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International Air Carrier's Liability to Passengers Under the Warsaw Convention 1929 and the Montreal Convention 1999

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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

S.J.D. DISSERTATION

**International Air Carrier's Liability to passengers
under the Warsaw Convention 1929 and the Montreal
Convention 1999**

BY

JIANG BO*

This dissertation is dedicated to my dear father.

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CHAPTER ONE

General Grounds for International Air Carrier's Liability

1-1. Introductory note

The Warsaw Convention 1929, officially referred to as the Convention for the Unification of Certain Rules Relating to International Transportation by Air,¹ established and elaborated, as one of its major tenets, the principle of the air carrier's liability for damage caused to passengers, baggage and goods, and also for damage caused by delay.²

The Warsaw Convention emerged in a world of differences among the countries engaging in all humanities as to the rules governing liability for accidents reflecting of the carriage of goods and passengers by air.³ The parties to the Warsaw Convention desired to limit carriers' liability for catastrophic aircraft disasters which might otherwise threaten the financial security of the infant industry.⁴ Other objectives were to achieve uniformity in an air carrier's liability and documentation for

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat.3000, 137 L.N.T.S. 11, reprinted in 449 U.S.C. §1502 (1998) (adherence of United States proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention]. The various instruments comprising the Warsaw Convention are reprinted and collected in the International Air Transport Association's Essential Documents on International Air Carrier Liability (1999) [hereinafter IATA, Aviation Documents].

² Warsaw Convention, supra note 1, art. 1(1).

³ See *id.* p.mbl.; see also Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497-99 (1967). (noting the intention of the Warsaw Convention to create, among other things, uniform regulations regarding liability of air carriers).

⁴ See Lowenfeld & Mendelsohn, supra note 3, at 498-99 (discussing the relative youth of the airline industry and the goal of the Warsaw Convention to limit air carrier liability in instances involving accidents).

transportation, to avoid conflict involvement in the problems of the laws in order to protect the fledgling international transportation business, and to facilitate transactions between countries around the world.⁵

The rules of the Warsaw Convention are being applied all over the world and have demonstrated their reliability and usefulness. The passenger knows that, wherever and whenever he flies, there is a certain degree of uniformity in the rules governing the carrier's liability, while the carrier, being aware of the extent of his liability, can make arrangements to insure himself against possible losses. It is therefore appropriate to examine the nature and the development of the legal grounds on which the air carrier's liability rests, and their impact on everyday practice. The following will be devoted to these important matters.

As time went by and aviation began expanding on a large scale, the Warsaw Convention had to be amended or added to on a number of occasions in order to be kept up to date. The amendments and/or additions are the following:

1. The Hague Protocol of 1955.⁶ It was added in order to adapt

⁵ See Warsaw Convention, *supra* note 1, pmble. (relating the aims of the Warsaw Convention); see also Lowenfeld & Mendelsohn, *supra* note 3, at 498-99 (discussing the goals of the Warsaw Convention).

⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter

the Warsaw Convention to the demands of modern transport. The Protocol entered into force on 1 August 1963, the ninetieth day after ratification by 30 countries.

2. The Guadalajara Convention of 1961 for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier.⁷ This amendment took the form of a Supplementary Convention because it was concluded to deal with an entirely new subject-matter, namely chartering. It has been in force since 1 May 1964.

3. The Montreal Agreement of May 1966.⁸ This is a private agreement concluded between IATA carriers and the United States Civil Aeronautics Board, and the so-called 'Malta Agreement', which is a private agreement between a number of air carriers, mostly from Europe.

4. The Guatemala Protocol of 8 March 1971.⁹ This Protocol was also meant to be an amendment to the Warsaw Convention.

The Hague Protocol].

⁷ Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Guadalajara, 18 September 1961. [hereinafter cited as Guadalajara Convention].

⁸ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (1966), Civil Aeronautics Board Agreement No. 18,900, approved by Exec. Order No. 23,680, 31 Fed. Reg. 7,302 (1966) [hereinafter Montreal Interim Agreement], reprinted in IATA, Aviation Documents, *supra* note 1, at 139.

⁹ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Mar. 8, 1971 [hereinafter Guatemala Protocol], reprinted in IATA, Principal Instruments of the Warsaw System 3-47 (2d ed. 1981) [hereinafter Principal Instruments].

However, it has yet to come into force.

5. Another four amending Protocols were concluded at Montreal on 25 September 1975.¹⁰

Moreover, there have been unilateral efforts to modify the Warsaw liability scheme. These primarily include the Japanese Initiative of 1992,¹¹ the European Community Regulation,¹² and the IATA Intercarrier Agreement.¹³ These unilateral efforts

¹⁰ Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, Sept. 25, 1975, reprinted in *Principal Instruments*, supra note 9, at 48-50; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Sept. 25, 1975, reprinted in *Principal Instruments*, supra note 9, at 51-53; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955 and at Guatemala City on 8 Mar. 1971, Sept. 25, 1975, reprinted in *Principal Instruments*, supra note 9, at 54-57; Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Sept. 25, 1975 [hereinafter *Montreal Protocol No. 4*], reprinted in *Principal Instruments*, supra note 9, at 2-47.

¹¹ See Nanaeen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 *J. Air L. & Com.* 437, 453-56 (1996). (discussing Japanese airlines' agreement to abandon liability limits imposed by the Warsaw Convention). This initiative preceded the modern IATA Agreements and the Montreal Convention of 1999. See *id.* It constitutes an agreement among ten Japanese carriers to establish a two-tiered liability scheme with absolute liability of up to 100,000 SDRs and presumed liability for damages in excess of this limit. See *id.* A major impetus behind this agreement was the 1985 crash of a Japanese Airline, which killed five-hundred twenty-nine people. See *id.*; Bin Cheng, *Air Carriers' Liability for Passenger Injury and Death: The Japanese Initiative and Response to the Recent EC Consultation Paper*, 18 *Air & Space L.* 109 (1993) (discussing the importance and circumstances of the Japanese initiative).

¹² See Council Regulation 2027/97, 40 *O.J. (L 285)* 1 [hereinafter *EC Regulation*]; see also Berend Crans & Onno Rijdsdijk, *EC Aviation Scene*, 21 *Air & Space L.* 193 (1996) (reviewing the EC Regulation in the context of the European Community). The EC Regulation resulted from the Commission of the European Union's concern over the voluntary nature of the IATA initiative. See Crans & Rijdsdijk, *supra*. The EC Regulation not only set forth a two-tiered liability system like the IATA and Japanese initiative, but also provided that it was mandatory for all European Union countries and required up-front payments to the family of a victim in case of death. See *EC Regulation, supra*. In *The Queen v. The Secretary of State For the Environment, Transport and the Regions*, the regulation was challenged before the High Court of Justice in the United Kingdom as constituting an impermissible change to the Warsaw Convention without the consent of the signatory states. The Court held that the Regulation in suspense because it conflicts 'with the Warsaw Convention and impedes the performance by member states who are parties to it.' 1 *Lloyd's Rep.* 242 (Apr. 21, 1999).

¹³ See IATA Intercarrier Agreement on Passenger Liability (IIA), available at http://www.iata.org/legal/list_intercarrier.htm [hereinafter *IIA*], reprinted in *IATA, Aviation*

finally led to the adoption of the Montreal Convention 1999,¹⁴ which was spearheaded by the International Civil Aviation Organization (“ICAO”) and signed by more than 50 countries at an International Conference on Air Law in Montreal, Canada in May 1999. With the ratification by the thirtieth signatory state, the United States, the Convention became effective as of November 4, 2003. This is a landmark movement of modern civil aviation law. Rather than amending the Warsaw Convention, the Montreal Convention replaces the system of liability established under the previous treaty regime.¹⁵ However, the entry into force of Montreal does not stop the development and further refinement of the Warsaw analysis, much of which still provides sound guidance on the development of the Montreal framework. This is especially true in the analysis of its coverage.

The basic Convention of Warsaw and its subsequent amendments and the Montreal Convention will now be

Documents, supra note 1, at 51; Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA), available at http://www.iata.org/legal/list_intercarrier.htm, reprinted in IATA, Aviation Documents, supra note 1, at 55.

¹⁴ Convention For the Unification of Certain Rules for International Carriage by Air, opened for signature on 28 May 1999, available at <http://www.dot.gov/ot/ogc/Convention.pdf> [hereinafter Montreal Convention 1999], reprinted in IATA, Aviation Documents, supra note 1, at 17.

¹⁵ See Ehrlich v. American Airlines, Inc., 360 F.3d 366, 371 (2d Cir. 2004); Schopenhauer v. Compagnie Nationale Air France, 255 F. Supp. 2d 81, 87 (E.D.N.Y. 2003); see also Modernization of the Warsaw System - Montreal 1999, J.C. Bactra, 65 J. Air. L. & Com.429, 433 (2000); Letter of Submittal of Strobe Talbott (June 23, 2000), reprinted in S. Treaty Doc. No. 106-45, 1999 WL 33292734.

considered in their chronological order.

1-2. The Warsaw Convention 1929

The Warsaw Convention was the product of international conferences held in 1925 and 1929.¹⁶ At the 1929 conference, the Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.), a committee of government-selected experts previously appointed to establish a set of rules for international air carriage, presented a draft convention.¹⁷ Underlying this draft were the principles upon which the liability provisions of the Warsaw Convention were founded.

According to the Rapporteur of the 1925 Conference:

"The Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third parties must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory."¹⁸

Further, the Convention's formation involved the convergence of principles of carrier liability under both the civil and common law systems. Under common law, the carrier is subjected to a heightened duty of care. While not absolute, it

¹⁶ See Lowenfeld & Mendelsohn, *supra* note 3, at 498 (providing the background of the Warsaw Convention).

¹⁷ See John J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. & Com. 27, 32, 36 (1932) (describing the work of the CITEJA on the Warsaw Convention).

¹⁸ See Georgette Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* 63 (1977) (quoting Conference Internationale (Paris, 1925) Rapport Pittard Annexes, p. 60).

requires the carrier 'to use the greatest amount of care and foresight which is reasonably necessary'¹⁹ under the circumstances. Thus, failure to exercise this care is negligent. Carriers are not liable for the assaults or torts of third parties absent notice and failure to protect the injured passenger.²⁰ In contrast, under the civil law system, a carrier's duty to passengers is a strict contractual duty to safely transport.²¹ The only exception to this contractual liability is if the damage or loss is due to a cause that is not attributable to the carrier.²² Under the principle of force majeure, a carrier is not liable for loss or damage if the occurrence is unforeseeable, insuperable, and extraneous to the carrier's business and activities,²³ and includes 'fait ou faute d'un tiers' (act or fault of a third party) so long as all three conditions are met.²⁴

A primary and fundamental purpose of the Convention was to establish uniform rules governing claims arising out of

¹⁹ Id. at 52.

²⁰ See *Milone v. Washington Metro. Area Transit Auth.*, 91 F.3d 229, 231 (D.C. Cir. 1996). (quoting *Washington Metro. Area Transit Auth. v. O'Neill*, 633 A.2d 834, 840 (D.C. 1993)) (holding that a common carrier 'has a duty to protect its passengers from foreseeable harm arising from criminal conduct of others.').; see also *Kelley v. Metro-N. Commuter R.R.*, 37 F. Supp. 2d 233, 240 (S.D.N.Y. 1999). (holding that a railroad 'knew or should have known the assailant was the type of person who might commit an assault.').

²¹ See *Miller*, supra note 18, at 54 (describing the presence of a contractual duty to transport goods and passengers safely under French law).

²² See *id.* (describing the exception to contractual liability, 'cause étrangère,' under the civil code).

²³ See *id.* at 54-55 (listing instances where a carrier is not liable for failing to deliver passengers and goods safely under the concept of force majeure in French law).

²⁴ See *id.* at 55 n.41 (noting the requirement that all three conditions must be met in order for liability to be excluded in situations involving 'fait ou faute d'un tiers').

international air transportation and limit the liability of air carriers.²⁵ At the time, the air transportation industry was in its infancy,²⁶ and there were substantial differences among the world's countries as to liability rules governing air transportation accidents.²⁷ Many countries' civil laws allowed carriers to contractually (i.e. by ticket) disclaim liability for injury or death.²⁸ Importantly, while uniformity was an essential goal to the Convention, the objectives also included the desire to protect the fledgling air transportation business from disaster.²⁹ The primary concern was air accidents, such as crashes or other large-scale incidents in the plane's operation, which could lead to disastrous financial consequences.³⁰ There was also the

²⁵ See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989). (discussing the background of the Warsaw Convention and its aims); Lowenfeld & Mendelsohn, *supra* note 3, at 498-99 (outlining the drafter's goals for the Warsaw Convention).

²⁶ See 1 Lee S. Kreindler, *Aviation Accident Law* sec. 10.01[2], at 10-6 (Blanca I. Rodriguez ed., 1996) (describing the state of the aviation industry in 1929); Lowenfeld & Mendelsohn, *supra* note 3, at 498 (characterizing the aviation industry as being on the verge of becoming a common mode of transportation).

²⁷ See 1 Stuart M. Speiser & Charles F. Krause, *Aviation Tort Law* §11.4, at 635-36 (1978 & Supp. 1999) (stating the twin goals of the Convention to be establishing uniformity in law and limiting the liability of air carriers in accidents).

²⁸ See Huibert Drion, *Limitation of Liabilities in International Air Law* 1-11 (1954) (discussing limitations on liability in civil aviation law).

²⁹ See generally Jonathan L. Neville, *The International Air Transportation Association's Attempt to Modify International Air Disaster Liability: An Admirable Effort with an Impossible Goal*, 27 *Ga. J. Int'l & Comp. L.* 571, 573-74 (1999). (citing Francis Lyall, *The Warsaw Convention: Cutting the Gordian Knot and the 1995 Intercarrier Agreement*, 22 *Syracuse J. Int'l L. & Com.* 67, 68-69 (1996)) (noting the problem that liability posed to the relatively young airline industry in the event of an airline disaster).

³⁰ See *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971) (discussing the aims of the Warsaw Convention, particularly preventing liability claims from severely harming air carriers in the event of a disastrous accident); see also James N. Fincher, *Watching Liability Limits Under the Warsaw Convention Fly Away*, and the IATA Initiative, 10 *Transnat'l Law* 309, 310 (1997) (noting the concerns surrounding the potential financial ramifications that an air disaster could have had on the airline industry); cf. Lowenfeld & Mendelsohn, *supra* note 3, at 499 (observing that the Warsaw Convention's aim of establishing liability ceilings was an effort to attract capital to the

concern that insurance would otherwise become too expensive for carriers, and tickets too costly for most passengers. At the time, the air carrier industry was financially weak and faced possible, if not inevitable, bankruptcy from a single disaster.³¹ It was crucial for the Convention to limit air carrier liability and allow the air transportation industry to grow and obtain the necessary capital by placing uniform limits on possible disastrous claims.³² This could be done by identifying, at the outset, what liability the carrier could incur.³³

Also underlying the Convention's goal of limiting a carrier's liability was the understanding that liability of the air

airline industry).

³¹ See generally Kreindler, *supra* note 26, sec. 10.01[2], at 10-6 (citing *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 410-11 (9th Cir. 1978)) (discussing early issues and problems with the aviation industry).

³² See Lowenfeld & Mendelsohn, *supra* note 3, at 498-500 (maintaining that a central goal of the Convention was to uniformly restrict the potential liability of the airline in the event of passenger injuries or fatalities); see also D. Goedhuis, *National Airlegislations and the Warsaw Convention* 136 (Martinus Nijhoff ed., 1937) (stressing that the airliners' motive to enter into the Convention was in limiting their own liability). Moreover, the airliners sought to exclude domestic flights, non-commercial flights, and 'carriages performed not for reward by individuals or groups' from the Convention altogether. *Id.* at 142; Kriendler, *supra* note 26, sec. 11.01[2] n.4 (citing *Dunn*, 589 F.2d at 410-11). (providing the example of *Dunn*, a federal case in which the defendant airline was forced to pay a substantial penalty to an injured passenger). Airlines were fully aware of the possibility that a major lawsuit could destroy capital investment, and thus sought to limit their potential liability through the Convention. See Kriendler, *supra* note 26, sec. 11.01[2] n.4.

³³ See *Id.*, *supra* note 17, at 30 (citing Report of 1925 International Conference of Private Air Law) (reporting the establishment of two commissions by the First International Conference of Private Air Law in 1925, created to report on general questions of private air law and the liability of air carriers); see also Andrea Buff, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Inter-carrier Agreement Eliminate the Need to Amend the Convention?*, 20 *Fordham Int'l L.J.* 1768, 1774 n.42 (1997). (citing Senate Comm. on Foreign Relations, Message from the President of the U.S. Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., at 3-4 (2d Sess. 1934), reprinted in 1934 U.S. Aviation Rep. 239, 242) (contending that limited liability would attract investors and insurance underwriters to the airline industry); Goedhuis, *supra* note 32, at 243 (explaining that the purpose of the Warsaw Convention was to give carriers the advantage of knowing when and to what extent their liability would be engaged).

carrier would be 'less rigorous' than that for other carriers³⁴ and that the carrier was not assuming responsibility for the safety of the passenger absent fault. It was also understood and intended that the carrier would not assume responsibility for risks associated with travel in general.³⁵ Reduced to its essentials, the Convention's limited liability scheme imposed presumed liability upon the carrier for injury resulting from aviation accident, set monetary limits on any damage recovery, and allowed exoneration where the carrier exercised due diligence.³⁶ Since the Convention was imposing liability upon the carrier for aircraft accidents, it placed the burden of proof regarding due diligence on the carrier, as it was believed that, in most crashes or major incidents, the carrier would be the most knowledgeable as to cause.³⁷ If the cause could not be determined, then the

³⁴ See Goedhuis, *supra* note 32, at 233, 236 (stating that the '[t]he liability of the air carrier must be submitted to rules less rigorous than those imposed on other carriers.').

³⁵ See *id.* (justifying the 'less rigorous' enforcement of airline liability with the belief among representatives at the Convention that airline passengers, unlike passengers traveling on the more traditional modes of transportation, accepted the increased risks accompanied with flying). The argument for decreased airline liability was further strengthened by the contention that an airline could not overcome a presumption of fault where the airplane is involved in an accident, or disappears in the sea. See *id.* at 237; Miller, *supra* note 18, at 63 (admitting that 'anyone using an aircraft does not ignore the risks inherent in a mode of transportation which has not yet reached the point of perfection that one hundred years have given to the railways.').

³⁶ See Goedhuis, *supra* note 32, at 38 (explaining that 'a system of liability must be arrived to which the injured party is relieved from the burden of proof without this resulting in declaring the carrier liable when it has committed no fault.').

³⁷ See International Conference on Air Law Affecting Air Questions, Second International Conference on Private Aeronautical Law, Minutes, Oct. 4- 12, Warsaw 1929, at 21, 37, 252 (R. Horner ed. & D. Legrez transl., 1975) [[hereinafter 1929 Warsaw Minutes] (noting that a showing of due diligence will lessen the extent to which the air carrier would be liable); Goedhuis, *supra* note 32, at 217-18, 230 (discussing the generally accepted rule of placing the burden of proof on the carrier).

carrier would be liable.³⁸ Indeed, it was the placement of the burden of proof on the carrier that served as the justification for modest liability limits.

