[[6]](#endnote-6)

1. **The Fifth Circuit Court’s Analysis**

The District Court in the Eastern District of Louisiana granted SAS’s motion to dismiss Hardy’s lawsuit, determining it lacked personal jurisdiction.[[7]](#endnote-7) On appeal, Hardy presented three claims: “first, that the Montreal Convention creates both personal and subject matter jurisdiction; second, that SAS waived any objection to personal jurisdiction by incorporating the Montreal Convention into its contract of carriage; and third, that SAS is subject to personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) because it waived service.”[[8]](#endnote-8) The 5th Circuit Court rejected the first two claims but agreed with the third. [[9]](#endnote-9)

* 1. Hardy’s First and Second Claim

Understanding the court's decision requires examining significant articles in the Montreal Convention and how U.S. courts view personal and subject matter jurisdiction.

* + 1. *The Montreal Convention*

Article 17(1) of the Montreal Convention states that “[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”[[10]](#endnote-10) Article 21 outlines a two-tiered system for compensating injured passengers.[[11]](#endnote-11) Article 33 describes which courts can hear claims under the Montreal Convention.[[12]](#endnote-12) Before ratification, injured passengers could sue in four fora: “the carrier’s corporate and actual headquarters states, the place of destination, and where it physically sold a ticket (if applicable)[.]”[[13]](#endnote-13) Article 33 established a “fifth jurisdiction[,]” allowing individuals to file “injury suits in the Contracting State where an injured passenger had her ‘principal and permanent residence’ so long as the international carrier served the forum.’”[[14]](#endnote-14)

The addition resulted from U.S. policymakers who "were under pressure from the families of Americans killed in crashes or terrorist incidents on foreign carriers who discovered their cases could only be heard in foreign courts that would apply damages regimes much more limited than were available in the United States."[[15]](#endnote-15) However, “the adoption of the fifth jurisdiction did not finish the job[,]”[[16]](#endnote-16) as "[e]ven if an American plaintiff meets Article 33’s requirements, personal jurisdiction problems can bar the courthouse door.”[[17]](#endnote-17)

* + 1. *Subject Matter Jurisdiction*

The Fifth Circuit quickly determined it could exercise subject matter jurisdiction.[[18]](#endnote-18) In the U.S., "[s]ubject matter jurisdiction is the power of a court to adjudicate a particular type of matter and provide the remedy demanded.”[[19]](#endnote-19) Since “[a] claim that arises from a treaty is a federal question” per 28 U.S.C. § 1331, and “Hardy asserts liability under the Montreal Convention[,]” her claim arises under federal law.[[20]](#endnote-20)

* + 1. *Personal Jurisdiction*

Despite the treaty's grant of subject matter jurisdiction, whether it also provides personal jurisdiction is more complex. "Personal jurisdiction refers to a court’s authority to adjudicate the rights and liability of the defendant.”[[21]](#endnote-21) U.S. policymakers intended for the fifth jurisdiction to support the exercise of personal jurisdiction over corporate entities.[[22]](#endnote-22) However, federal courts have routinely rejected the contention that the Montreal Convention permits U.S. courts to assert personal jurisdiction over claims arising from airline injuries.[[23]](#endnote-23) While the Fifth Circuit court had not yet had the opportunity to make a similar judgment, Hardy provided the Fifth Circuit with its chance to signal its agreement with this precedent.[[24]](#endnote-24) The Fifth Circuit noted that “Article 33, despite being titled ‘Jurisdiction,’ uses ‘may be brought’ and ‘must be brought’ language, which is wording indicative of venue prescriptions.”[[25]](#endnote-25) Since "venue prescriptions do not establish personal jurisdiction without language also authorizing the service of process[,]"[[26]](#endnote-26) and “[b]ecause the Montreal Convention lacks that language, it does not create personal jurisdiction.”[[27]](#endnote-27)

* + 1. *Hardy’s Second Claim*

Given this conclusion, the court reasoned that “SAS’s acknowledging that it is bound by the Convention does not waive any objections to personal jurisdiction.”[[28]](#endnote-28)

* 1. Hardy’s Third Claim

Although the Montreal Convention does not itself authorize personal jurisdiction over airlines in U.S. courts for personal injury claims, plaintiffs can establish such jurisdiction under Rule 4(K)(2) of the Federal Rules of Civil Procedure.[[29]](#endnote-29) The Fifth Circuit uses a three-step analysis to determine whether it has specific jurisdiction over a claim: “(1) whether the defendant has minimum contacts with the [United States as a whole]; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts [with the United States]; and (3) whether the exercise of personal jurisdiction is fair and reasonable.”[[30]](#endnote-30)