Based on these notions, the Warsaw liability scheme that emerged in 1929 allowed a passenger to recover damages for any injury or death if the following were established:

- (a) the claimant was a passenger of an international flight;³⁹
- (b) the claimant suffered an 'accident';⁴⁰
- (c) the accident occurred aboard the international flight or in the course of embarking or disembarking the international flight;⁴¹
- (d) the accident caused the passenger to suffer 'death or wounding . . . or any other bodily injury.'⁴²

While the first one is rare in dispute, the other three are of primary concern to this dissertation.

The two main defenses were contributory negligence on the part of the claimant and carrier exoneration where the carrier undertook 'all necessary measures' to avoid the accident.⁴³ Finally, the monetary limit could be broken by showing that the

³⁸ See Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (Kluwer 2000) (providing a translation and analytical commentary for the Warsaw Convention).

³⁹ See Warsaw Convention, *supra* note 1, arts. 1, 17.

⁴⁰ See *id.* art. 17.

⁴¹ See *id.*

⁴² *Id.*

⁴³ See *id.* art. 20(1).

carrier engaged in 'willful misconduct,'⁴⁴ or where the carrier failed to deliver the ticket.⁴⁵ The monetary limit was 125,000 francs (approximately U.S. \$8,300).⁴⁶ Although the Convention barred carriers from undermining the Convention rules by exculpatory contract language, carriers could agree to a higher limit of liability with the passenger 'by special contract.'⁴⁷

1-3. The Hague Protocol 1955

In 1955, a Diplomatic Conference at the Hague proposed the adoption of a Protocol to amend the Warsaw Convention of 1929. Although the Convention was, at the time, considered to be one of the best agreements dealing with matters of private international law, some practical and legal problems had become evident as aviation expanded rapidly between 1929 and 1955, necessitating a number of improvements in the original text.

The most conspicuous of all amendments, however, was that the limit of liability for passengers was increased twofold, bringing the ceiling limit for compensation up to 250,000 francs (approximately U.S. \$16,600).⁴⁸ It also added a provision

⁴⁴ See *id.* art. 25.

⁴⁵ See *id.* art. 22.

⁴⁶ See *id.*

⁴⁷ See *id.* art. 22(1).

⁴⁸ See The Hague Protocol, *supra* note 6, art. XI.

allowing recovery of litigation expenses according to local law.⁴⁹

A very important modification was made in Article 25. In the original version of the Warsaw Convention, Article 25 stipulated that the carrier cannot have recourse to the provisions limiting or excluding his liability in the event of damage resulting from “willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct”.

The authentic text of the Convention is in the French language, where the words ‘*dol*’ and ‘*faute...equivalente au dol*’ are used. The English and French texts, however, do not cover exactly the same concept considering that ‘*dol*’ is characterized by the intention to inflict a specific injury on another person, whereas in the case of “willful misconduct” the perpetrator must be aware of his misbehaviour and the potential damage which may ensue without having necessarily intended to inflict a specific injury. The definition of “willful misconduct” is wider than that of ‘*dol*’, since it may include cases where no wrong has intentionally been committed.

⁴⁹ See id. art. XIII. The United States did not adopt The Hague Protocol due to its continued dissatisfaction with the amount of the Protocol's limits. See Matthew R. Pickelman, Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time, 64 J. Air L. & Comm. 274, 284 (1998).

In civil law countries there is a strong tradition to treat 'gross negligence' as equivalent to '*dol*'.⁵⁰ In France, however, the prevailing attitude since 1957 is that the fault equivalent to '*dol*' is the '*faute inexcusable*' (inexcusable fault).⁵¹

In common law countries the courts have emphasized the specific character of "willful misconduct", which is entirely different from negligence and goes far beyond it, however gross or culpable the negligence may have been.⁵²

It should be noted that the term of "willful misconduct" has caused a confusion of terminology which in turn has led to varying interpretations by a number of national courts. In the case of Goepp v. American Overseas Airlines⁵³ willful misconduct has been defined as follow:

"Willful misconduct, as the court correctly charged, depends upon the facts of a particular case, but in order that an act may be characterized as willful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another,

⁵⁰ See H. Drion, *Limitation of Liabilities in International Air Law*, thesis Leiden (the Netherlands, 1954), para. 179.

⁵¹ See, e.g., *Sontag et al. v. Air France et al.* Tribunal de Grande Instance de Paris (Ire Ch.), 8 January 1971; [1971] RFDA 176; IATA CALR, No.391. cf. *Bornier v. Air-Inter*, Tribunal de Grande Instance de Paris (Ire Ch., 2me Sect.), 27 April 1979; [1979] RFDA 340; *Air Law*, Vol. IV (1979), p. 168.

⁵² See G. Miller, *Liability in International Air Transport* (1977), at p. 194 et seq.

⁵³ *Goepp v. American Overseas Airlines*, New York Supreme Court, Appellate Division (1st Dep.), 16 December 1952; [1952] USAvR 486; IATA ACLR, No.12.

or intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. The burden of establishing willful misconduct rests upon plaintiff.”

In Hennessy v. Air France⁵⁴ it was observed that the pilot’s excessive confidence in his own competence and the soundness of his equipment must in no way be considered as constituting gross negligence.

In the case of Gallais v. Aero-Maritime⁵⁵ the French court found that flying too close to the earth’s surface was the cause of the accident and that this low flying constituted “willful misconduct” according to Anglo-Saxon law, the more so because the fault was equivalent to ‘*dol*’ in French law. On that ground the carrier was held liable for damages to the heirs of the deceased in accordance with Article 25 of the Warsaw Convention.

A recent Spanish case centering on willful misconduct is Quimica v. Danzas.⁵⁶ Here one of the Parcels to be transported from Barcelona to Moscow had gone missing. The carrier

⁵⁴ Hennessy v. Air France, Tribunal Civil de la Seine (Ire Ch.), 24 April 1952; [1952] RFDA 199. Affirmed: Cour d’Appel de Paris (Ire Ch.), 25 February 1954; [1954] RFDA 45; IATA ACLR, No.21.

⁵⁵ Gallais v. Aero-Maritime, Tribunal Civil de la Seine, 28 April 1954; [1954] RFDA 184 [1955] JALC 99.

⁵⁶ Esteve Quimica SA v. Danzas SA Espanola, Tribunal Supremo (Sala do Civil), 6 June 1998, No.625/1998.

invoked the limitation of his liability; the consignee tried to break the limits by alleging willful misconduct of the carrier. The Supreme Court held that the lower court had rightfully ruled that in this case there had been no willful misconduct by the carrier. It was only a matter of negligence, as Danzas had not actively caused the loss, nor had the actual loss been foreseeable considering the material facts.

In view of all these varying interpretations the Hague Protocol 1955 replaced Article 25 by a new Article stating that the limits laid down in the Warsaw Convention will not apply if it is proved "that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result".⁵⁷

The advantage of this new rule is that the elements of both '*dol*' and 'willful misconduct' are included, while at the same time 'omission' has been included as a ground for unlimited liability. In the event of such negligence the claimant is required to prove that the employee has committed the act within the scope of his employment.

⁵⁷ See also Bin Cheng, "Willful Misconduct: from Warsaw to the Hague and from Brussels to Paris", *Annals of Air and Space Law* (1977), Vol. II, pp. 55-102.

1-4. The Guadalajara Convention 1961

When the Warsaw Convention was drafted in 1929, charter flights played a relatively small part in international air traffic. No definition of the term 'carrier' was adopted in the Convention, because it was considered undesirable to hamper the development of aviation by doing so.

After the Second World War, the number of charter arrangements increased significantly, which made it urgent to draw up new rules designed specifically for the purpose. These rules were laid down in this Supplementary Convention⁵⁸ rather than in a protocol, since it was not a matter of revising old rules; they extended into an entirely new area not covered by the Warsaw Convention.

This convention distinguishes between the carrier who concludes the agreement, and the carrier who actually carries it out wholly or partly, each with his own obligations of liability. From an analysis of Article III, para. 2, it may be concluded that the carrier who actually performs the carriage is not liable to the same extent as the carrier who concludes it. The carrier who actually performs the carriage can never be held liable for an

⁵⁸ See J.W.F. Sundberg, 'The Guadalajara Convention Live from Cyprus', *Air Law*, Vol. I (1976), pp. 83-98.

unlimited sum; his liability is restricted to the limits specified in the Warsaw Convention. On the other hand, his acts, and those of his employees, may result in unlimited liability for the contracting carrier.

1-5. The Montreal Agreement 1966

The Montreal Agreement was concluded between a number of airline companies and the Civil Aeronautics Board of the United States. It heralded the beginning of a revolutionary movement aimed at changing the fault liability of the carrier into a risk liability, a development which eventually led to the adoption of the Guatemala Protocol of 1971; the four Montreal Protocols of 1975; and more recently the new Montreal Convention of 1999.

The Montreal Agreement was intended as a temporary solution to the impasse caused by the American denunciation of the Warsaw Convention on 15 November 1965. The Chief cause of the American move was the 125,000 francs limit, prescribed for the benefit of the carrier. The United States did not consider this sum to be commensurate with the compensation paid in cases involving domestic transport within the USA, where

unlimited liability is usually applied. The Hague Protocol had not been ratified by the USA because even its limits were not thought to be satisfactory.

According to Article 39, paragraph 2 of the Warsaw Convention the denunciation would become effective six months after notification, which would have been on 15 May 1966.⁵⁹ The ICAO had already called a meeting to discuss a revision of the liability limits. This meeting, which took place in February 1966, produced a resolution requesting the ICAO Council to convene a diplomatic conference for the purpose of discussing various proposals concerning maximum liability. In the meantime, however, IATA carriers had drafted the Montreal Agreement, which was approved by the United States Government. Consequently, on 4 May 1966, the United States requested that its notification of denunciation of the Warsaw Convention be cancelled.⁶⁰

The Montreal Agreement is applicable to all international flights in which a point within the United States is an agreed stopping place, point of departure or destination, but only

⁵⁹ See Warsaw Convention, *supra* note 1, art. 39 (allowing for any of the High Contracting Parties to denounce the Convention by giving notice to the Polish Government). Denunciation is to take place six months thereafter. See *id.*

⁶⁰ See Nicolas M. Matte, *Treatise on Air-Aeronautical Law* (1981), pp. 454-471, and D. Cohen, 'Happy Birthday: Agreement CAB 18900: A Critical Review of the Montreal Interim Agreement and the Authority for its Implementation', *Air Law*, Vol. VII (1982), pp. 74-91.

insofar as passengers are concerned.⁶¹ It is not a Protocol attached to the Warsaw Convention, but a private agreement between the air carriers and the US Civil Aeronautics Board, as explained earlier. The United States sought limits of \$100,000 per passenger, an amount that other countries believed was excessive.⁶² The two sides finally reached a compromise: the maximum liability of the carrier has been fixed at US\$75,000 (US\$58,000 excluding legal fees and costs)⁶³; it is up to the passengers to take out additional insurance.

Furthermore, in case of death or injury of a passenger, the carrier can no longer avail himself of the liability limitation clauses contained in Article 20, para. 1 of the Warsaw Convention stating that the carrier will not be liable if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures. The plaintiff no longer has to prove that the carrier was at fault, but only the extent of the injury sustained.⁶⁴ Article 25 of the Warsaw Convention concerning unlimited liability in cases of willful misconduct or gross negligence remains applicable.

⁶¹ See Waiver of Warsaw Convention Liability Limits and Defenses, 14 C.F.R. sec. 203 (1999).

⁶² See Lowenfeld & Mendelsohn, *supra* note 3, at 586-87.

⁶³ See J.C. Batra, Modernization of the Warsaw System--Montreal 1999, 65 J. Air L. & Com. 429, 430 (2000). (noting that the compromise is not a convention nor a protocol to the Warsaw Convention, but a bilateral agreement).

⁶⁴ See Special Notice of Limited Liability for Death or Injury under the Warsaw Convention, 14 C.F.R. sec. 221.175 (1999).

1-6. The Guatemala Protocol 1971

The Guatemala Protocol of 1971⁶⁵ was signed on 8 March 1971, by 21 nations, including the United States. It is further addition to the Warsaw system.

However, few states have ratified the Protocol to date. The Protocol has not yet entered into force⁶⁶ because (1) the ratifications of 30 nations are required and, (2) the scheduled air traffic of five ratifying states, on aggregate and expressed in passenger-kilometers, must represent at least 40 per cent of the 1970 total of international scheduled air traffic of the ICAO member States. Nonetheless, the provisions of the Guatemala Protocol deserve our close attention because they would have meant a definite step forward.

The Guatemala Protocol contains some fundamental modifications, but they affect only the rules of transportation of passengers and their baggage. Its main feature is a shift of principle, in that the fault liability at present attaching to the

⁶⁵ Guatemala Protocol, *supra* note 9.

⁶⁶ See *id.*, art. 14. In order for the Protocol to take effect, it needed ratification from thirty countries, five of which would have to comprise forty percent of international air travel of ICAO member nations. See *id.* art. 20(1); see also Frederico Ortino & Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation*, 64 *J. Air L. Com.* 377, 384 (1999). (explaining how the U. S. failure to ratify the Protocol effectively defeated the Protocol, given the U. S. share of the market).

carrier will be changed into a risk liability. Accordingly, the carrier will be liable also in cases where he bears no fault or blame, for instance in the event of death or injury resulting from hijacking or sabotage. There is, however, an important provision: carrier liability with regard to passengers and baggage can never exceed the sum of 1,500,000 francs (about US\$100,000)⁶⁷, not even when it is proved 'that the damage resulted from an act or omission of the carrier, his servants, employees or agents, done with intent to cause damage, or recklessly and with knowledge that damage would probably result'.⁶⁸ This limit has been made mandatory: the 1,500,000 francs are a maximum limit, a limit not to be exceeded.⁶⁹ This amount is, however, subject to periodical review.

The case for the introduction of fixed limits in the Warsaw System becomes apparent if one considers the enormous increase in the risks run by air carriers. Not only has the volume of air traffic increased sharply, entailing more likelihood of collisions especially around airports, but also the size of the aircraft, so that the number of passengers involved in accidents is now many times higher than was ever dreamt of in 1929.

⁶⁷ See *id.* art. 8.

⁶⁸ See *id.* art. 10.

⁶⁹ For a different point of view, see W.J. Hickey Jr., 'Breaking the Limit - Liability for Willful Misconduct under the Guatemala Protocol' [1976] JALC 603-622.

Finally, another innovation to be introduced by the Protocol needs mentioning: Article 28 of the Warsaw Convention is to be amended in such a way that it will become possible to file a suit in the state of domicile or permanent residence of the claimant if the defendant carrier has a place of business in that state and is subject to its jurisdiction.⁷⁰

1-7. The Four Montreal protocols 1975

Four 'Additional Protocols' amending the Warsaw System were adopted by a Diplomatic Conference held in Montreal in 1975.⁷¹

Montreal Protocols No. 1, 2, 3 & 4 emerged primarily due to unstable gold prices in United States dollars.⁷² The French franc was replaced by Special Drawing Rights ('SDR').⁷³ In addition, The Hague and Guatemala provisions (absolute liability with an unbreakable limit, a settlement inducement clause, and a supplemental compensation plan) were incorporated. Although Protocol No. 4 primarily concerned the

⁷⁰ See supra note 9, art. 12.

⁷¹ See supra note 10.

⁷² See David I. Sheinfeld, From Warsaw to Terrific: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention, 45 J. Air L & Comm. 653, 677-78 (1980).

⁷³ The SDR was created by the International Monetary Fund and is based on the currencies of France, the United States, Germany, England, and Japan. See Learning Network, Special Drawing Rights, at <http://www.infoplease.com/Ce6/bus/A0846206.html>.

simplification of rules pertaining to cargo liability, it changed Article 25's willful misconduct term to an 'act or omission' of the carrier or its agents committed 'with intent to cause damage or recklessly and with knowledge that damage would result' as the proof needed to escape the liability limit.⁷⁴ Moreover, it amended Article 24 by clarifying how the Convention precluded passengers from bringing actions under local law when they could not establish air carrier liability under the Treaty.⁷⁵

After the thirtieth ratification, Montreal Protocol No. 4 at last entered into force on 14 June 1998 (i.e., 23 years after its initial conclusion). Shortly before, on 15 February 1996, Protocols No. 1 and No. 2 had also become effective. Thus Protocol No. 3 is the only one of the four not to have this status; it is very questionable whether it will ever enter into force.

1-8. The Montreal Convention 1999

The complicated situation arising from the numerous Protocols caused the Montreal Diplomatic Conference to adopt a resolution requesting the ICAO Legal Committee to prepare a consolidated text covering the whole area of the Warsaw System,

⁷⁴ See Montreal Protocol No. 4, *supra* note 10, art. 25.

⁷⁵ See Guatemala Protocol, *supra* note 9, art. 24.

so as to create a measure of uniformity between the Warsaw Convention and its amendments.⁷⁶ This consolidated text eventually turned out as the Montreal Convention of 1999, which became effective as of November 4, 2003 and will replace the Warsaw Convention System among the contracting states.

Under the Montreal Convention, the carrier is strictly liable for the first 100,000 SDR⁷⁷, but which can be wholly or partly exonerated by the contributory negligence of the passenger;⁷⁸ The carrier is not liable for damages in excess of 100,000 SDR if the carrier proves that the damage was not caused by its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party.⁷⁹ For damages above 100,000 SDR (if approved), there is no monetary limit on the amount of recoverable compensatory damages for passenger bodily injury or death.

Other notable provisions include: automatic review of the SDR limit every five years;⁸⁰ the passenger's option of filing

⁷⁶ See the Minutes and Documents of the International Conference on Air Law (Montreal, 1975); ICAO Doc. 9154-LC/174-1 and 174-2.

⁷⁷ See supra note 14, art. 21(1) (describing the system of compensation for death and injury under the 1999 Convention).

⁷⁸ See id. art. 20 (allowing defendants to assert affirmative defenses).

⁷⁹ See id. art. 21(2)(a)-(b).

⁸⁰ See id. art. 24(1) (listing term limits of liability review).

suit where he or she has a principal place of business and permanent residence;⁸¹ mandatory advance payment obligation upon carrier in a sum to meet the passengers' 'immediate economical need';⁸² preemption over claims arising out of international air travel;⁸³ inflationary adjustment based on the Consumer Price Index ('CPI'); the right of carriers to stipulate to higher limits;⁸⁴ and the right of carriers to have recourse against third parties.⁸⁵

The centerpieces of all these reform efforts have been the low liability limits, the time consuming and expensive litigation surrounding claimants' attempts to break the liability limits by showing willful misconduct on the part of the carrier, and the belief that the compensatory scheme should allow a passenger to be compensated according to his or her own country's laws. However, interestingly, the crucial Article 17 (also the most concern of the present dissertation, will be discussed in length of the following Chapters), which governing personal injury claims under the Warsaw System and the new Montreal Convention 1999 remains the same as it did when the Warsaw Convention was originally enacted in 1929.