First, because SAS waived proper service, the first requirement is met.[[31]](#endnote-31) Second, whether the court has personal jurisdiction over SAS depends on general or specific jurisdiction, discussed below.[[32]](#endnote-32) Third, as explained later, the Due Process Clause in the Fifth Amendment requires that “the exercise of jurisdiction over [a] defendant [must] not offend ‘traditional notions of fair play and substantial justice.'”[[33]](#endnote-33)

* + 1. *General Jurisdiction v. Specific Jurisdiction*

U.S. federal courts agree that “a state has general jurisdiction to hear any claim against a corporation formed under its laws or if the company’s headquarters were located in that state.”[[34]](#endnote-34) Beyond that, general jurisdiction applies only where a corporation is “essentially at home” in a state, a boundary strictly enforced by the Supreme Court.[[35]](#endnote-35) Since "SAS has no employees or property in the United States, and no jurisdiction obviously has general jurisdiction over it."[[36]](#endnote-36)

However, specific jurisdiction allows a court to hear claims where there is no general jurisdiction but a connection exists between the claim, defendant, and forum.[[37]](#endnote-37) Specific jurisdiction requires that a “defendant’s conduct and connection with the forum state” are such that the defendant “should reasonably anticipate being haled into court there.”[[38]](#endnote-38) Importantly, “[f]or federal claims filed in federal courts . . . the relevant minimum contacts are those with the entire United States, not a forum state.”[[39]](#endnote-39)

* + 1. *Minimum Contacts*

The district court found SAS’s contacts with Louisiana insufficient to meet the minimum contacts requirement.[[40]](#endnote-40) However, the Fifth Circuit concluded that “[t]he district court incorrectly considered whether SAS had minimum contacts with Louisiana. Instead, it should have analyzed SAS's contacts with the United States writ large.”[[41]](#endnote-41)

Delegates at the Montreal Convention anticipated issues rising from injured passengers suing small airline companies in their home countries despite any significant contacts between the company and the country.[[42]](#endnote-42) Therefore, the Montreal Convention “plainly requires that the airline engage in some aspect of its business in the forum State . . . through a physical presence there, either directly or through an agreement with another carrier.”[[43]](#endnote-43) Additionally, “that presence required the sued carrier to operate ‘some aspect of its business from those premises,’ even if it is another carrier who owned or leased them.”[[44]](#endnote-44) Thus, “an airline must conduct business from some physical location in the U.S. before a court here can hear a personal injury claim stemming from international travel on that airline.”[[45]](#endnote-45)

U.S. courts have differed on what constitutes sufficient minimum contacts to exercise specific jurisdiction.[[46]](#endnote-46) Factors like operating weekly flights from U.S. locations and selling tickets in the forum increases the likelihood of meeting the minimum contacts standard.[[47]](#endnote-47) The Fifth Circuit Court noted that SAS “flies into/out of seven different metro areas in the U.S.”[[48]](#endnote-48) Additionally, SAS "advertises to American buyers, participates in the Star Alliance with United Airlines, owns and operates a subsidiary in the United States, sells tickets online across the U.S., and is regulated by the FAA."[[49]](#endnote-49) These contacts “more than meet the minimum-contacts test and show that SAS has purposefully availed itself of the protections of U.S. laws.”[[50]](#endnote-50) The court stated that these "purposeful contacts in the U.S. combined to create an unbroken causal chain that ends with Hardy's injury."[[51]](#endnote-51)

* + 1. *Is the Exercise of Personal Jurisdiction Over Hardy’s Claim Fair and Just?*

After establishing minimum contacts, courts determine whether exercising personal jurisdiction over a defendant would “offend the traditional notions of fair play and substantial justice from the Due Process Clause’s protection of individual liberty.”[[52]](#endnote-52) The Fifth Circuit weighs “five factors to determine whether such an exercise is fair and just: ‘(1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies.’”[[53]](#endnote-53)

The court concluded that the U.S.'s interest in protecting its injured citizens from navigating complex foreign legal systems, the manageable burden on SAS to litigate in the U.S., and the importance of upholding international agreements like the Montreal Convention all support the fairness and reasonableness of asserting personal jurisdiction over SAS.[[54]](#endnote-54)

1. **Possible Effects of *Hardy* on International Law**

 The Fifth Circuit Court's decision may affect the international legal system.[[55]](#endnote-55) First, fifty-three African Contracting States and France had previously raised concerns about including the creation of the fifth jurisdiction in the Montreal Convention.[[56]](#endnote-56) They worried the provision “would bring more complications than benefits and would not promote the necessary consensus” between member nations.[[57]](#endnote-57) Moreover, these countries “expressed concern over insurance costs and noted that forum courts often imposed local substantive law on ‘issues related to assessment of fault, contributory negligence and other matters related to Article 20 [regarding liability].’”[[58]](#endnote-58) Therefore, the frequency of U.S. courts deciding that the Montreal Convention lacks a specific grant of personal jurisdiction may prompt an international response to revise the treaty to prevent unintended legal consequences.[[59]](#endnote-59)

Second, countries like the United Kingdom and Canada maintain similar legal standards for exercising personal jurisdiction over foreign companies.[[60]](#endnote-60) It remains to be seen if courts in the UK and Canada ultimately decide to make decisions consistent with the Fifth Circuit’s ruling in *Hardy*. The uncertainty concerning the amount of contacts an airline has in any given country could cause foreign airlines to change their business practices to avoid being sued in unfavorable jurisdictions. While the court's decision in *Hardy* is unlikely to have direct and substantial effects on personal injury lawsuits against airlines in the U.S. in the near future, it may indirectly contribute to international calls for reforming treaties governing international air transit.

1. *See, e.g.*, Robert L. Rabin, *Stanford Law’s Robert Rabin on Boeing Accidents and Grounding: Who Is Liable?*, Stanford Law School: SLS Blogs (Mar. 14, 2019), https://perma.cc/C5V3-Y9JT. [↑](#endnote-ref-1)
2. *See* Hardy v. Scandinavian Airlines Sys., No. 23-30632, 2024 WL 3934793 (5th Cir. Aug. 26, 2024). [↑](#endnote-ref-2)
3. *Id*. at \*1. [↑](#endnote-ref-3)
4. *Id*. [↑](#endnote-ref-4)
5. *Id*. [↑](#endnote-ref-5)
6. Alexa West, *Defining “Accidents” in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention’s “Accident” Requirement*, 85 Fordham L. Rev. 1465, 1476–1477 (2016) (describing how decisions by U.S. courts further complicate the process of filing a personal injury claim against a nonresident airline company). [↑](#endnote-ref-6)
7. Hardy v. Scandinavian Airlines Sys., No. CV 21-1591, 2023 WL 5173793, at \*7 (E.D. La. Aug. 11, 2023), aff'd in part, rev'd in part and remanded, No. 23-30632, 2024 WL 3934793 (5th Cir. Aug. 26, 2024). [↑](#endnote-ref-7)
8. Hardy v. Scandinavian Airlines Sys., No. 23-30632, 2024 WL 3934793, at \*2 (5th Cir. Aug. 26, 2024). [↑](#endnote-ref-8)
9. *Id*. [↑](#endnote-ref-9)
10. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention], art. 17(1), [↑](#endnote-ref-10)
11. *Id*. at 7. [↑](#endnote-ref-11)
12. *See id*. at 11. [↑](#endnote-ref-12)
13. Hans Huggler, *Still Far From Home* *–How Personal Jurisdiction Doctrine Undercuts The Montreal Convention’s “Fifth Jurisdiction” For “Wandering Americans”*, 89 J. Air L. & Commerce 251, 253 (2024). [↑](#endnote-ref-13)
14. *Id*. at 251. [↑](#endnote-ref-14)
15. *Id*. at 253 [↑](#endnote-ref-15)
16. *Id*. at 251. [↑](#endnote-ref-16)
17. *Id*. [↑](#endnote-ref-17)
18. *See* Hardy v. Scandinavian Airlines Sys., No. 23-30632, 2024 WL 3934793, at \*7 (5th Cir. Aug. 26, 2024) (identifying claims governed by international treaties like the Montreal Convention as raising questions involving federal law). [↑](#endnote-ref-18)
19. Wex Definitions Team, *Subject Matter Jurisdiction*, Cornell L. Sch. Legal Info. Inst. (June 2024), https://perma.cc/L5TZ-XXQD. [↑](#endnote-ref-19)
20. *Hardy*, 2024 WL 3934793, at \*7. [↑](#endnote-ref-20)
21. Wex Definitions Team, *Personal Jurisdiction*, Cornell L. Sch. Legal Info. Inst. (Jan. 2024), https://perma.cc/LX5P-WMPF. [↑](#endnote-ref-21)
22. Huggler, *supra* note 14, at 274. [↑](#endnote-ref-22)
23. *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. UPS Supply Chain Sols., Inc., 74 F.4th 66, 69 (2d Cir. 2023), cert. denied sub nom. UPS Supply Chain Sols., Inc. v. EVA Airways Corp., 144 S. Ct. 559, 217 L. Ed. 2d 298 (2024); Burton v. Air France–KLM, No. 3:20-CV-01085-IM, 2020 WL 7212566, at \*7 (D. Or. Dec. 7, 2020). [↑](#endnote-ref-23)
24. See Huggler, *supra* note 14, at 293 for a discussion of how cases like *Hardy* “may be the leading edge of a new era in foreign carrier injury litigation[.]” [↑](#endnote-ref-24)
25. *Hardy*, 2024 WL 3934793, at \*1. [↑](#endnote-ref-25)
26. *Id*. [↑](#endnote-ref-26)
27. *Id*. [↑](#endnote-ref-27)
28. *Id*. [↑](#endnote-ref-28)
29. *See, e.g.,* Hardy, 2024 WL 3934793, at \*6 (agreeing with plaintiff’s claim that the court can assert personal jurisdiction over this claim despite the lack of a grant of that jurisdiction in the Montreal Convention). [↑](#endnote-ref-29)
30. *Id*. at \*2 (citation omitted). [↑](#endnote-ref-30)
31. Hardy, 2024 WL 3934793, at \*7. [↑](#endnote-ref-31)