⁸¹ See id. art. 33(2) (providing jurisdictional requirements for actions to bring damages).

⁸² See id. art. 28.

⁸³ See id. art. 29 (setting forth the Montreal Convention as a basis for air carriage claim).

⁸⁴ See id. art. 25.

⁸⁵ See id. art. 37.

1-9. But remember insurance

Insurance provides relief for a whole range of liability risks currently associated with modern society. The purchase of adequate insurance is a major element in risk management of the air carriers, since the high market value of aircraft and the great financial risks involved in aviation. One new wide body aircraft may cost in the area of US\$200,000,000. The aggregate liabilities arising out of a major air carrier's liability can be heavy. Liability reserves for accidents can be in the area of US\$750,000,000 or more.

Ivamy in his *Dictionary of Insurance Law* defines aviation insurance as "a type of insurance" covering:

- (i) Loss of or damage to an aircraft;
- (ii) Third party liability;
- (iii) Liability to passengers.

While several important aviation insurance centers exist in USA, France, Germany, Italy, Japan and Switzerland; London is the most important center of the market. "London Aircraft Insurance Policy"⁸⁶ is a world wide standard policy of aviation

⁸⁶ AVN 1C, 21.12.98. (AVN and its number denotes a specific standard clause used in the London market which may be included in the contract. Various market policy forms, endorsements and

insurance. Most law mentioned thereafter in this chapter comes from UK law, which applies, to much of the activity of the market.

In the UK the market consists of:

- (i) Incorporated insurance companies which may be owned by:
 - (a) various shareholders or holding companies;
 - (b) a State or other authority.
- (ii) Pools or groups of insurers trading together under the same manager.
- (iii) Lloyd's syndicates.

The insurance industry in the UK is regulated by the Insurance Companies Act 1982 ("1982 Act") and the Lloyd's Acts 1871-1982.

The 1982 Act applies mainly to companies although the Lloyd's syndicates must also comply with certain of its provisions. It requires companies and Lloyd's syndicates to comply with rules on maintenance of solvency margins, auditing and filing of accounts and other regulatory requirements. It also applies certain EC Directives.

Subject to the 1982 Act, the Lloyd's Acts 1871-1982

AVN and other clauses are found in Lloyd's Aviation Underwriters Association book *Standard Policy Forms, Proposal Forms and Clauses Etc.* "LAUA Book". The Association expressly makes no recommendation as to whether or when use of the forms and clauses is appropriate.)

currently control Lloyd's including the functioning of its council and the Syndicates. The 1982 Act also regulates insurance companies whose principal places of business are in other States both within and outside the EU, and who carry on business in the UK. Schedule 2 to the 1982 Act classifies four types of insurance business as falling within "aviation" business: accident, aircraft, goods in transit and aircraft liability.

The last question is whether insurance is compulsory in aviation. The answer is that there is no direct obligation in aviation insurance law to arrange for adequate insurance. It would clearly be unreasonable, however, for an air carrier to fail to maintain adequate insurance. The Montreal Convention 1999⁸⁷ regulates that airlines must maintain adequate insurance.

1-10. The definition of insurance

In order to understand the law of insurance it is necessary to distinguish it from other contracts. A contract of insurance is any contract whereby one party assumes the risk of an uncertain event,⁸⁸ which is not within his control, happening at a future

⁸⁷ See supra note 14.

⁸⁸ It is clear that the uncertain event need not be adverse to the other party, though in cases other than certain endowment and annuity policies, such as aviation insurance, it will be. See *Gould v. Curtis* [1913] 3 K.B. 84, qualifying the definition given in the leading case of *Prudential Insurance Co. v. I.R.C.* [1904] 2 K.B. 658.

time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs. Several aspects of this definition merit closer attention:

First, legal entitlement. There must clearly be a binding contract, and the insurer must be legally bound to compensate the other party. A right to be considered for a benefit which is truly only discretionary is not enough.⁸⁹

Secondly, uncertainty. Uncertainty is a necessary feature of insurance. In most cases, the question is whether or not the event insured against will occur. If it is bound to happen, then when will it happen?

Thirdly, insurable interest. Insurable interest is a basic requirement of any contract of insurance unless it can be, and is, lawfully waived. As a general level, this means that the party to the insurance contract who is the insured or policyholder must have a particular relationship with the subject-matter of the insurance, whether that be a life or property or a liability to which he might be exposed. The absence of the required relationship will render the contract illegal, void or simply unenforceable, depending on the type of insurance. This

⁸⁹ *Medical Defence Union v. Department of Trade* [1979] 2 All E.R. 421.

principle was brought several hundred years ago to stop abuse and/or gambling.

For example, in the case of property insurance such as an aircraft hull, the insured must show he has a present right to a legal or equitable interest in the aircraft or right under a contract. A hirer (bailee) of an aircraft has an insurable interest in his liability to the person who hires out the aircraft (bailor) for its loss or damage.

Fourthly, control. It seems essential that the event insured against be outside the control of the party assuming the risk. However, no case law has been directly considered on this point.

Fifthly, provision of money's worth. There seems no reason in principle why it should be necessary for the insurer to have to undertake to pay money on the occurrence of the uncertain event, and there is clear authority that the provision of something other than money is enough, provided that it is of money's worth.⁹⁰

1-11. Proper law of insurance contract

In the English marine hull insurance case of *Amin Rasheed*

⁹⁰ *Department of Trade and Industry v. St Christopher's Motorists' Association Ltd.* [1974] 1 All E.R. 395.

Shipping Corp v. Kuwait Ins Co,⁹¹ Lord Diplock said: “Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines obligations assumed by the parties to the contract.”

In respect of direct insurance of aviation risks, choice of law is left to the parties. In reinsurance the parties are also free to choose their law under the UK Contracts Act 1990, or the underlying governing law if not the UK law.

In the absence of choice by the parties the court seised of the case will have to decide according to its own rules as to the proper law of the contract.

1-12. Law and practice in the London market

As we already know, aviation risks are substantial. Liability insurance can be offered to major airlines by the market sometimes in the area of “US\$2,000,000,000, Combined Single Limit any one accident”. This means that insurance cover is provided up to that figure in respect of all liabilities arising out of one accident, thus covering passenger, cargo and third party

⁹¹ [1984] AC 50.

liability. Liability insurance has to provide for the possibility of a mid-air collision between wide-bodied aircraft full of passengers over an urban area or installation such as a nuclear power station.

Therefore, most aviation risks are shared by insurers. In some States 100 per cent of a major risk may be insured within that State, for example where the insured is a State enterprise and the insurer is a State insurance company; however, a substantial part of such risk will probably be reinsured on the market. A few risks can be insured with one insurer in one State which will require no reinsurance, for example certain minor general aviation risks.

Insurers working in the market both insure and reinsure. One important role should bear in mind is "insurance brokers". Risks may only be placed with Lloyd's underwriters by approved Lloyd's brokers. Brokers who are not Lloyd's-approved brokers are restricted to placing risks with insurance companies only. The insurance broker is an intermediary used to place business in the market. Whether the broker is the agent of the insured or of the insurer is determined by domestic law. In the UK the broker is generally the agent of the insured.

English law on insurance contract/policy interpretation and contractual validity is mostly established by case law. While the Marine Insurance Act 1906 applies to marine insurance only, it codifies many common law principles also applicable to other types of insurance including aviation.⁹²

1-13. Duty of disclosure

In English law a contract of insurance is classified as a contract of “utmost good faith”. The Latin phrase “*uberrima fides*” is used to describe the relationship between the insurer and the insured. This means that the proposer seeking insurance must disclose all facts relevant to the risk to the prospective insurers. Such disclosure may be done on the slip, in a proposal, or by some other document.

Section 18(1) of the Marine Insurance Act 1906 provides that: “The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the insured, and the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.”

⁹² *Highlands Ins Co v. Continental Ins Co* [1987] 1 Lloyd's Rep 109.

Scrutton LJ stated in the English case of *Rozanes v. Bowen*⁹³ that “It is the duty of the assured... to make a full disclosure to the underwriters without being asked of all the material circumstances... that is expressed by saying that it is a contract of the utmost good faith---*uberrima fides*”. In simple words, this means that “it is the insured’s duty to disclose, not the insurer’s duty to ask”.

A material fact is “one which would influence the judgement of a prudent insurer in deciding whether to assume the risk, and if so at what premium and on what terms and conditions”.⁹⁴

In *Lambert v. Co-operative Ins Soc Ltd*,⁹⁵ the English Court of Appeal held that the duty of disclosure on renewal was the same as when applying for the original policy; and that the rules on disclosure in marine insurance were the same as rules in other forms of insurance.

There are four situations which the insured need not disclose to the insurer:

- (1) Any fact that reduces the risk (only in legal theory).
- (2) Any fact that the insurer already knows or can be

⁹³ [1928] 32 Ll R 98.

⁹⁴ *Container Transport International Inc v. Oceanus Mutual Underwriting Assoc (Bermuda) Ltd* [1984] 1 Lloyd’s Rep 476, CA.

⁹⁵ [1975] 2 Lloyd’s Rep 485.

presumed to know:

- (i) public knowledge;
 - (ii) common notoriety or knowledge in that particular type of insurance;
 - (iii) previous claims in the same insurer (English law is open to doubt as to this point, the author's view is that the insured does not have to disclose the previous claims to the same insurer).
- (3) Any fact regarding which the insurer waives knowledge. For instance, the insured tells the insurer there is a problem, but the insurer did not ask for more details, then the court will assume the insurer did not want to know the fact.
- (4) Any fact which deal with by a term/clause in the insurance policy. For aviation insurance policy there is an implied warranty that the aircraft is airworthy when it aviates. In this circumstance, the insurer does not need the insured to disclose the aircraft is not airworthy, because if so, the warranty has been breached, and there is no insurance covered at all.

Failure under English law to disclose material facts which could have been ascertained by reasonable inquiry will render the policy voidable by the insurers. Should an insurer decided to

end the insurance contract/policy, the end is from the beginning.

Margo points out that while the duty of disclosure usually terminates when the contract is made, the policy may include a continuing obligation on the insured during the policy period to notify any material change in the circumstances or nature of the risks which are the basis of the contract, though it is always a difficult task to define the meaning of "the change of the *nature* of the risks".

There are different approaches of disclosure around the world, the main ones as the follows:

- (1) *USA*. Nearly all US states adopt that there is only non-disclosure if it is fraudulent non-disclosure. The burden of proving that it was fraudulent is only on the insurer. In practice, it was very difficult to prove fraudulent, so most cases in the US there is no duty of disclosure.
- (2) *Australia and Belgium*. The insured only has to disclose what a reasonable insured would concern to be a material fact.
- (3) *France, Switzerland, Finland and Spain*. The insured's obligation is to answer the questions be asked by the insurer. Special attention pay to Spain is that during the

insurance policy period, the insured has to disclose any increase of the risks to the insurer, which is the only rule around the world harder than the UK “change of nature of the risks” rule.

- (4) *France, Denmark, Finland and Ontario (Canada)*. These countries adopt the Proportionality Rule. For example, if innocent non-disclosure of x% information, then the insured will lose x% claim.
- (5) *South Africa*. In *Mutual and Federal Ins Co Ltd v. Oudtshoorn Municipality*,⁹⁶ the Appellate Division of the Supreme Court of South Africa held that while affirming the basic duty on the part of the insurer and insured to disclose facts material to the risk, the term *uberrima fides* (utmost good faith) is an “alien, vague and useless expression without any particular meaning in South African law”.

1-14. Misrepresentation under English law

Section 24 of the Marine Insurance Act 1906 provides that “if the insured has made a false or inaccurate representation as

⁹⁶ [1985] (1) SA 419, 433A, cited by Margo.

to material fact and which induced the insurers to enter into the contract, the policy will be voidable at the instance of the insurers. The insurer may waive the requirement to disclose material circumstances and misrepresentation by the insured.

The non-disclosure or misrepresentation must induce the insurer to enter into the contract; if it does, the insurer may elect to avoid the policy and return the premium and until him so elects, the policy remains in effect, but is voidable.⁹⁷

1-15. Policy, “the slip” and “cover note”

In present dissertation, “Policy” means a written policy of insurance, when prepared, which constitutes the contract and replaces any other written document such as the slip.

“The slip” means a piece of paper which a broker writes down the details of the risk and the principal terms and conditions of the insurance cover required by the prospective insured. These terms and conditions include the risk to be insured, period of cover, fleet details, the identity of the insured, the standard clauses, and a reference to the wording to be used in the policy, premium and commission. In a simple case, the

⁹⁷ *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1994] 3 All ER 581, HL.

broker selects the insurer and offers the risk to him. When the terms have been negotiated the contract is concluded and the policy is issued.

Once the contract has been concluded, the broker may issue a "cover note" to the insured with details of the insurance which should reflect what is shown on the slip. The slip is the contract, the cover note is not.

Where, for whatever reason, there is a conflict between policy and slip, then it may be necessary to apply to the court for rectification of the policy.

1-16. Reinsurance

The insurer often "lays off" the risk of insurance by reinsuring part or sometimes all of the risk with other insurers ("reinsurers"). Reinsurers are either Lloyd's underwriters or special reinsurance companies, two best known reinsurance companies are Munich RI and Swiss RI.

In practice, such as most aviation insurance, if an insurer cannot arrange the reinsurance, he will not take the original insurance since the high value nature of the business.

Types of reinsurance include the following:

- (1) Reinsurance of a single direct insurance, known as facultative/back to back/one off reinsurance;
- (2) Reinsurance of a series of risks, known as Treaty Reinsurance, which made in advance, cover a certain period of time for certain types of risks or certain amount of money or combined together;
- (3) Reinsurance of reinsurers, known as a retrocession agreement.⁹⁸

Other forms of laying off the risk include “excess of loss”, being the loss reinsured from a bundle of insurance contracts above a certain aggregate sum retained by the insurer. Excess of loss can also relate to only one underlying contract of insurance. The contract of insurance and the contract of reinsurance are separate contracts between separate parties. The reinsurance may apply the same proper law as the original insurance or its own proper law. While the London market applies English contractual rules to an insurance contract, reinsurance contracts concluded in the market may nevertheless apply the law of the underlying policy, thus possibly raising a conflict of law question.

Sometimes in the case of aircraft financing, the underlying

⁹⁸ Highlands Ins Co v. Continental Ins Co [1987] 1 Lloyd's Rep 109.

policy may contain a “cut through” clause which in turn should be reflected in the reinsurance policy. This requires hull reinsurers to pay direct the original insured finance company their entitlement of the hull moneys. Without this arrangement the finance company as assured would be entitled to claim only against the original insurers. However, cut-through clauses are usually subject to the domestic law of the original insurance which sometimes forbids such clauses.

In the case of facultative reinsurance it is quite possible to have a full insurance policy and then a full form reinsurance policy. However, often reinsurance is done by way of use the “same terms and conditions clause”, which means make reinsurance contract subject to same terms and conditions of the original contract. Are there any limits to operate this clause? The answer is yes. First, a clause should not be brought down if which will cause conflicts with the reinsurance contract,⁹⁹ second, a clause should not be brought down if which is not appropriate for reinsurance.¹⁰⁰

Subject to any express provision in the contract, English law imposes on the reinsured the burden of proving that the reinsurer is liable to indemnify him.

⁹⁹ *Australian Widows Fund v. National Mutual Life of Australasia* [1914] AC 634.

¹⁰⁰ *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.* [1907] AC 59.

In reinsurance the alternative claims handling procedures are:

(1) *Follow the fortunes/settlements clause*, also referred to as “Full RI”. Which leaves the original insurer free to handle the claims of the original insured subject to any contractual obligations imposed by the reinsurance contract. There are three limits to this clause:¹⁰¹

(i) this clause applies as long as the case was settled in honest and business like way;

(ii) the reinsurer does not have to pay “ex gratia” payment (pay out of the policy);

(iii) if the insurer settled the claim and the reinsurer followed the settlement, then later on turns out that the insured is guilty of fraud, but the insurer acted in honest and business like way, the reinsurer has to try to recover the money from the insured, not the insurer.

(2) *Claims cooperation clause* (used by EU countries). This provides that it is a condition precedent to reinsurers’ liability that:

(i) the insured shall upon knowledge of any loss which may

¹⁰¹ *Insurance Co. of Africa v. Scor* [1984] 1 Lloyd’s Rep 541.

- give rise to a claim under this policy advise reinsurers within seven days; and
- (ii) the reinsured shall furnish reinsurers with all information available and shall cooperate with reinsurers in any adjustment and settlement (AVN 21).
- (3) *Claims control clause* (used by non-EU countries). It is a condition precedent to reinsurers' liability that:
- (i) the reinsured shall, upon knowledge of any loss or losses which may give rise to a claim, advise reinsurers within 72 hours; and
- (ii) furnish reinsurers with all information available and the reinsurers shall have the right to appoint adjusters, assessors and/or surveyors and to control all negotiations, adjustments and settlements in connection with such loss or losses (AVN 25).
- (4) *Reinsurance and underwriting claims control clause*. This has more stringent provisions additionally giving reinsurers the sole right to appoint adjusters, assessors, or surveyors and/or lawyers and to control all negotiations, adjustments and settlements in connection with the loss. No amendment of the original policy shall be binding on reinsurers without their prior agreement (AVN 41).

But the question of which clause has priority has no easy answer. In the *Scor*¹⁰² case, both “Follow the fortunes/settlements clause” and “Claims cooperation clause” are in the reinsurance contract, the English Court of Appeal held that “Claims cooperation clause” is more powerful than “Follow the fortunes/settlements clause”. But why? The Court did not give any persuasive reason, the result can be easily on the contrary. A hint can be traced that Fox LJ stated: “that does least violence to the language”, the true meaning of his statement is that, in simple words, “it is a nightmare!”

In practice, which clause should be adopted in the reinsurance contract depends on the reinsurance premium and the market conditions.

1-17. Deductible

The deductible is that part of the liability or hull risk which is retained and paid for by the insured with the insurance cover being provided only when the liability or loss has reached a certain amount. Deductibles on hulls can be substantial and the prospective insured can buy insurance cover for this deductible

¹⁰² See note 15, *supra*.

exposure.

1-18. Premium and commission

The price paid by the insured for insurance is called the premium. The amount of the premium should normally be included in the contract of insurance. It may be included on the slip. Sometimes the premium may remain "TBA", i.e. "to be agreed".

Method of payment depends on the terms of the contract and market practice. The effect of late or non-payment of the premium will be dealt with expressly in the insurance contract or by the governing domestic law.

Premiums for hull insurance are calculated often as a fixed sum or percentage of the total value of the aircraft. In the case of passenger liability, the premium can be assessed on an amount per passenger seat or in the case of airlines on the basis of the revenue passenger miles flown by the airline. The policy may require an additional premium to be paid on increase of risk or for reduction of the premium on certain occasions.

Where the broker is the agent of the insured, his commission may be deducted from the premium, usually before

it is paid. In the London market a Lloyd's broker is liable to the Syndicates for the payment of premium on default by the insured.

1-19. Subrogation

Subrogation based on the concepts of equity and fairness, stop the insured to get double indemnity. It is now an implied term of an insurance contract. This doctrine is widely recognized and applied in the international community, each State has its own domestic law on subrogation.

Subrogation in the English law of insurance is "a doctrine in favour of underwriters or insurers in order to prevent the insured from recovering more than a full indemnity; it has been adopted solely for that reason".

It was stated in *Castellain v. Preston*¹⁰³: "Once the insurers have indemnified the insured under the policy they step into his shoes in relation to any rights of recovery which may be available to the insured against third parties."

The English common law doctrine of subrogation applies to indemnity insurance which includes hull and liability

¹⁰³ [1883] 11 QBD 380.

insurance. It does not apply in the case of personal accident or life insurance.

Subrogation takes place automatically when insurers have admitted and paid the insured's claim. The right is exercisable in the name of the insured. Conceptually, an insurer cannot bring a legal action against a third party in his own name because no legal connection between the insurer and the third party. For example, if insurers indemnify an airline against passenger liability claims, they will take over the right of the airline and by use of the airline's name to make a claim against a third party such as a manufacturer.

However, if there has been an express assignment of rights by the insured to insurers then it is very likely that any action will have to be started by insurers in their own names, since a fierce and arduous subrogation action in the name of the insured against a defendant with whom it does business regularly is not always welcome to the insured.

The insured has an implied duty to assist insurers and not to prejudice their position. An insured should not take any step in respect of a third party which would prejudice the insurer's subrogation rights.

The principles of subrogation may cover not only the

insurer stepping into the shoes of the insured to make a recovery against a third party, but also the exercise of the insurer of a right to recover from the insured moneys received by the latter from the third party in respect of an insured loss already paid by insurers. In the latter case in English common law the moneys would be held on trust for the insurers.

Aviation insurance policies often contain a clause setting out the insurer's rights of subrogation. The court concerned must apply the applicable domestic law rules of construction in interpreting an express subrogation clause when the question of subrogation is already regulated either by the Civil Code, as in the civil law countries, or by legal precedent, as in the common law countries.

In the case of a major hull subrogation the duties of the insured to assist its insurers may be extensive and costly, for example the provision of witnesses, and the production of evidence and technical information. It may save both misunderstanding and time if these questions are dealt with expressly in the policy.

1-20. London Aircraft Insurance Policy AVN 1C

The London Aircraft Insurance Policy AVN 1C is a world wide standard policy. This policy has four Sections which list below:

Section I, Loss of or damage to aircraft;

Section II, Legal liability to third parties (other than passengers);

Section III, Legal liability to passengers;

Section IV, (A) General Exclusions applicable to all sections, (B) Conditions Precedent applicable to all sections, (C) General Conditions applicable to all sections, and (D) Definitions.

Section III, Paragraph 1, is the most concern of the present dissertation (Chapter 3, section 3-7, *infra*), which provides:

“The Insurers will indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay, and shall pay, as compensatory damages (including costs awarded against the Insured) in respect of

(a) accidental bodily injury (fatal or otherwise) to passengers whilst entering, on board, or alighting from the Aircraft and

(b) loss of or damage to baggage and personal articles of passengers arising out of an Accident to the Aircraft.

Provided Always that (i) before a passenger boards the Aircraft the insured shall take such measures as are necessary to exclude or limit liability for claims under (a) and (b) above to the extent permitted by law; (ii) if such measures include the issue of a passenger ticket/baggage check, the same shall be delivered correctly completed to the passenger a reasonable time before the passenger boards the Aircraft.

In the event of failure to comply with these documentary precautions in proviso (i) or (ii), the liability of insurers under this section shall not exceed the amount of legal liability which would have existed had the proviso been complied with.”

Some issues within this Section merit closer examination:

First, if “entering” and “alighting” are more limited than “the course of any of the operations of embarking or disembarking” in Article 17 of the Warsaw Convention, questions may arise on

the extent of cover if a passenger is injured when crossing the apron. Furthermore the proviso to paragraph 1 uses the words "boards the Aircraft". It is hoped that any arbitrator will take a realistic approach.

Secondly, with regard to baggage and personal articles referred to in paragraph 1(b) an accident to aircraft is required while it is not so in the case of the passenger injury cover. In the policy definitions, "accident" is defined as meaning "any one accident or series of accidents arising out of one event". However, what are the criteria to be an "accident"? In one early English case¹⁰⁴ it was held that an accident is "an unlooked for mishap or an untoward event which is not expected or designed". The wording suggests that if a passenger entering an aircraft stumbles on defective embarkation steps, breaking his ankle and his spectacles, the insured's liability for the ankle but not for the spectacles will be covered, unless the breaking of the ankle can be construed as an accident to the aircraft, which is unlikely.

Thirdly, the Policy provides no cargo liability cover which can be added by agreement.

Fourthly, the proviso requiring issue of tickets/baggage checks covers two situations: (a) where the Warsaw Convention

¹⁰⁴ *Fenton v. J Thorley & Co Ltd* [1903] AC 443.

or similar provisions in respect to “non-international” carriage apply; (b) where the Warsaw Convention or such provisions do not apply. The need to issue a passenger ticket/baggage check for Warsaw Convention carriage in order to limit liability (the Montreal Convention gets rid of this prerequisite). To the extent that a special contract has removed limits of liability for death or injury then this provision ceases to be of significance as no doubt the insured will have advised the insurers of the special contract concerned. However, failure to issue a ticket where death or injury liability limits have been waived may still result in an unintentional unlimited liability in respect of baggage or delay. This could prove expensive for the insured where the baggage of the oil-rig worker includes an essential drilling component.

One arbitration case¹⁰⁵ concerns not only failure to issue a ticket where a similar policy requirement applied but also the question of insurer’s agreement by way of policy endorsement to an increased limit of liability by way of special contract. Such increase would have been dealt with in the ticket which was not issued. The arbitrator held that the insurer’s liability extended to the increased limit.

¹⁰⁵ *Re Keenair Services Ltd and Norwich Union Fire Insurance Society Ltd* (Arbitration Re Policy No A. 8203/218, 29 July 1983).

In respect of non-Warsaw Convention situations, there may be some States where it is still possible to limit or exclude liability in respect of death or bodily injury by contract. However, this is a diminishing possibility.

Fifthly, the exclusions apply to directors or employees acting in the course of their employment. Thus the insured is unlikely to be covered in respect of the death of an in-house accountant when traveling as a passenger from London to Paris for a meeting with insured's local handling agents.¹⁰⁶ The transport of corporate employees is an element in distinguishing "public transport" and "aerial work" under the ANO.¹⁰⁷

Sixthly, Section III is not subject to the Noise and Pollution and other Perils Exclusion Clause.

1-21. The legal reality in China

Finally, for the concern of the author, in China, aviation insurance law is very new. Frankly, this area is almost blank. China is a civil law system country, there is no statute named as "aviation insurance law" or any other similar title; even in the

¹⁰⁶ See *Fellowes (or Herd) and Another v. Clyde Helicopters Ltd* (HL, 1997).

¹⁰⁷ UK Air Navigation (No 2) Order 1995 or replacement Order.

general insurance law, "aviation insurance" contains no mention at all; in the Chinese Civil Aviation law, there is only one reference to Article 184, which provides: "Chinese courts should apply international conventions which China has ratified." From the perspective of this dissertation, however, which provides no means to interpret an international convention. The only thing we have in practice is the "Regulations" issued by the Civil Aviation Administration of China (CAAC), which is the governmental authority for civil aviation in China. However, still, this is no contribution as to interpret an international convention such as the Warsaw Convention or the Montreal Convention. This situation creates uncertainty, for Chinese courts, airlines, lawyers, no one is clear what exactly the law is.

To clarify the uncertainty, the proposed dissertation will concentrate on a comparative analysis of the different approaches to interpret a multinational convention, especially the different versions of the crucial Article 17 which governing personal injury claims. And which version China could appropriately adopt having regard to Chinese legal reality. By studying this, the author hopes to be able to make a meaningful contribution to the development of Chinese aviation insurance law.

CHAPTER TWO

What Constitutes “ACCIDENT” Under the Warsaw - Montreal System

2-1. Introduction

Since 1929, an international air carrier's liability for personal injury and cargo damage has been governed by the Warsaw Convention. After the Convention's inception, various issues have emerged regarding the scope and interpretation of the Convention, especially in light of the modernization and expansion of air travel. As a result, the Convention has recently undergone significant changes and reform efforts aimed at modernizing the liability scheme. The traditionally low liability limits have been raised, converted into an international market standard, and tied to inflation. The concept of willful misconduct to break the monetary limits has been eliminated with an essentially no-fault based system in place for damage claims under the new and higher limits, with a pure fault based system for claims over the established limits. The reforms also have introduced notions of up-front payments, arbitration, and mandatory insurance as well as expanded the possible forums to assert claims.

Despite these changes, however, the fundamental standard of liability for death and injury claims under the crucial Article 17 remains unchanged, which provides:

“The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Accordingly, if a passenger would process a personal injury claim against an international air carrier, the very first thing the passenger has to establish is there was an “accident” within the meaning of the Article 17. But what exactly the word “accident” means, the Warsaw Convention and the new Montreal Convention do not define.

It is fairly universal that the goal in the interpretation of any instrument is to effectuate the intent of the parties.¹⁰⁸ Treaty interpretation is no different. According to the Vienna Convention,¹⁰⁹ ‘a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’¹¹⁰ The basic rules include the need to uphold the purposes of the treaty and give meaningful effect to the signature or intent behind the

¹⁰⁸ See Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) (describing the court's reliance on facts surrounding the treaty, along with parties' understanding and intent, as important factors in treaty interpretation).

¹⁰⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has never ratified the Vienna Convention. See Chubb & Sons v. Asiana Airlines, 214 F.3d 301 (2d Cir. 2000). It nonetheless is used as a guide to international treaty interpretation as it is a codification of customary international law. *Id.* (citing Maria Fran Kowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 Va. J. Int'l L. 281, 286 (1988)).

¹¹⁰ Vienna Convention, *supra* note 109, art. 32; see Air France v. Saks, 470 U.S. 392, 397 (1985) (emphasizing that interpretation of a treaty requires one to commence 'with the text of the treaty and the context in which the words are used.'). In Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991), the Court interpreted Article 17's 'bodily injury' requirement and held that it does not encompass mental injuries.

treaty.¹¹¹ Upon examination of the treaty's text and the context in which the words are used,¹¹² particularly with respect to uncertain or ambiguous areas, one can resort to the 'history of the treaty, the negotiations, and the practical construction adopted by the parties.'¹¹³ Notions of liberality and good faith¹¹⁴ are also commonly invoked, as is the interpretation of sister signatories' courts.¹¹⁵ According to the U. S. Supreme Court, as the 'travaux preparatoires' of the Warsaw Convention are published and are generally available to litigants, courts will frequently refer to these materials to resolve ambiguities in the text.¹¹⁶ With Article 17, in particular, the 'travaux preparatoires,' context, and post-ratification conduct are crucial, given that the article is 'stark and undefined.'¹¹⁷

Notably, the draft convention initially presented to the Warsaw delegation by CITEJA made air carriers liable 'in the case of death, wounding or any other bodily injury suffered by a traveler,' 'in the case of loss, damage or destruction of goods or baggage,' or 'the case of delay suffered by a traveler, goods, or

¹¹¹ See Floyd, 499 U.S. at 531 (describing the need to consider signatory conduct in interpreting parties' intent).

¹¹² See Saks, 470 U.S. at 397 (citing Maximov v. United States, 373 U.S. 49, 53-54 (1963)).

¹¹³ See Choctaw, 318 U.S. at 432.

¹¹⁴ See Vienna Convention, supra note 109, art. 32.

¹¹⁵ See Saks, 470 U.S. at 404 (emphasizing the importance of opinions and the conduct of signatories in interpreting treaties).

¹¹⁶ See id. at 400.

¹¹⁷ Janice Cousins, Note, Warsaw Convention--Air Carrier Liability for Passenger Injuries Sustained Within a Terminal, 45 Fordham L. Rev. 369, 388 (1976).

baggage.' The liability scheme did not textually include any requirement of causation and made no mention or reference to 'accident.' Liability was likewise the same for personal injuries and damage to goods or baggage.¹¹⁸ Pursuant to this initial draft, Article 22 permitted the carrier to avoid liability by proving it had taken reasonable measures to avoid the damage.¹¹⁹

The minutes to the Convention establish that the term 'accident' itself was never discussed, but simply appeared in final form as revised by the drafting committee at the Convention.¹²⁰ While there is no information as to why or when this occurred, the wording remains exactly the same today as it was then. Notably, the term 'accident' previously appeared in an early draft convention prepared by CITEJA directed toward liability of carriers for damage or injury caused to 'person or objects' on the ground.¹²¹ Under this draft, liability was imposed

¹¹⁸ See International Conference on Air Law Affecting Air Questions, Second International Conference on Private Aeronautical Law, Minutes, Oct. 4- 12, Warsaw 1929, at 264-265 (R. Horner ed. & D. Legrez transl., 1975) [[hereinafter 1929 Warsaw Minutes], (listing liability of the carrier as adopted by CITEJA in May 1928).

¹¹⁹ See Warsaw Convention, art. 22.

¹²⁰ See 1929 Warsaw Minutes, *supra* note 118, at 267 (using the term 'accident' in discussing the liability of third party carriers).

¹²¹ See John J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, at 46, 3 J. Air L. & Com. 27, 32, 36 (1932) (describing the work of the CITEJA on the Warsaw Convention). CITEJA was charged with writing a draft convention, which would then be addressed at the international conference. See *id.* at 31. At the First Session of CITEJA on May of 1926, members identified and divided a set of problems to study among four Commissions within the CITEJA group. See *id.* at 32. The problems were identified as follows:

First Commission: (1) Nationality of aircraft; (2) aeronautical register; (3) ownership, co-ownership, construction, and transfer; (4) vested rights, mortgages, privileges and seizure. Second Commission: (1) Category of transport (commercial transport, touring, etc.); (2) bill of lading; (3) liability of carrier towards consignors of goods and towards passengers; (4) jettison of

where the injury or damage was 'caused by aircraft,'¹²² which is referenced in the draft as an 'accident'.¹²³ Further, liability was limited to the value of the aircraft, and the carrier could not be held liable where the damage was caused 'by any person on board the aircraft' who acted 'intentionally by some act which had nothing to do with the operation of the aircraft and without the operator or his staff being able to prevent the damage.'¹²⁴ Finally, the draft allowed the monetary limits to be exceeded if the 'damage was caused by his fault.'¹²⁵ This history is informative, as the use of 'accident' by CITEJA was limited, tied to aircraft operation and modified by concepts of fault.

One can hardly disagree with the U. S. Supreme Court's description of Article 17 as 'stark and undefined.'¹²⁶ The plain or ordinary meaning of 'accident' or, 'l'accident', is certainly similar under both English and French usage, and references an unexpected, fortuitous, or untoward event or happening. What it includes within its ambit, however, remains in question, as the

cargo and general damage; and (5) renting of aircraft. Third Commission: (1) Damage and liability toward third parties (landing, collision, and jettison); (2) limits of liability (contractual limitation, abandonment); and (3) insurance. Fourth Commission: (1) Legal status of commanding officer and crew; (2) accidents to the crew and insurance; (3) status of passengers; (4) law governing acts committed aboard aircraft. Id. at 33.

¹²² Id. at 46, art. 1.

¹²³ Id. at 47, arts. 5-6.

¹²⁴ Id. at 46, art. 2(b).

¹²⁵ Id. at 47, art. 8.

¹²⁶ See Cousins, *supra* note 117, at 388.

context in which it is used is what gives the term meaning.¹²⁷ Since the initial elimination of the international carrier's due diligence defense, beginning in 1966, the meaning and intent of 'accident' has been under great strain. Moreover, it is now clear that the Convention provides the exclusive remedy for claims arising out of international air travel. This has further intensified the debate over the scope and meaning of Article 17, especially as to disturbances or incidents arising out of modern air travel.

2-2. "Accident" is an "unexpected or unusual event or happening external to passenger"

Then how to define the word "accident" in the Warsaw Convention Article 17. The leading US case is Air France v Saks,¹²⁸ which also has a world-wide effect. In this landmark case, the US Supreme Court defined "accident" as an "unexpected or unusual event or happening external to passenger", and this definition has been readily adopted by other countries with virtually no analysis.

*Air France v Saks*¹²⁹

¹²⁷ See Maximov, 373 U.S. at 53-54 (commenting that words used in treaties are to be interpreted based on the context in which they are used).

¹²⁸ 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985).

¹²⁹ See id.

Ms. Saks was a passenger on an international flight between France and Los Angeles, California.¹³⁰ As the aircraft descended, Ms. Saks felt extreme pressure and pain in her left ear¹³¹ and suffered permanent deafness as a result.¹³² It is important to note, however, that she did not base her claim on abnormal operation of the aircraft, but conceded that the cabin depressurization was functioning properly at the time.¹³³ Despite this fact, Ms. Saks claimed that the normal pressurization changes during descent caused her deafness and constituted an accident under Article 17.¹³⁴ She argued that "accident" should be defined as a "hazard of air travel," and that her injury had indeed been caused by such a hazard.

The District Court ruled that Ms. Saks could not recover under Article 17, as she could not demonstrate some malfunction or abnormality in the aircraft's operation.¹³⁵ On appeal, the Ninth Circuit reversed.¹³⁶ The Court held that a showing of a malfunction or abnormality in the aircraft's operation was not a prerequisite to liability under the

¹³⁰ See Saks, 470 U.S. at 394.

¹³¹ See *id.*

¹³² *Id.*

¹³³ See *id.* (stating that 'all the available evidence, including the post flight report, affidavits, and passenger testimony, indicated that the aircraft's pressurization system had operated in the usual manner.').

¹³⁴ See *id.*, at 395.

¹³⁵ *Id.*

¹³⁶ See Saks, 724 F.2d at 1384.

Convention.¹³⁷ According to the Ninth Circuit, an accident is defined as 'an occurrence associated with the operation of aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked...'¹³⁸ Thus, under this definition, a normal cabin depressurization qualifies as an accident. Central to the Ninth Circuit's analysis was its reliance on the 'history and policy' of Annex 13 to the Convention on International Aviation and the Montreal Interim Agreement of 1966, which, according to the Court, allowed 'accident' to be equated with 'occurrence.'¹³⁹

The U.S. Supreme Court, however, reversed the Ninth Circuit's decision. The court stated that Air France is liable to the passenger under the terms of the Warsaw Convention *only if* the passenger proves that an "accident" was the cause of her injury.¹⁴⁰ The narrow issue presented is whether respondent can meet this burden by showing that her injury was caused by the normal operation of the aircraft's pressurization system. The proper answer turns on interpretation of a clause in an

¹³⁷ See *id.* at 1396 (explaining that the Ninth Circuit based its decision on the Montreal Agreement's view, which imposes absolute liability on airlines for injuries proximately caused by inherent risks in travel).