32. *Id*. at \*7-8. [↑](#endnote-ref-32)
33. Eddy v. Printers House (P) Ltd., 627 F.App’x. 323, 326 (5th Cir. 2015) (quoting Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 215 (5th Cir. 2000)). [↑](#endnote-ref-33)
34. Huggler, *supra* note 14, at 260. [↑](#endnote-ref-34)
35. *Id*. [↑](#endnote-ref-35)
36. Hardy, 2024 WL 3934793, at \*7; *see also* Sweden Davydov v. Scandinavian Airlines Sys., No. CV 19-17628, 2020 WL 12979368, at \*1 (D.N.J. Oct. 5, 2020)(“SAS is a consortium existing under the laws of Denmark, Norway, and Sweden, with its headquarters in Sweden.”). [↑](#endnote-ref-36)
37. *See* Huggler, *supra* note 14, at 260. [↑](#endnote-ref-37)
38. *Id*. at 260–61; Defendant corporations are considered to have been sufficiently warned of this possibility if the company “‘purposefully directed [its]’ activities at residents of the forum [state]’ and the litigation at issue ‘ar[o]se out of or relate[d’] to those activities.’” *Id*. at 282. [↑](#endnote-ref-38)
39. *Id.*  [↑](#endnote-ref-39)
40. *See* Hardy, 2023 WL 5173793, at \*6. [↑](#endnote-ref-40)
41. *Id*. at \*1. [↑](#endnote-ref-41)
42. *See* Huggler, supra note 14, at 275. [↑](#endnote-ref-42)
43. *Id.* at 287. [↑](#endnote-ref-43)
44. *Id*. [↑](#endnote-ref-44)
45. *Id.* at 287–88. [↑](#endnote-ref-45)
46. *See, e.g.,* Carmona v. Leo Ship Mgmt., Inc., 924 F.3d 190, 194 (5th Cir. 2019). [↑](#endnote-ref-46)
47. *See, e.g.*, Khan v. Qatar Airways Corp., No. 4:23-CV-04138, 2024 WL 3744397, at \*3 (S.D. Tex. Aug. 8, 2024) (identifying an airline's ticket sales in the U.S. as well as the company conducting weekly flights from one U.S. state to another U.S. state as being significant for assessing its minimum contacts). [↑](#endnote-ref-47)
48. Hardy, 2024 WL 3934793, at \*9. [↑](#endnote-ref-48)
49. *Id*. [↑](#endnote-ref-49)
50. *Id*. [↑](#endnote-ref-50)
51. *Id.* The Fifth Circuit reasoned that, but for the advertising and sale of airline tickets and the operation of its aircraft in the U.S., Hardy would never have been injured by stepping off the jet bridge in Oslo, Norway. *See id*. [↑](#endnote-ref-51)
52. *Id*. at \*10. [↑](#endnote-ref-52)
53. *Id*. [↑](#endnote-ref-53)
54. *See id.* at \*10–11. Moreover, the court viewed the fact that SAS had previously filed for bankruptcy in a U.S. court as significant. *See, id*. [↑](#endnote-ref-54)
55. *See* Huggler, *supra* note 14, at 293. [↑](#endnote-ref-55)
56. *See* Huggler, *supra* note 14, at 272–73. [↑](#endnote-ref-56)
57. *Id*. at 272. [↑](#endnote-ref-57)
58. *Id.* at 272–73. [↑](#endnote-ref-58)
59. *See, e.g.*, Huggler, *supra* note 14, at 294 (identifying the possibility that prior disagreements about the fifth jurisdiction may cause other nations to call for the Montreal Convention to be altered). [↑](#endnote-ref-59)
60. *See, e.g.*, Kate Bonacorsi, *Not at Home with “At-Home” Jurisdiction*, 37 Fordham Int’l L.J. 1820, 1841 (2014) (explaining the similarities between the UK's application of 'doing business jurisdiction' to the U.S.'s interpretation of personal jurisdiction); Matthew Johnson, *One More Brick in the Wall: The Impact of Personal Jurisdiction of Ex Juris Defendants on the Relationship Between the United States and Canada*, 4 Penn St. J.L. & Int’l Aff. 522, 538–39 (2015) (describing the close relationship between Canada's application of personal jurisdiction and the U.S.'s application of personal jurisdiction). [↑](#endnote-ref-60)