¹³⁸ *Id.* at 1385.

¹³⁹ *Id.*

¹⁴⁰ See MacDonald v. Air Canada, 439 F.2d 1402 (CA1 1971); Mathias v. Pan Am World Airways, Inc., 53 F.R.D. 447 (WD Pa.1971). See also Shawcross & K. Beaumont, *Air Law VII*(147) (4th ed. 1984); D. Goedhuis, *National Airlegislations and the Warsaw Convention 199* (1937).

international treaty to which the United States is a party.¹⁴¹ The general rule is a court should rely on the text of the Convention, the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts.

The U.S. Supreme Court reasoned that Article 17 imposes liability for injuries to passengers caused by an “accident,” whereas Article 18 imposes liability for destruction or loss of baggage caused by an “occurrence.” This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word “accident” to mean something different than the word “occurrence,” for they otherwise logically would have used the same word in each article.¹⁴² And the text of Article 17 refers to an accident *which caused* the passenger's injury, and not to an accident *which is* the passenger's injury. In Article 17, the drafters of the Warsaw Convention apparently did make an attempt to discriminate between “the cause and the effect”; they specified that air carriers would be liable if an accident *caused* the passenger's

¹⁴¹ See Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-432, 63 S.Ct. 672, 677-678, 87 L.Ed. 877 (1943). (Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.)

¹⁴² See Goedhuis, *supra* note 139, at 200-201; M. Milde, *The Problems of Liabilities in International Carriage by Air* 62 (Caroline Univ.1963).

injury. The text of the Convention thus implies that, however we define "accident," it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone.¹⁴³

Finally, the court concluded that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by "an unexpected or unusual event or happening that is external to the passenger." Thus, when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply. The court admonished that this definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries, that the inquiry should address 'the nature of the event which caused the injury rather than the care taken by the airline to avert the injury;' and that the passenger need only prove 'that some link in the chain was an unusual and unexpected event external to the passenger.'¹⁴⁴ Further, the Court considered the inquiry to be 'an objective one, which does not focus on the perspective of the person experiencing the injury.'¹⁴⁵

¹⁴³ American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident. See Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491, 54 S.Ct. 461, 78 L.Ed. 934 (1934).

¹⁴⁴ See Saks, 470 U.S. at 393.

¹⁴⁵ Id., at 392.

*Tseng v El Al Israel Airlines, Ltd.*¹⁴⁶

Recognizing the Supreme Court in *Saks*, the appellate court in *Tseng* stated that not every identifiable incident or occurrence during a flight is an accident within the meaning of Article 17 even if the incident or occurrence gives rise to an injury. The appellate court thus declared, "accident" does not include the normal operation of the aircraft or the procedures followed by the airline personnel in the normal course of air travel, although they may cause illness in a passenger, noting the Supreme Court's statement in *Saks* that an injury has not been caused by an accident when indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft. The court explained that the drafters of the Warsaw Convention did not aim to impose close to absolute liability for an individual's personal reaction to routine operating procedures, measures that, although inconvenient and embarrassing, are the price passengers pay for airline safety.

Australia followed the US Supreme Court's interpretation of "accident" in the Warsaw Convention Article 17. In the case

¹⁴⁶ 122 F.3d 99, 147 A.L.R. Fed. 783 (2d Cir. 1997), rev'd on other grounds, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

of Povey v Qantas Airways Ltd¹⁴⁷, the High Court of Australia held that "accident" is a concept which invites two questions: first, what happened on board (or during embarking or disembarking) that caused the injury of which complaint is made, and secondly, was what happened unusual or unexpected.

The UK also agrees the US definition of "accident". In the case of Chaudhari v British Airways plc,¹⁴⁸ the UK Court of Appeal determined that a passenger, who was already suffering from a left-sided paralysis and who was injured when he fell as he tried to leave his seat, did not suffer an "accident" that fell within Article 17 of the Convention. Leggatt LJ emphasized that the word "accident" focused attention on the cause, rather than the effect of the accident, and should be contrasted with Article 18 of the Convention (covering loss and damage to baggage) which refers to the "occurrence" which caused the damage. The word "accident" was not to be construed by reference to the passenger's peculiar condition, but was properly to be defined as something external to the passenger.

Canada also followed this approach, in the case of Quinn v. Canadian Airlines Int'l Ltd.¹⁴⁹, Canadian court relying on Saks'

¹⁴⁷ 2005 WL 1460709 (HCA 2005), affirming QANTAS Ltd v. Povey, 2003 WL 23000692 (VCA 2003), Special leave to appeal granted by, 2004 WL 3222486 (HCA 2004) and Affirmed by, 2005 WL 1460709 (HCA 2005).

¹⁴⁸ [1997] Times 7 May 1997 (Apr. 16, 1997).

¹⁴⁹ [1994] 18 O.R.3d 326.

holding that turbulence was not considered an accident under the Warsaw Convention.

The only doubt as to this worldwide standard interpretation of "accident" in the Warsaw Convention is the "external" requirement. Prior to the decision of the US Supreme Court in *Saks*, a number of courts expressed the view that an "accident," as that term is used in Article 17, must be an unexpected or unusual happening without requiring the event to be external to the passenger.¹⁵⁰ And the *Australia Povey* case expressed this concern as well. The concurring opinion in *Povey* noted that the US Supreme Court insisted that the "accident" must be external, however, there is not a lot of textual support in the Warsaw Convention for this conclusion. On the contrary, the text of Article 17 uses the word "accident" as the necessary cause of the "damage so sustained." Thus, arguably, if such "damage" were sustained by an internal "accident" (should that be possible) so long as it happened "on board the aircraft" or "in the course of" the specified "operations," that would be enough. In the concurring opinion's view, the happening or event in such special and temporal circumstances would be sufficient to attract the liability of the carrier.

¹⁵⁰ See *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977); see also *Rullman v. Pan American World Airways, Inc.*, 122 Misc. 2d 445, 471 N.Y.S.2d 478 (Sup 1983).

Even in the Saks, why an event must be "external" to qualify as an "accident" has not been clearly reasoned. For the author's view, this prerequisite of Article 17 accident arises from the court's desire to reduce the trouble of proof, since under the modern science, it is extremely difficult to prove "internal accident" which connects to the air travel, such as the DVT cases, *infra*.

2-3. Interpret "accident" under the pressure of the Warsaw Convention's exclusivity

After the US Supreme Court in Saks, provided a rather narrow definition of "accident,"¹⁵¹ the plaintiffs were able to bring state law claims separate from a Warsaw Convention claim. As a result, the plaintiffs often argued for a narrow definition of "accident" so as to avoid the dollar limits on a carrier's liability as well as the two-year limitations period under the Warsaw Convention and, conversely, carriers generally argued for a broad definition of accident to take advantage of the Warsaw Convention's limits on liability. When the Supreme

¹⁵¹ See McCarthy, 56 F.3d at 316, (this restraint is entirely understandable as Article 17 provides for strict liability and there are sound policy reasons to confine that liability to the letter of the text, narrowly construed.)

Court decided El Al Israel Airlines v Tseng¹⁵², which made the Warsaw Convention's exclusivity significant, the parties traded arguments. Airlines typically argue for a narrow definition of "accident" because if an incident is not an accident, there is no other basis for recovery. Plaintiffs, on the other hand, try to get a broader definition of accident applied to encompass their particular situation.¹⁵³ Since recovery for personal injury if not allowed under Article 17 of the Warsaw Convention, is not available at all,¹⁵⁴ courts usually interpret the meaning of "accident" in a broad fashion after Tseng.

Given that the fundamental purpose of the Warsaw Convention was to provide a uniform system of rules, the delegates certainly believed the Convention would have a substantial preemptive scope. The issue was to what extent the Convention would have preemptive power, given that the Convention incorporated express reference to local law in many of its provisions.¹⁵⁵ Indeed, the Convention expressly provided for resort to local law, based on the forum's choice of law rules, on such issues as recoverable damages,¹⁵⁶ contributory or

¹⁵² 525 U.S. 155.

¹⁵³ See Louie v. British Airways, Ltd., 2003 WL 22769110 (D. Alaska 2003).

¹⁵⁴ See Tseng, 525 U.S. at 161.

¹⁵⁵ See, e.g., Zicherman v. Korean Airlines, 516 U.S. 217, 227 (1996) (holding that Article 17 of the Convention permits compensation only for legally cognizable harm recognized under domestic law).

¹⁵⁶ See Warsaw Convention, arts. 17-19 (providing carrier liability for damages relating to

comparative negligence,¹⁵⁷ award of costs,¹⁵⁸ issues of procedure,¹⁵⁹ calculation of the limitation period,¹⁶⁰ and definition of willful misconduct.¹⁶¹

The original text of Article 24 of the Warsaw Convention provides as follows:

- “1. In the cases covered by articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In cases covered by article 17, the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.”

The Montreal Convention 1999, Article 29 provides:

“In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

By adding ‘...whether under this Convention or in contract or in tort or otherwise... [and] ...In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.’ the drafters made the preemptive scope of the

personal injury, checked baggage, and transportation delay).

¹⁵⁷ See *id.* art. 21 (stating that the court to which a claim was submitted may exempt carriers from liability in accordance with their own law where a carrier proves that damage was caused in whole or in part by the injured party).

¹⁵⁸ See *id.* art. 22 (setting forth maximum amounts of liability for recoverable damages, and providing that the form of payments be governed by the law of the court to which the claim was submitted).

¹⁵⁹ See *id.* art. 28 (establishing that procedural questions be determined by the law of the court to which the claim was submitted).

¹⁶⁰ See *id.* art. 29 (providing a two year statute of limitations to be calculated according to the law of the court to which the claim was submitted).

¹⁶¹ See Warsaw Convention, art. 25 (stating that provisions which exempt or limit a carrier's liability are not available to carriers who have demonstrated willful misconduct as defined by the law of the court to which a claim was submitted).

Conventions expressly clear that the Conventions preclude passengers from bringing actions for bodily injury, delay in cargo or baggage damages under local law, provide an exclusive remedy even in instances where the international passenger could not establish liability under the Conventions.

Before the adoption of the Montreal Protocol No.4 (came into force in 1998 world widely, and became effective in the US in March of 1999), which similar to the Montreal Convention 1999 Article 29, Article 24 of the Warsaw Convention created a court split on whether the language and/or purpose of the Convention precluded a claimant from resorting to local law remedies.¹⁶² The debate was resolved in January 1999 by the Supreme Court in El Al Israel Airlines, Inc. v. Tseng¹⁶³ and the U. S. Senate's adoption of the Montreal Protocol No. 4 in March of 1999.¹⁶⁴

Prior to Tseng, courts in both the United Kingdom and

¹⁶² See Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (recognizing a circuit split on whether the Warsaw Convention preempts state law). Compare Abramson v. Japan Airlines, 739 F.2d 130, 134 (3d Cir. 1984) (stating that the Warsaw Convention does not preclude passengers unable to recover under the Warsaw Convention from pursuing state law remedies), and Beaudet v. British Airways, PLC, 853 F. Supp. 1062, 1072 (N.D. Ill. 1994) (enumerating the number of cases which exemplify the divergence of views over whether a claimant's failure to satisfy terms under the Convention precludes a claimant's recovery under state law), with Fishman v. Delta Airlines, Inc., 132 F.3d 138, 142 (2d Cir. 1998) (holding that all state law claims falling within provisions of the Warsaw Convention are preempted by the Convention), and Potter v. Delta Airlines, Inc., 98 F.3d 881, 885 (5th Cir. 1996) (holding that the Warsaw Convention created an exclusive remedy for claims resulting from personal injury accidents aboard an aircraft, precluding resort to state claims).

¹⁶³ See Tseng, 525 U.S. at 161.

¹⁶⁴ See 144 Cong. Rec. S11059 (Sept. 28, 1998). The Protocol entered into force in the United States on March 4, 1999.

Canada found the Warsaw Convention to be exclusive. In the case of Sindu v. British Airways, PLC,¹⁶⁵ the English court stated that the purpose of Article 17 is 'to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.' In the case of Naval-Torres v. Northwest Airlines, Inc.¹⁶⁶, the Canadian court stated that claims under the Warsaw Convention are exclusive. The court read Article 24's reference to 'cases covered under Article 17' to mean those cases within the Convention not covered by Article 18 (baggage) and Article 19 (delay), rather than distinguish between incidents of personal injury that are or are not within the provisions of the Convention.

*El Al Israel Airlines, Inc. v. Tseng*¹⁶⁷

In *Tseng*, the US Supreme Court made it clear that recovery for personal injury suffered 'on board an aircraft or in the course of any of the operations of embarking or disembarking,' if not allowed under Article 17 of the Warsaw Convention, is not available at all.¹⁶⁸ The Court's emphasis on the Convention's 'comprehensive scheme of liability rules' and goals of

¹⁶⁵ [1997] 1 A.C. 193, 207.

¹⁶⁶ [1998] 159 D.L.R. 4th 67, 76.

¹⁶⁷ See supra note 163.

¹⁶⁸ See *Tseng*, 525 U.S. at 161.

uniformity¹⁶⁹ enabled it to conclude that allowing air carriers to be subject to 'distinct, non-uniform liability rules of the individual signatory nations' would be an unreasonable construction of the Convention.¹⁷⁰ The Court also based its opinion on the consideration that a nonexclusive interpretation of liability under the Convention might encourage plaintiffs to attempt to opt out of the Convention's liability scheme where local laws provided maximum limits of liability above those available under the Convention.¹⁷¹

The Supreme Court made clear, however, that the exclusive effect of the Convention was not all-encompassing, by stating that 'the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope.'¹⁷² As such, a carrier is subject to liability under local law for injuries arising outside of the air transportation or 'any of the operations of embarking' or 'disembarking.'

Then Warsaw Convention Articles 17 and 24 have a symbiotic relationship. That is, whether or not an event is an accident can conclusively determine whether the claimant will

¹⁶⁹ See *id.* at 169, (stating that it would be difficult to conclude that delegates to the Convention intended to subject air carriers to non-uniform local laws, given the textual emphasis on uniformity and the vast scope of the Conventions liability rules).

¹⁷⁰ *Id.* at 171.

¹⁷¹ *Id.*

¹⁷² See *id.* at 172 (citing Brief for the United States as Amicus Curiae 16).

have any remedy at all.¹⁷³ After Tseng, and the adoption of the Montreal Protocol No. 4, only a limited number of courts have addressed the parameters of the Convention's exclusivity. Under the instruction of Tseng and the terms of the Convention, the Convention precludes any resort to alternative law, where the injury arose out of the international flight or out of any of the operations of embarking or disembarking, regardless of whether the event constitutes an accident.¹⁷⁴ The few courts that have addressed the scope of the Convention's exclusivity since Tseng generally have done so in a relatively broad fashion.

Courts have been mindful of Tseng's admonition that to allow parties to pursue claims covered by the Convention would 'encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the Convention.' So long as the underlying event arises out of or occurred during the air transportation or process of embarking or disembarking, the courts were careful not to allow the Convention to be circumvented.¹⁷⁵ As two recent decisions held in separate

¹⁷³ See *Asher v. United Airlines*, 70 F. Supp. 2d 614, 617 (D. Md. 1999) (asserting that plaintiffs must establish the incident as an 'accident' in order to recover damages under the Convention).

¹⁷⁴ See *id.*, (noting that the Supreme Court found that 'the cardinal purpose of the Warsaw Convention... is to achieve uniformity of rules governing claims arising from international air transportation).

¹⁷⁵ See *Laor*, 31 F. Supp. 2d at 347.

scenarios, 'the precipitating cause of 'the accident' cannot be artificially separated from its results in order to avoid the Warsaw Convention.'¹⁷⁶ In *Choukroun v. American Airlines Inc.*,¹⁷⁷ for instance, various state claims such as false arrest, malicious prosecution, false imprisonment, and negligence arose out of the diversion of the flight and the plaintiff's removal as a result of a purported smoking incident. The event at issue took place during the flight and, regardless of whether it constituted an 'accident' or the fact that the arrest and prosecution came later, was not sufficient to elude the Convention's exclusivity.¹⁷⁸

Courts have found a wide range of claims to be preempted, including claims for breach of contract, negligence, false arrest, false imprisonment, civil rights, malicious prosecution, defamation, deceit, assault, and battery.¹⁷⁹ Even federal statutory claims of discrimination have been found preempted.¹⁸⁰ Contract claims found preempted include those

¹⁷⁶ See *Laor*, 31 F. Supp. 2d at 347; *Cruz*, 193 F.3d at 531 (holding that fraud and deceit claims were preempted, as 'the relationship between the occurrence that [caused the] injuries is so closely related to the loss of luggage itself as to be, in a sense, indistinguishable from it.'). In *Choukroun*, the issue was whether the incident was an 'accident', as plaintiff did not assert a claim under the Convention and any such claim was barred by the two year statute of limitations under the Convention. See *Choukroun v. American Airlines, Inc.*, No. 98-12557-NG (D. Mass. Aug. 2, 2000) (order granting defendant's motion for summary judgment).

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *Asher*, 70 F. Supp. 2d at 619 (preempting claims for defamation, false arrest and assault under state law, based on disturbances over seat assignments and detention by airline service employees); *Hermano*, 1999 WL 1269187, at *5-6 (holding that defamation and other willful or reckless acts were preempted under Warsaw).

¹⁸⁰ See *Turturro v. Continental Airlines, Inc.*, 128 F. Supp. 2d 170, 181-82 (S.D.N.Y. 2001) (holding that a discrimination claim under Air Carrier Access Act was preempted).

arising out of damages for delays,¹⁸¹ loss of luggage,¹⁸² or failure to transport due to removal or diversion.¹⁸³ The only means of escaping the Convention's preemptive scope is to establish that the claim arises out of an event that did not take place during the transportation or the process of embarking or disembarking.¹⁸⁴

The US Supreme Court's decision in *Tseng*, the adoption of Montreal Protocol No.4, and the coming into force of the Montreal Convention of 1999 all expressly indicate that the Warsaw-Montreal system provides an exclusive remedy supplanting resort to local law remedies. The issue that emerges is what effect the exclusivity will play in the Court's interpretation of the liability rules of the Convention, particularly Article 17.¹⁸⁵ Given that claimants will have no

¹⁸¹ See *Perralta v. Continental Airlines, Inc.*, No. C 98-1252, 1999 WL 193393, at *2 (N.D. Cal. Mar. 30, 1999) (stating that a breach of contract claim for delay resulting in the loss of a business deal was governed exclusively by the Warsaw Convention); *Minhas v. Biman Bangladesh Airlines*, 1999 WL 447445, at **2-3 (S.D.N.Y. June 30, 1999) (stating that claims arising from delay due to 'bumping' were governed by the Warsaw Convention); *Daniel v. Virgin Atl. Ltd.*, 59 F. Supp. 2d 986, 989 (N.D. Cal. 1998) (concluding that passengers' inconvenience as a resulting delay was a legally cognizable harm under the Convention); *Obuzor v. Sabena Belgian World Airlines*, No. 98 CIV 0224, 1999 WL 223162, at *1 (S.D.N.Y. Apr. 16, 1999) (holding that the Convention imposes liability upon carriers for damages caused by delay in transportation of passengers).

¹⁸² See *Spanner v. United Airlines, Inc.*, No. C 97-2972, 1998 WL 196466, at **2-3 (N.D. Cal. Mar. 22, 1998) (holding that the Warsaw Convention is inapplicable to a loss of luggage because of the liability provision, Article 18(1), which requires that a loss of baggage take place during air transport); see also *Cruz*, 193 F.3d at 530 (stating that a common law claim for fraudulent denial of lost luggage was preempted by the Warsaw Convention).

¹⁸³ See *Donkor*, 62 F. Supp. 2d at 965 (describing a passenger's detainment and deportation during layover).

¹⁸⁴ See *id.* at 968 (holding that plaintiff's causes of action are governed by Articles 17, 18, and 19, and must be established to support preemption under the Convention).

¹⁸⁵ Noteworthy is the remaining question of whether a state law claim can be asserted where there was no accident, but the injury was caused by the willful or intentional conduct of the carrier. See

remedy for personal injuries suffered during international flights, or in the course of operations of embarking or disembarking, if they cannot establish an 'accident' or 'bodily injury,' courts may be more inclined to broadly apply the Convention's liability prerequisites. Indeed, the Court in *Tseng* could have arguably foreshadowed such a result when it stated, in dicta, that it disagreed with the lower court's conclusion, which was not before the Supreme Court, that the routine security search to which Ms. Tseng was subjected was likely an 'accident.'¹⁸⁶

Loryn B. Zerner, *Tseng v. El Al Israel Airlines* and Article 25 of the Warsaw Convention, 14 Am. U. Int'l L. Rev. 1245, 1273 (1999) (arguing that 'in light of the unequal positions between air carriers and passengers, an injured party denied recovery under Article 17 should be allowed recovery under the willful misconduct exception set forth in Article 25.'). Virtually all lower courts that have addressed this issue have found that Article 25 only comes into play if an Article 17 accident is established. See *El Al Israel Airlines, Ltd. v. Tseng*, 122 F.3d 99, 104 (2d Cir. 1997) (stating that *Tseng* mistakenly asserts that El Al's conduct is 'willful misconduct' under Article 25 and, therefore, constitutes an 'accident' as defined under Article 17); *Brandt v. American Airlines, Inc.*, No. C 98-2089 SI, 2000 WL 288393, at *6 (N.D. Cal. Mar. 13, 2000) (holding that Article 25 does not provide an independent cause of action under local law when willful misconduct is alleged); *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313, 1321 (S.D. Fla. 1999) (stating that the Eleventh Circuit previously held that Article 25 does not create a separate cause of action from Article 17); *Carey v. United States*, 77 F. Supp. 2d 1165, 1175 (D. Or. 1999) (concluding that plaintiff must assert a valid Article 17 claim before reaching a claim under Article 25); *Harpalani v. Air India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (stating that 'Article 25 is most reasonably interpreted as an exception to the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention.'). Further, the concern that, without such a reading of Article 25, carriers cannot be held accountable for intentional torts such as assault, battery, and false imprisonment, is simply ill-founded; accidents cover both negligent and intentional conduct of the carrier. See *Laor v. Air France*, 31 F. Supp. 2d 247, 350 (S.D.N.Y. 1998) (noting that an 'accident' can occur from an 'inappropriate or unintended happenstance' during aircraft operation). If the carrier's agent commits an intentional tort, then the conduct would clearly be an abnormal aircraft operation and unexpected event rendering the carrier liable.

¹⁸⁶ See *Tseng*, 525 U.S. at 166 n.9. (defining 'accident' under Article 17 as an 'unexpected or unusual event or happening that is external to the passenger'). Apparently, Ms. Tseng gave 'illogical' responses to routine questions during screening and was classified as a 'high risk' passenger. See *Tseng*, 122 F.3d at 101. She was thus subjected to a security search pursuant to the carrier's security procedures, taken to a private room, and searched. See *id.* at 163, 164. She was required to remove her jacket and sweater, and lower her blue jeans. See *id.* A female security guard searched her entire body, including her breasts and her groin area. See *id.* The search was pursuant to standard procedures and, thus, was not an abnormal operation necessary for Article 17 liability. See *id.* Of course, if the claimed 'illogical' answers that formed the basis for the search

The aftermath of Tseng clearly show the effect, only very a few cases have interpreted an incident was not an “accident” after Tseng. Some scholars heavily criticize this broad approach to interpret Article 17’s “accident”, say that this approach failed to include Article 17 within its purview and contrary to the drafters’ intention, which render international air carriers nearly as virtual insurers to air travel passengers. However, for the author’s view, the Warsaw-Montreal system is intended to provide uniform rules of international air carriers’ liability that are suitable to modern civil aviation, and the advantages of the Conventions’ exclusivity are commonly understood. Meanwhile, in the event of an unfortunate occurrence that contributes to the injury of a passenger, international air carriers are in the best positions to manage (through insurance) and/or prevent unfortunate occurrences. Accordingly, in the light of the Conventions’ exclusivity, the author concerns with the courts’ broad interpretation of the meaning of Article 17’s “accident”, so long as this interpretation does not render air carriers as real insurers. Finally, no matter which side you stand for, the strong suggestion is the readers of this Chapter should pay close attention to the cases which after the 1999 Tseng case, since

were false, then an accident would exist, as it would constitute an abnormal operation and deviation from standard procedures. See *id.* at 158 (stating that a security search of a passenger based solely on ‘suspicion of circumstances’ subjects the carrier to liability under Article 17).

those cases show the up-to-date trend of worldwide interpretation of Warsaw-Montreal system's "accident".

2-4. Relation of event to inherent risks of air travel or aircraft operations

It is comparatively easy understanding and less controversial that an event is a Warsaw-Montreal system "accident" when such an event arising out of risk characteristic of air travel and aircraft operations. However, more controversially is that when accident has no relation to risk characteristic of air travel but connect with aircraft operations. Furthermore, the most debated ones are the cases which accident arising out of neither the inherent risks of air travel nor to aircraft operations, as discussed infra.

Whether a Warsaw Convention Article 17's "accident" must involve a 'risk inherent or characteristic to air travel'? While the exact origins of this debate are not particularly clear, including whether it is meant to be synonymous with aircraft operation, it is derivative of the drafters' intent to have the Convention pertain to aviation accidents. Interestingly, the Court in *Saks* made no express reference to any risk allocation and, in

fact, rejected the notion that the Montreal Interim Agreement of 1966 affected Article 17's intention of establishing absolute liability.¹⁸⁷ Moreover, while the Court in *Saks* did not make express reference to any notion of risks characteristic to air travel, it did reverse the Ninth Circuit's decision referencing the normal depressurization on an aircraft as a 'hazard of air travel.'¹⁸⁸ As a result, one could argue that the Supreme Court was rejecting 'a risk inherent to air travel' view, especially when Ms. Saks had expressed such a view in her Supreme Court brief. On the other hand, by holding that injuries resulting from normal, as opposed to abnormal, aircraft operations are not recoverable, the Court was equating abnormal operations with air risks assumed by the carrier. If the injury did not result from aircraft operations outside the normal and routine, it did not result from the type of risks for which the carrier should be liable.

As to whether a Warsaw Convention Article 17's "accident" must involve some aircraft operations, a large portion (but not all) of the decisional law to date has either expressly or implicitly referenced a causal connection or relationship between the unusual event and the aircraft's operation or

¹⁸⁷ See *Saks*, 470 U.S. at 393.

¹⁸⁸ *Id.* at 395.

procedures.¹⁸⁹ For instance, where a passenger is injured as a result of abnormal pressurization changes, a sudden dive,¹⁹⁰ unusual turbulence, emergencies, evacuation,¹⁹¹ harsh landings,¹⁹² or unusual engine noise,¹⁹³ the abnormality of the aircraft operation element is obviously present and understandable. Nevertheless, this is not the end of the story, there are some cases do hold that the Article 17's "accident" is not limited to events that are related to the operation of an aircraft (section 2-4-3, *infra*).

2-4-1. Event connected to both inherent risks of air travel and aircraft operations

*Maxwell v Aer Lingus Ltd.*¹⁹⁴

Remarking that the Warsaw Convention does not impose a per se rule of liability on an air carrier for every occurrence that results in an injury to a passenger, the court held that the

¹⁸⁹ See *Levy v. American Airlines*, 1993 WL 205857, at *1 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994) (holding that some relationship between the accident and the operation of the aircraft is required under Article 17).

¹⁹⁰ See *Weintraub v. Capital Int'l Airways, Inc.*, 16 Av. Cas. (CCH) 18,0858 (N.Y. 1980) (holding that an aircraft's sudden steep dive and swerve to the right constituted an accident).

¹⁹¹ See *Tavarez v. American Airlines, Inc.*, 1997 U.S. Dist. LEXIS 17507, at *1 (S.D.N.Y. Nov. 5, 1997); *Sanna v. Delta Airlines*, 132 F.R.D. 47, 48-49 (N.D. Ohio 1990); *Hinds v. Philippine Airlines, Inc.*, 1979 U.S. Dist. LEXIS 10638, at *1 (S.D.N.Y. Aug. 2, 1979).

¹⁹² See *Mathias v. Pan-Am. World Airways, Inc.*, 53 F.R.D. 447, 448-49 (W.D. Pa. 1971); *Weaver v. Delta Airlines, Inc.*, 56 F. Supp. 2d 1190, 1191-92 (D. Mont. 1999).

¹⁹³ See *Manion v. American Airlines, Inc.*, 17 F. Supp. 2d 1, 5 (D.D.C. 1997) (stating that whether engine noise is unusual for purposes of Article 17 is a question of fact).

¹⁹⁴ 122 F. Supp. 2d 210 (D. Mass. 2000).

convention reaches only those injurious happenings that result from risks that are characteristic of air travel in the sense of having some relationship to the operation of the airplane.¹⁹⁵ The court explained that at one end of the spectrum are cases in which liability is always found, where airline personnel have either facilitated a passenger's tort or have themselves committed a tort in connection with a flight. At the other end of the spectrum, the court continued, are cases where the injury is caused by the passenger's internal reaction to the ordinary operation of the aircraft in which liability is almost never found because such accidents involve events or conditions outside the airline's purview or control. In the middle of the spectrum, the court added, are hijacking and terrorism cases where liability is imposed because terroristic acts are held to be a risk characteristic of modern day air travel which is allocated to the airline because the airline is in a far superior position than the passengers are to institute protective safeguards. The unexpected event, the court concluded, while not fully within the carrier's control, is not wholly beyond the ability of the carrier to influence.

¹⁹⁵ See *id.* at 211 (stating that 'while a reasonable passenger would expect some shifting of the contents of an overhead bin, particularly during a turbulent flight, she would not expect, as an ordinary incident of the operation of the aircraft, to be struck on the head by a falling object when the bin above her seat is opened by a fellow passenger.').

*Fulop v. Malev Hungarian Airlines*¹⁹⁶

The court finding the reasoning in cases requiring some causal relationship between a claimed accident within the meaning of Article 17 of the Warsaw Convention and the operation of an aircraft or an airline or the conduct of a carrier's employees more persuasive, declared that (1) it is to some "operation of the aircraft" that a passenger's injury should relate and it is only the unusual, abnormal, and unexpected operation of an aircraft that would constitute an Article 17 accident, and (2) an unusual and unexpected happening arising in the course of air travel need not rest on any notion of negligence or fault to be actionable, as long as the element of abnormality relates in some discernible way to the inappropriate or unintended happening arising in connection with or during the course of operation of the aircraft or airline.

2-4-2. Event not connected to inherent risks of air travel but to aircraft operations

*Girard v American Airlines, Inc.*¹⁹⁷

¹⁹⁶ 175 F. Supp. 2d 651 (S.D. N.Y. 2001).

¹⁹⁷ 2003 WL 21989978 (E.D.N.Y. 2003).

The court held that it is not necessary that the injury be related to those risks characteristic of air travel. Whether an "accident" under Article 17 has occurred depends, the court thought, on the extent to which the circumstances giving rise to the claimed accident fall within the causal purview or control of the carrier. The court said that careful analysis of the post-Saks cases demonstrated that the causal link necessary for Article 17 liability may be satisfied, the court said, by any act of judgment, exercise of control or application of carrier operation that, regardless of fault, implicated the airline in some abnormal, unusual or unexpected role as a causal agent of the injury. Alternatively, the court continued, the accident may arise from any risk reasonably associated with aviation which, if known, the carrier could reasonably assume and insure against. Adopting an "inherent risk of air travel" definition would restrict awards under the Warsaw Convention to only the narrow subset of accidents that are unusual and unexpected but not so outside the ordinary that they cannot be deemed risks characteristic of air travel, the court thought, would be a far-reaching curtailment of liability that clearly was not the intention of the Warsaw Convention. Moreover, the court reasoned, to constrain the definition of "accident" would eviscerate the careful balance

achieved by the original Warsaw Convention, especially given the Supreme Court's recognition that the Warsaw Convention provides passengers the exclusive means of recovery for injuries incurred on board an aircraft or in the course of any of the operations of embarking or disembarking under Tseng. The court saw no indication that the Warsaw Convention intended to insulate an airline from all liability stemming from ordinary negligence or recklessness in the operation of its business.

*Barratt v Trinidad & Tobago (BWIA Intern.) Airways Corp.*¹⁹⁸

Rejecting a passenger's contention that a trip and fall within an airline terminal can never come within the scope of Article 17 of the Warsaw Convention because such an accident is not caused by a risk inherent in aviation, the court stated that the definition of "accident" as an injury caused by an unexpected or unusual event or happening that is external to the passenger under Saks is in no way limited to those injuries resulting from dangers exclusive to aviation. The court noted that Article 17 specifically limits liability for accidents, not by reference to risks inherent in aviation, but by whether they occur "on board

¹⁹⁸ 1990 WL 127590 (E.D.N.Y. 1990).

the aircraft or in the course of any of the operations of embarking or disembarking."

2-4-3. Event neither connected to inherent risks of air travel nor to aircraft operations

*Gezzi v British Airways PLC.*¹⁹⁹

In which the court of appeals commented on the defendant carrier's contention that water on the staircase to its aircraft could not be an "accident" for purposes of Article 17 of the Warsaw Convention because it had no relation to the operation of the aircraft, stating that it was not clear whether an event's relationship to the operation of an aircraft is relevant to whether the event is an accident, since the Supreme Court's definition of accident in *Saks* did not indicate that an accident must relate to the operation of an aircraft.

*Morris v KLM Royal Dutch Airlines.*²⁰⁰ (UK case)

The English court referring to the U.S. Supreme Court's definition of "accident" under Article 17 of the Warsaw Convention in *Saks* held that there was nothing in *Saks* that

¹⁹⁹ 991 F.2d 603 (9th Cir. 1993).

²⁰⁰ 2001 WL 483072 (CA (Civ Div) 2001).

justifies the requirement that an "accident" must have some relationship with the operation of an aircraft or carriage by air. Nor, the court added, did it consider that a purposive approach to interpretation requires that gloss on the word. Stating that liability under Article 17 only arises in relation to an accident that occurs on board an aircraft or in the course of embarking or disembarking, the court thought that the accident will occur at a time when the passenger is in charge of the carrier. In those circumstances, the court opined, it seemed a logical and reasonable scheme of liability that, whatever the nature of the accident, a passenger should be entitled to be compensated for its consequences.

2-5. Intentional misconduct as "accident"

Can intentional misconduct constitute an "accident" within the meaning of Article 17 of the Warsaw Convention? The global cases said yes, according to the inter-relationship of the Article 17 and Article 25²⁰¹, intentional misconduct will fall in the scope of Article 17's "accident".

²⁰¹ Warsaw Convention 1929, Article 25 provides:
“(1) The carrier shall not be entitled to avail himself of the provisions of this convention which

*Olympic Airways v. Husain*²⁰²

The U.S. Supreme Court observing that Article 25 of the Warsaw Convention removes the cap on carrier liability when an injury is caused by the air carrier's willful misconduct and stating that because there can be no liability for passenger death or bodily injury under the Convention in the absence of an Article 17 "accident," such willful misconduct is best read to be included in the realm of conduct that may constitute an "accident" under Article 17. The court referred to its prior decision in *Saks*, contemplating that intentional conduct could fall within the "accident" definition under Article 17 and, as such, the court stated, *Saks* correctly characterized the term "accident" as encompassing more than unintentional conduct. The term "accident," the court acknowledged, has at least two plausible yet distinct definitions: (1) accident may refer to an unintended event or (2) accident may be defined as an event that is unusual or unexpected, whether the result was intentional or not, adding that *Saks* discerned the meaning of accident under

exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct;

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

²⁰² 540 U.S. 644, 124 S. Ct. 1221, 157 L. Ed. 2d 1146, 4 A.L.R. Fed. 2d 709 (2004).

Article 17 as an unexpected or unusual event or happening that is external to the passenger.

*El Al Israel Airlines v Tseng*²⁰³

With respect to the apparent assertion that a carrier's conduct was willful misconduct covered by Article 25 of the Warsaw Convention and therefore could not constitute an accident under Article 17, the US Supreme Court affirmed the lower court, held that the finding of an accident under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger and Article 25 simply describes a subset of accidents that are more egregious and to which a greater degree of culpability attaches. The two articles of the Warsaw Convention are not mutually exclusive, the court explained; rather, the finding of an accident under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger.

*Carey v United Airlines*²⁰⁴

The Ninth Circuit held that an "accident," as that term is defined for purposes of Article 17 of the Warsaw Convention,

²⁰³ 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

²⁰⁴ 255 F.3d 1044 (9th Cir. 2001).

can include intentional misconduct. Noting the Supreme Court's definition of accident in *Saks*, as including any unexpected or unusual event or happening that is external to the passenger, the court saw nothing in that definition suggesting that an accident includes only negligent or reckless conduct as opposed to intentional misconduct. In fact, the court continued, there is no mention of the carrier's motive or mental state whatsoever and the *Saks* court cautioned that its definition should be applied flexibly. A deeper look into the rationale behind the Supreme Court's decision in *Tseng*, supported the conclusion that the Warsaw Convention applies to claims arising out of intentional misconduct, the court remarked. If intentional misconduct claims were outside the Warsaw Convention, the court reasoned, then international air carriers would face two sources of liability, the Warsaw Convention and local law, depending on the nature of their actions, a scenario that the *Tseng* court rejected. Given the cardinal purpose of the Warsaw Convention to achieve uniformity of rules governing claims arising from international air transportation, the *Tseng* court ruled, it would be hard put to conclude that the delegates at Warsaw meant to subject carriers to the distinct, nonuniform liability rules of the individual signatory nations. Moreover, the court found nothing in Article

25, eliminating the Convention's limitation on liability for damage caused by willful misconduct, suggesting that the Convention does not apply to claims arising out of intentional misconduct, pointing out that Article 25 does not state that the entire Warsaw Convention is inapplicable to damage caused by willful misconduct.

Qantas Ltd. v Povey²⁰⁵ (Australian case)

The Australian Court of Appeal of the Supreme Court of Victoria held that cases show that there may be an accident within the meaning of Article 17 of the Warsaw Convention despite the event consisting of intentional, even criminal, conduct by one passenger towards another passenger or towards all passengers.²⁰⁶ Those cases, Ashley, AJA continued, make the point that the focus is on whether an event is unexpected or unusual and not on whether it is, for example, inadvertent, careless, intentional, or criminal.

²⁰⁵ 2003 WL 23000692 (VCA 2003), special leave to appeal granted by, 2004 WL 3222486 (HCA 2004) and affirmed on other grounds by, 2005 WL 1460709 (HCA 2005).

²⁰⁶ The court cited Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322 (C.D. Cal. 1975) (abrogated on other grounds by, Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991)); Oliver v. Scandinavian Airlines System, Inc., Av. Cas. (CCH) 18,283 (D. Md. 1983); and Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000).

*Naval-Torres v Northwest Airlines Inc.*²⁰⁷ (Canadian case)

Stating that the word "accident" in Article 17 of the Warsaw Convention is a term of art with a meaning particular to the Warsaw Convention, the Canadian Ontario Court of Justice, General Division held that, reading the Warsaw Convention as a whole, it is apparent that "accident" in Article 17 must be interpreted to embrace intentional acts of wrongdoing. Since Article 17 is the sole source of liability imposed on a carrier by the Warsaw Convention for bodily injury to passengers, the court reasoned, it followed that if "accident" were interpreted to include only inadvertent or negligent acts by a carrier, it would lead to the extraordinary result that the Warsaw Convention provides a remedy for inadvertence or negligence but fails to provide any remedy for deliberate wrongdoing. In the court's view, the fact that Article 25 of the Warsaw Convention limits defenses or limits on liability where a carrier is guilty of willful misconduct plainly indicated that deliberate wrongdoing is actionable under the Warsaw Convention.

*Deep Vein Thrombosis and Air Travel Group Litigation, Re.*²⁰⁸

(UK case)

²⁰⁷ 1998 WL 1717959 (Ont. Gen. Div. 1998).

²⁰⁸ 2002 WL 31784484 U.K. QBD 2002).

The English court held that "accident" under Article 17 of the Warsaw Convention cannot bear its natural meaning as it is clear that it is intended to cover intentional or reckless acts committed with intent to cause injury, even though a dictionary definition could not possibly include such a meaning, finding support for its statement in Article 25, common sense, and the decision in *Naval-Torres supra*.

2-6. Whether "inaction" could be an "accident"

Whether inaction may constitute an "accident" within the meaning of Article 17 of the Warsaw Convention? The US courts said yes, however, the Australian and English courts denied pure inaction could be an "accident".

*Olympic Airways v Husain*²⁰⁹

The US Supreme Court observing its definition of "accident" under Article 17 of the Warsaw Convention in *Saks* as an unexpected or unusual event or happening that is external to the passenger and not a passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, held

²⁰⁹ 540 U.S. 644, 124 S. Ct. 1221, 157 L. Ed. 2d 1146, 4 A.L.R. Fed. 2d 709 (2004).

that the term accident is not limited to affirmative acts. Under the circumstances of the instant case, the court rejected the defendant airline's argument that a flight attendant's failure to act, by refusing to assist a passenger sensitive to second-hand cigarette smoke in moving farther from the smoking section, could not constitute an "accident" because it was not an affirmative act. The court declared that the relevant "accident" inquiry was whether there was an unexpected or unusual event or happening and the rejection of an explicit request for assistance would be an event or happening under the ordinary and usual meaning of those terms. Moreover, the court thought that Article 25, providing that Article 22's liability cap does not apply in the event of willful misconduct or such default [emphasis added by the court] on the carrier's part that may be the equivalent of willful misconduct, suggested that an airline's inaction could be the basis of liability.

*Qantas Ltd. v Povey*²¹⁰ (Australian case)

The Court of Appeal of the Supreme Court of Victoria held that mere nonaction or any failure to act, however egregious the negligence involved, should not in itself be characterized as an

²¹⁰ 2003 WL 23000692 (VCA 2003), Special leave to appeal granted by, 2004 WL 3222486 (HCA 2004) and Affirmed on other grounds by, 2005 WL 1460709 (HCA 2005).

"accident" within the meaning of Article 17 of the Warsaw Convention. Finding no need to incorporate into the undefined word "accident" concepts that are alien to the required precondition of an event or an occurrence of the requisite kind, the court observed the connotation of accident as "that which befalls one." One may concede, the court remarked, that usage in the English language tends to become less precise, dependent on the whims and usages of the day, but the same could not be said of the French language where the word "accident" means a fortuitous and unfortunate event, causing physical injury or material damage. The court conceded that inaction sometimes may lead to an event which may be characterized as an accident, but that is quite a different thing, the court reasoned, from mere inaction or any negligent failure to act, however serious.

*Deep Vein Thrombosis and Air Travel Group Litigation, Re.*²¹¹

(UK case)

Noting that a critical issue in the instant case was whether a failure to act or an omission can constitute an accident for purposes of Article 17, the United Kingdom court held that it was unable to see how inaction itself can ever properly be

²¹¹ 2003 WL 21353471 (CA (Civ Div) 2003).

described as an accident. Inaction, the court added, is not an event, but rather a nonevent and the antithesis of an accident. The court recognized that often a failure to act results in an accident or forms part of a series of acts and omission which together constitute an accident, remarking that in such circumstances it may not be easy to distinguish between acts and omissions. Where a passenger's allegations do no more than state a failure to do something, that cannot be characterized as an event or happening, whatever the concomitant background of that failure to warn or advise, the court said. Acknowledging that a failure to take a specific required step in the course of flying an aircraft can lead to an event or happening of the requisite unusual or unexpected kind and, thus, be an accident for the purpose of Article 17, the court reasoned that a failure by a pilot to use some device in the expected and correct manner may lead an accident contemplated by Article 17 but, the court suggested, it would not be the failure to take the step which is properly characterized as an accident but rather its immediate unexpected and dangerous result. It is a slide in reasoning, the court thought, to say that every failure to do that which a carrier ought to do necessarily amounts to an accident, although it may frequently lead to such an event or occurrence of the required

kind. The court concluded that the question in each case, nevertheless, still is whether there has been an accident.

Having discussed the general issues of the meaning of the Warsaw Convention Article 17's "accident", the following of this Chapter will concentrate on detailed events which may, by analyzing the decisions around the world, or may not constitute a Warsaw Convention's "accident". Those cases fall basically into three categories: (1) interaction between carrier's personnel and passengers; (2) events related to passenger's health; (3) other events.

2-7. Inter-action between carrier's personnel and passengers

2-7-1. Will service of food or beverages be an "accident"

Whether service of food or beverages could be an "accident"? Normally, courts said yes. However, in one case²¹², the court held serving food or beverages, under certain circumstances, insufficient to establish, or support a finding of, a Warsaw Convention Article 17's "accident".

²¹² Padilla v Olympic Airways, 765 F. Supp. 835 (S.D.N.Y. 1991), *infra*.

Langadinis v. American Airlines, Inc.²¹³

Reversing the district court's order granting a carrier's motion to dismiss for failure to state a claim on which relief can be granted, the First Circuit held that the plaintiff's allegation that a carrier served alcohol to a fellow passenger just prior to that passenger's assault of the plaintiff, knowing that the passenger was intoxicated and that his behavior was erratic and aggressive, sufficiently alleged a violation of Article 17 of the Warsaw Convention and that the Supreme Court's definition of "accident" in *Saks* was broad enough to permit recovery for torts committed by fellow passengers. According to the plaintiff, he was waiting in line to use a lavatory when the fellow passenger forcefully grabbed the plaintiff's testicles, causing excruciating pain, and then grabbed the plaintiff's hand and pulled it to the fellow passenger's own groin. Although the plaintiff reported the assault to the flight crew, he was unsatisfied with their response. The court conceded that not every tort committed by a fellow passenger is a Warsaw Convention accident, noting that where airline personnel play no causal role, the courts have found no Warsaw accident,²¹⁴ but where airline personnel play a causal role in a passenger-on-passenger tort, the courts have found

²¹³ 199 F.3d 68 (1st Cir. 2000).

²¹⁴ The court cited *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881 (5th Cir. 1996), and *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823 (D. Haw. 1995).

Warsaw accidents.²¹⁵ In the instant case, the court determined, the plaintiff's claim survived under those standards. It was alleged that the fellow passenger appeared intoxicated, aggressive, and erratic, that the carrier was aware of such behavior, and that despite its awareness, the carrier continued to serve him alcohol. Serving alcohol to an intoxicated passenger may, in some instances, create a foreseeable risk that the passenger will cause injury to others, the court stated. The court agreed with the carrier's argument that the complaint could not survive without a properly pled allegation of over-serving, but disagreed with the carrier's further argument that the charge of over-serving was pled defectively in that it relied on conclusory words and phrases like "erratic," "aggressive," and "diminished capacity." The carrier, the court declared, demanded more from the plaintiff than the Federal Rules of Civil Procedure require, opining that the plaintiff put the carrier on notice that it was accused of serving alcohol to an aggressive, erratic, and incapacitated passenger even though it knew he was intoxicated. Finally, the court was not persuaded by the carrier's point that the plaintiff only alleged over-serving of alcohol in his amended complaint on the basis of information and belief, remarking that

²¹⁵ The court cited Schneider v. Swiss Air Transport Co. Ltd., 686 F. Supp. 15 (D. Me. 1988).

the plaintiff's attorney was entitled to include such information and believe allegations in the complaint as long as there was a good faith basis for doing so based on the reasonable inquiry required under Fed. R. Civ. P. Rule 11(b).

*Diaz Lugo v. American Airlines, Inc.*²¹⁶

Denying a carrier's motion for summary judgment in a suit by a passenger and her husband for burns she suffered when a cup of coffee spilled over her while aboard a flight to the Dominican Republic, the court held that the spill was an unusual or unexpected event external to the passenger and, thus, an "accident" within the meaning of Article 17 of the Warsaw Convention. In response to the passenger's request for a cup of coffee, a stewardess placed the cup on the passenger's tray. The coffee spilled on the passenger's lap, causing burns in her pelvic and gluteal areas. The court explained that, when a passenger boards a plane, it is not expected that a cup of coffee will spill over the passenger's lap, noting that the usual operation of an airplane does not require that hot coffee be spilled on passengers. The passenger's injuries did not result from her internal reaction to normal airplane operations, the court continued; rather, her

²¹⁶ 686 F. Supp. 373 (D.P.R. 1988).

injuries were caused by the unexpected event external to her of coffee spilling over her body. The carrier urged the court to go back in the chain of causes resulting in the spill, to find, as a matter of fact, that the plane's inclination caused the spill, and to hold that the inclination was not an Article 17 "accident." The court determined, however, that the inquiry need not go that far back in the chain, declaring that any injury is the product of a chain of causes, and that a passenger is only required to prove that some link in the chain was an unusual or unexpected event external to the passenger. The spill, the court concluded, was such a link.

*Scala v. American Airlines*²¹⁷

Denying a carrier's motion to dismiss an action under the Warsaw Convention by a passenger who alleged that he suffered a physical injury to his heart when he requested cranberry juice from a flight attendant as part of the carrier's in-flight beverage service but instead was served and consumed cranberry juice with alcohol, the court held that the event which happened to the passenger qualified as an accident within the meaning of Article 17. The mistaken substitution of beverages in the instant case

²¹⁷ 249 F. Supp. 2d 176 (D. Conn. 2003).

was an unexpected and perhaps unusual event, the court ruled, because the passenger expected to receive the beverage he ordered and it was presumably not common for the carrier to mistakenly provide alcoholic beverages to those who do not desire them. Moreover, the court found that the substitution of an alcoholic beverage for the beverage ordered by the passenger was external to the passenger in the sense that it was a mix-up presumably done by the flight attendant. Acknowledging that the passenger's internal reaction to the event was obviously wholly internal, the court stated that the accident was the drink substitution, not the passenger's pre-existing heart ailment. Rejecting the carrier's argument that the event did not qualify as an "accident" because it did not arise out of a risk that was peculiar to air travel, the court noted that whether an event's relationship to the operation of an aircraft is relevant to whether the event is an "accident" was an open question in the Second Circuit²¹⁸ and declared that even under the restrictive standard of "characteristic risk of air travel", the drink substitution was a characteristic risk of air travel in that it increased the passenger's vulnerability to a mistaken drink substitution. Commenting that passengers on airplane flights are not free to move about the

²¹⁸ The court cited Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000).

cabin to prepare their own drinks but must rely on flight attendants to accurately take their beverage order and prepare the appropriate drink, the court said that no passenger would expect to have to supervise preparation of his or her requested beverage. The court compared the circumstances of the instant case to those in *Wallace*,²¹⁹ where it was found that a sexual assault was an accident even though, like a drink substitution, it could have easily occurred in other contexts.

*Bouso v. Iberia Lineas Aereas De Espana*²²⁰

The court held that an injury suffered by a passenger on an international flight, a cracked tooth that occurred while eating a meal, was caused by an accident as that term is defined by the Supreme Court in *Saks* and the Second Circuit in *Fishman* by *Fishman v. Delta Air Lines, Inc.*,²²¹ and was therefore covered by Article 17 of the Warsaw Convention. Since the passenger's action was commenced more than two years after the flight landed, the court granted the carrier's motion to dismiss on the ground that the passenger's claim was time-barred under Article 29(1).

²¹⁹ See id.

²²⁰ 1998 WL 148422 (S.D. N.Y. 1998).

²²¹ 132 F.3d 138 (2d Cir. 1998).

Gonzalez v. TACA Intern. Airlines²²²

In a suit by a passenger under the Warsaw Convention for pain suffered during an angina attack allegedly caused by actions of a carrier's personnel in spilling a tray of food on him and serving him a beverage containing a small piece of plastic, the court found that the incidents in question constituted accidents under Article 17 since they were unusual and unexpected events during air travel. Determining that the passenger suffered an angina attack in flight, causing him increased anxiety, the court awarded damages to the passenger in the amount of \$5,000.

Price v. KLM-Royal Dutch Airlines²²³

Where an international airline passenger asserted a claim against a carrier under Article 17 of the Warsaw Convention based on an injury to her knees which occurred when she was struck by a food cart, the court referring to the Supreme Court's definition of "accident" under Article 17 in *Saks*, held that it was beyond dispute that being struck by a trolley was an unexpected event which is external to the passenger and constituted an accident. The court denied the passenger's motion for summary

²²² 1992 WL 142399 (E.D. La. 1992).

²²³ 107 F. Supp. 2d 1365 (N.D. Ga. 2000).

judgment, however, since she still had to prove that an accident caused her injury.

*Padilla v Olympic Airways*²²⁴

Concluding that a passenger failed to sustain his burden of proving that he was injured as the result of an "accident" within the meaning of Article 17 of the Warsaw Convention, the court entered judgment in favor of the carrier as to the passenger's claim that his injury from a fall in a lavatory during a flight from Athens, Greece to New York City, was caused by a violation of the carrier's rules by employees who served him between seven and nine beers. The court explained that in order to succeed on his theory, the passenger was required to prove that the continued service of alcohol to him during the flight was an "unusual or unexpected event," noting Second Circuit authority²²⁵ for the proposition that the consumption of alcohol during travel, in and of itself, is not an unusual occurrence. Although the passenger argued that his injuries did not occur during the course of a routine or normal flight because permitting or causing him to become intoxicated was an obvious deviation from the norm, the court found no evidence that the

²²⁴ See supra note 212.

²²⁵ The court cited *German-Bey v. National R.R. Passenger Corp.*, 703 F.2d 54 (2d Cir. 1983).

carrier was aware of the passenger's alleged intoxication. The passenger did not establish that he requested the seven to nine beers from one flight attendant or that when he spoke to any of the flight attendants serving his section, if he spoke to them at all, he appeared so intoxicated that he should have been refused further alcohol. Moreover, the court pointed out, the flight attendant in charge of the passenger's section testified that he observed nothing abnormal in the passenger's gait or carriage. Given these circumstances, the court ruled, the passenger did not establish that the carrier's employees knew or should have known that to continue to serve the passenger alcoholic beverages was to expose him to danger or that the carrier's service of alcohol to him was anything but normal and routine; no unusual or unexpected event occurred before the passenger collapsed in the lavatory, and the evidence suggested that the injury sustained by the passenger was caused by his own internal reaction to his voluntary intoxication.

2-7-2. Will detention or search of passenger be an "accident"

Can detention or search of a passenger be an "accident"?
Probably yes. Prior to the Supreme Court's decision of Tseng,²²⁶

²²⁶ 525 U.S. 155 (1999).

courts are divided for the outcomes, however, after Tseng, notice that there has no case particularly concerned this issue, the reasonable expect is that courts will interpret detention or search of passenger as a Warsaw Convention Article 17's "accident" as long as the detention or search is unexpected or unusual.

*El Al Israel Airlines v Tseng*²²⁷

The Supreme Court stated, in dicta, that it disagreed with the lower court's conclusion, which was not before the Supreme Court, by concluding the routine security search to which Ms. Tseng was subjected was likely an 'accident.' Apparently, Ms. Tseng gave 'illogical' responses to routine questions during screening and was classified as a 'high risk' passenger.²²⁸ She was thus subjected to a security search pursuant to the carrier's security procedures, taken to a private room, and searched.²²⁹ She was required to remove her jacket and sweater, and lower her blue jeans.²³⁰ A female security guard searched her entire body, including her breasts and her groin area.²³¹ Of course, if the claimed 'illogical' answers that formed the basis for the

²²⁷ See id.

²²⁸ See Tseng, 122 F.3d at 101.

²²⁹ See id. at 163, 164.

²³⁰ See id.

²³¹ Id.

search were false, then an accident would exist, as it would constitute an abnormal operation and deviation from standard procedures. Stating that a security search of a passenger based solely on 'suspicion of circumstances' subjects the carrier to liability under Article 17.²³²

*Shen v. Japan Airlines*²³³

Noting the Supreme Court's interpretation of the meaning of "accident" in Article 17 of the Warsaw Convention as a passenger's injury caused by an unexpected or unusual event or happening that is external to the passenger in *Saks*, a definition which the Supreme Court said should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries, the court found that the passengers' injuries, as described in their complaint, appeared to have been caused by unusual events, prolonged detention without food as well as search and seizure. Specifically, the complaint stated that the carrier, a Japanese airline, and another defendant falsely arrested and maliciously prosecuted the passengers by keeping them in a jail in Tokyo for over 15 hours without any food, illegally searched them and seized their passports and luggage, and then

²³² See *id.*, at 158.

²³³ 918 F. Supp. 686 (S.D. N.Y. 1994), *aff'd* without opinion, 43 F.3d 1459 (2d Cir. 1994).

forced them back to Shanghai, China. The passengers claimed that they were delayed in returning to the United States, suffered great pain of body and mind, and incurred expenses for traveling and medical attention as well as loss of time from work as a result of the defendants' actions. The court thus determined that all of the passengers' claims were governed by the Warsaw Convention.

*Thach v. China Airlines, Ltd.*²³⁴

An action was brought against a carrier for injuries allegedly suffered when a passenger was not allowed to board the carrier's flight from Taiwan to New York due to the mistaken belief of an employee of the carrier that the passenger held a fraudulent passport, which resulted in the passenger's detention by Taiwanese police, and the court stated that the weight of authority in the Southern District of New York was contrary to the passenger's argument that the incident giving rise to the action did not constitute an "accident" under the terms of Article 17 of the Warsaw Convention. The court concluded, however, that since the plaintiffs did not suffer any physical injury, no recovery was available under Article 17 for any of their claims.

²³⁴ 1997 WL 282254 (S.D. N.Y. 1997).

Curley v. American Airlines Inc.²³⁵

This case is a good example of different decisions, most likely, would be held if the case happened after Tseng. It was a diversity action against a carrier alleging negligence and false imprisonment brought by a passenger who claimed that he suffered psychological injury when Mexican customs authorities detained and searched him after an aircraft captain falsely identified him as having smoked marijuana in the aircraft lavatory, the court denied the carrier's motion for summary judgment in which the carrier contended that the passenger's causes of action for negligence and false imprisonment were preempted by the Warsaw Convention. In the instant case, the passenger alleged that the captain had been informed by the flight attendants of the passenger's suspected activity during descent and, on landing, advised the carrier's ground crew, which in turn informed Mexican customs authorities who detained and searched the passenger. Observing that the applicability of the Warsaw Convention to the passenger's claims turned on whether his injuries were caused by an "accident" within the meaning of Article 17, the court

²³⁵ 846 F. Supp. 280 (S.D. N.Y. 1994).

determined that the captain's unfounded suspicion that the passenger had been smoking marijuana in the aircraft and the relaying after the landing of this suspicion to the carrier's ground crew did not constitute an accident within the contemplation of the signers of the Warsaw Convention.

2-7-3. Will removal of passenger from aircraft be an "accident"

Can removal of passenger from aircraft be an accident under Warsaw Convention Article 17? Some courts said yes, while others said no, depending on the particular circumstances of each case.

*Sirico v. British Airways PLC.*²³⁶

With respect to an airline passenger's claim under Article 17 of the Warsaw Convention for the injuries she allegedly sustained when she was removed from the carrier's airplane by London, England Metropolitan Police, the court denied the carrier's motion for summary judgment, holding that there was a triable issue as to whether an accident within the meaning of Article 17 occurred. Agreeing that if the passenger refused an order to leave the aircraft, then that refusal and not the actions of

²³⁶ 2002 WL 113877 (E.D. N.Y. 2002).

the carrier would be the proximate cause of her injury, the court found, viewing the evidence in the light most favorable to the passenger, she did not refuse to voluntarily disembark the aircraft. As to the carrier's contention that it should not be held liable for the actions of the police, the court also found a triable issue of fact. If the passenger's version of the incident was found accurate by a jury and the carrier's employees gave police false information that led to the plaintiff's violent arrest, the court was of the opinion that the carrier could be liable for injuries sustained by the passenger at the hands of the police.

*Cush v. BWI Intern. Airways, Ltd.*²³⁷

Where a passenger brought an action under Article 17 of the Warsaw convention based on injuries allegedly sustained when Guyana immigration officials forcibly removed him from an international flight after he had boarded the aircraft and refused to deplane, the court granted the carrier's motion for summary judgment, holding that the passenger's injuries were not the result of an "accident" within the meaning of Article 17. It was alleged that the passenger was surrounded by five or six immigration officials after he had taken a seat on the aircraft,

²³⁷ 175 F. Supp. 2d 483 (E.D. N.Y. 2001).

that the officials did not wear uniforms or badges and did not identify themselves, and that after he refused to leave voluntarily the immigration officials punched him, placed him in a choke hold, handcuffed him, and pushed him down the stairs to the tarmac.

Noting that under *Saks*, a passenger need only prove that some link in the chain of causes of an injury was an unusual or unexpected event external to the passenger as long as that link is attributable to the cause of the incident and not merely to the occurrence itself, the court determined that it was not the unusual circumstances of the passenger's boarding that caused the altercation but rather the passenger's refusal to leave the plane after he was informed that he was not permitted to travel. Accepting that the passenger was not made aware that the individuals who sought to remove him were immigration officials, the court nevertheless found that the passenger should have been aware that the carrier had approved his removal since the carrier's representatives onboard did not intervene, thereby indicating their approval. The court opined that once the passenger was aware that his removal was officially sanctioned, he was obligated to depart the aircraft, adding that if the passenger had complied with that obligation he would not have

been forcibly removed. In other words, the court said, when a passenger is forcibly removed after refusing to disembark at the request of airline officials or at the request of those authorized and accompanied by airline officials, the passenger's refusal to disembark, not the decision to remove the passenger, is the proximate cause of the passenger's injury. Furthermore, the court pointed out that the instant case involved a passenger who caused a disturbance because he refused to disembark at the request of immigration officials seeking relief based on the premise that the altercation that he himself instigated was an "unusual" occurrence. Were relief available to a disruptive passenger based on the proposition that the forcible removal was "unusual" or "unexpected," the court reasoned, disruptive passengers would be rewarded for their disruptions.

*Grimes v. Northwest Airlines, Inc.*²³⁸

The court held that the removal of an international airline passenger from an aircraft by airport police after the passenger refused to comply with a request of the carrier's employee to move from his seat in an exit row because another passenger had been assigned the same seat, an event in which the

²³⁸ 1999 WL 562244 (E.D. Pa. 1999), aff'd without opinion, 216 F.3d 1076 (3d Cir. 2000).

passenger allegedly was injured, was not an "accident" under Article 17 of the Warsaw Convention. Noting the Supreme Court's definition of that term as an unexpected or unusual event that is external to the passenger in *Saks*, the court found that whatever injuries the passenger suffered occurred because he was arrested, and he was arrested only because he refused to leave the aircraft voluntarily.

Reasoning that the passenger would not have been handcuffed and taken off the aircraft had he left the aircraft when ordered to do so by the captain, the court stated that it did not matter if it was the captain's decision that initiated the chain of events leading to the passenger's arrest because the fact remained that it was entirely within the passenger's control whether he was arrested. The passenger's decision interrupted the captain's causal connection to the alleged injuries, the court remarked. Under *Saks*, the court said, it was necessary to look at the circumstances surrounding the incident and the passenger's behavior and decisions plainly were among the factors to be considered. Having precipitated the result, neither the Warsaw Convention nor equity permitted the passenger to recover from the carrier, the court concluded.

2-8. Events related to passenger's health

2-8-1. *Will passenger's pre-existing medical condition be an "accident"*

Can a passenger's pre-existing medical condition be an accident under Warsaw Convention Article 17? Usually the cases about this issue concerned passengers' heart attack, and the courts said "no", it is not a Warsaw Convention "accident".

*Rajcooar v. Air India Ltd.*²³⁹

In an action under Article 17 of the Warsaw Convention, the court held that the death of a passenger, who suffered a heart attack during layover in an airport transit lounge utilized by several carriers and restricted to passengers who cleared customs and security checks, was not the result of an "accident" under Article 17 because a heart attack, under the definition of that term by the Supreme Court in *Saks*, was not an event external to the passenger.

*Rullman v. Pan American World Airways, Inc.*²⁴⁰

²³⁹ 89 F. Supp. 2d 324 (E.D. N.Y. 2000).

²⁴⁰ 122 Misc. 2d 445, 471 N.Y.S.2d 478 (Sup 1983).

The court held that an airline passenger's fainting approximately 10 feet from the door of the aircraft on the jet way connecting the terminal and the plane did not constitute an "accident" under the Warsaw Convention, and declared that an event or occurrence is not an accident if it results solely from the stated health of a passenger and is unconnected with the carrier's flight. The passenger was on a flight from Rome to New York with a scheduled one-hour stopover in Ireland. The first leg of the flight was delayed by eight hours, during which time the passenger became ill, allegedly due to the crowded and unsanitary conditions in the terminal waiting room. She tried unsuccessfully to obtain medical treatment during the stopover. After approximately a three-hour delay in Ireland, the passengers were informed that their plane was disabled and that they would not continue their flight to New York until the following day; the passengers were told to retrieve their personal belongings from the plane, after which they would be taken into a hotel for the night. The passenger sustained injuries when she fainted while walking to the plane to retrieve her possessions. The court quoted with approval the definition of the district court in Warshaw v. Trans World Airlines, Inc.,²⁴¹ that

²⁴¹ 442 F. Supp. 400 (E.D. Pa. 1977).

an occurrence must be an unusual or unexpected happening to constitute an accident, and in the present case, it is not.

2-8-2. Will carrier's personnel response to passenger's medical emergency be an "accident"

Can a carrier's personnel response to passenger's medical emergency be an accident under Warsaw Convention Article 17? The courts are divided for the outcomes. The following cases are held to be "accident".

*Olympic Airways v Husain*²⁴²

Holding that the requirement of an "accident" under Article 17 of the Warsaw Convention was a condition precedent to an airline's liability for personal injury of a passenger is satisfied when the airline's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in aggravation of the passenger's pre-existing medical condition by exposure to a normal condition in the aircraft cabin, the U.S. Supreme Court affirmed an award of damages for the death of an asthmatic passenger after a flight attendant refused on three occasions the passenger's request to move to a seat further from

²⁴² 540 U.S. 644 (2004).

the smoking section. Under the facts of the case, the decedent, who was sensitive to second-hand smoke, and his spouse requested and obtained seats away from the smoking section on the airline's international flight. After boarding the flight, the decedent's spouse discovered that their seats were only three rows in front of the smoking section and asked a flight attendant to move the decedent, but was told to "have a seat." Prior to takeoff, after all passengers had boarded, the decedent's spouse again asked the flight attendant to move the decedent and explained that the decedent was allergic to smoke, but the flight attendant refused because the plane was totally full and that she was too busy to help. After takeoff, the decedent was surrounded by ambient cigarette smoke, and the flight attendant refused to move the decedent, stating erroneously that the plane was full, that the decedent could exchange seats with another passenger, but that the decedent's spouse would have to ask other passengers without assistance from the crew. The decedent died about two hours into the flight after moving toward the front of the plane to get some fresher air. Affirming the Ninth Circuit's ruling²⁴³ that the flight attendant's refusal to reseat the decedent was an "accident" within the meaning of Article 17

²⁴³ Husain v. Olympic Airways, 316 F.3d 829 (9th Cir. 2002), cert. granted, 538 U.S. 1056, 123 S. Ct. 2215, 155 L. Ed. 2d 1105 (2003) and aff'd, 540 U.S. 644, 124 S. Ct. 1221, 157 L. Ed. 2d 1146, 4 A.L.R. Fed. 2d 709 (2004).

because the flight attendant's refusal to reseat the decedent was clearly external to the decedent and was an unexpected and unusual in light of industry standards, the court noted that the airline did not challenge the district court's ruling²⁴⁴ that the flight attendant's conduct was unusual or unexpected in light of the relevant industry standard or the airline's own company policy. The court rejected the airline's contention that the flight attendant's conduct was irrelevant for purposes of the "accident" inquiry and that the only relevant event was the presence of ambient cigarette smoke in the aircraft's cabin. Acknowledging that the presence of ambient cigarette smoke during an international flight might have been "normal" at the time of the flight in question, the court said that the airline's argument that the "injury producing event" inquiry, which looks to the precise factual event that caused the injury, neglected the reality that there are often multiple interrelated factual events that combine to cause any injury. The court stated that any one factual event may thus be a link in the chain of causes and, so long as it is unusual or unexpected, may constitute an "accident" under Article 17.

²⁴⁴ Husain v. Olympic Airways, 116 F. Supp. 2d 1121 (N.D. Cal. 2000), supplemented, 2000 WL 1780264 (N.D. Cal. 2000).

*Fishman by Fishman v Delta Airlines, Inc.*²⁴⁵

The court of appeals affirmed the district court's ruling that both the scalding of a child by a stewardess attempting to alleviate the passenger's earache and the emotional injuries alleged by the child's mother were caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. On the defendant carrier's international flight from Tel Aviv, Israel to New York City, the child, who had a cold, suffered from the change of air pressure. The stewardess suggested that a cup containing a warm cloth be placed over the ear and, when the poultice was applied to the child's ear, scalding water in the cup dripped on the child's neck and shoulder, causing burns.

In an effort to take their claim outside the Warsaw Convention and avoid the result of the district court's ruling, dismissal of the claims because the two-year limitations period for bringing suit under Article 29 of the Warsaw Convention had expired, the plaintiffs attempted to cast their claims chiefly in terms of the tortious refusal of medical care that happened afterward and argued that the claims did not arise out of the normal operation of aircraft, and in any event were not accidental in nature. The appellate court approved the district

²⁴⁵ 132 F.3d 138 (2d Cir. 1998).

court's reasoning that the underpinning of both claims was the scalding of the child by the flight attendant, an unexpected event that was external to both plaintiffs. Although the plaintiffs contended that the child suffered serial colds and ear infections and had narrow eustachian tubes, all of which predisposed her to earaches caused by a change of pressure on the aircraft, the appellate court agreed with the district court's reasoning that the injury in the instant case was not the child's earache, but rather the application of scalding water to treat it. The appellate court thus found that, although the earache was caused by a change in air pressure, which was part of the normal operation of the aircraft and not an accident, all the harm alleged by the plaintiffs flowed from the scalding, which was easily seen as accidental.

*Turturro v Continental Airlines*²⁴⁶

The court held that an airline passenger's allegations that the carrier falsely imprisoned her, defamed her, and caused her to suffer emotional distress in connection with her request to deplane prior to departure because of anxiety she experienced on realizing that her anti-anxiety medication had been stolen at the airport were within broad definition of "accident" under

²⁴⁶ 128 F. Supp. 2d 170 (S.D. N.Y. 2001).

Article 17 of the Warsaw Convention. Specifically, the court found, the accident included the carrier's act of delaying the return to the gate and its employees' comments directed to the passenger and her fellow passengers.

*McCaskey v Continental Airlines, Inc.*²⁴⁷

An action brought against a carrier under the Warsaw Convention on behalf of a passenger who allegedly suffered a stroke onboard an aircraft during a domestic leg of an international flight and subsequently died, the court denied the carrier's motion for summary judgment, holding that a reasonable trier of fact could conclude that an "accident" within the meaning of Article 17 occurred based any or all of three types of events alleged by the plaintiff: (1) rude treatment of the plaintiff and the passenger by the carrier's gate attendant prior to boarding, (2) a malfunction of the aircraft which caused the cabin temperature to rise uncomfortably and delayed the flight's departure, and (3) the flight crew's inappropriate response to the passenger's stroke. The plaintiff alleged that after the passenger's stroke symptoms appeared, a fellow passenger who was a registered nurse took control of the situation and the carrier's

²⁴⁷ 159 F. Supp. 2d 562 (S.D. Tex. 2001).

personnel contacted a contractor which provided medical advice during in-flight medical emergencies. Oxygen was administered to the passenger, but because of concerns about supply, the flow was reduced below 100%. A physician employed by the contractor expressed the opinion, based on an inaccurate belief that the aircraft was closer to its destination than it was, that the flight need not be diverted. Stating that it was inclined to agree that a failure to divert is not ipso facto an accident under Article 17, the court nevertheless said it was unwilling to hold that a failure to divert can never present a jury question, particularly in view of the Supreme Court's mandate in *Saks*, that courts flexibly apply the definition of an accident after an assessment of all the circumstances surrounding a passenger's injury.

*Gupta v Austrian Airlines*²⁴⁸

The court denied the defendant carrier's motion for summary judgment on the plaintiff's claim under the Warsaw Convention for the death of their decedent who suffered a heart attack on a the carrier's international flight, holding that it could not be said, as a matter of law, that in the context of all the circumstances surrounding the decedent's death, the carrier's

²⁴⁸ 211 F. Supp. 2d 1078 (N.D. Ill. 2002).

allegedly inadequate procedures in rendering medical assistance did not constitute an "accident" under Article 17.

*Kemelman v Delta Air Lines, Inc.*²⁴⁹

Reversing the trial court's order granting summary judgment in favor of the defendant carrier on the plaintiff's claim under the Warsaw Convention for the death of an airline passenger who suffered a heart attack on an international flight, the court held that, contrary to the carrier's contention, the plaintiff's response to the carrier's summary judgment motion raised a triable issue of fact as to whether the passenger's demise was caused by an accident under Article 17. Based on deposition testimony and affidavits submitted by the plaintiff in opposition to the carrier's motion, the court found that it could not be said, as a matter of law, that the routine procedures which the carrier's employees followed in response to the passenger's medical situation were carried out in a reasonable manner. The court pointed out that an injury resulting from routine procedures in the operation of an aircraft can be an accident if the procedures or operations are carried out in an unreasonable manner.²⁵⁰

²⁴⁹ 293 A.D. 2d 576, 740 N.Y.S.2d 434 (2d Dep't 2002).

²⁵⁰ The court cited Fishman case, supra note 245, in support of its statement.

The courts held, under the circumstances of the following cases, that the alleged failure of a carrier's personnel to properly respond to the medical emergency of a passenger on an international flight was insufficient to show or support an allegation as to the occurrence of an accident as that term is used in Article 17 of the Warsaw Convention.

*Horvath v. Deutsche Lufthansa, Ag*²⁵¹

The court held that an airline passenger did not suffer an "accident" within the meaning of Article 17 of the Warsaw Convention when, after ingesting salmon served by the defendant carrier and experiencing an allergic reaction, a fellow passenger-physician administered the drug "Tiaphlin" which caused the passenger further difficulty. In view of the passenger's concessions that the carrier acted properly in eliciting the assistance of the physician-passenger and the physician's response was entirely within the best tradition of the profession, the court ruled that the administration of Tiaphlin or any other drug to a passenger who was experiencing an allergic reaction was not an "accident" separate and independent from

²⁵¹ 2004 WL 486976 (S.D. N.Y. 2004).

ingestion of the salmon under the definition of that term by the Supreme Court in *Saks*, as an unusual or unexpected event external to the passenger. The court recognized that under certain circumstances, a carrier's response to and treatment or lack thereof of a passenger's in-flight medical emergency may constitute an accident, but explained that without a claim that the carrier departed from ordinary procedures with respect to the passenger's treatment and in light of the passenger's admissions to the contrary, no reasonable jury could conclude that the administration of a drug by a physician-passenger constituted an accident under the Warsaw Convention.

*Fulop v. Malev Hungarian Airlines*²⁵²

The behavior of a carrier's personnel in response to a passenger's in-flight chest pain, specifically, the failure to divert the flight in order to provide the passenger medical care did not qualify as an "accident" as defined under Article 17 of the Warsaw Convention, the court held. The passenger contended that the carrier's failure to act caused permanent damage to his heart that would not have occurred if the carrier had diverted the flight so that proper medical treatment could have been obtained

²⁵² 244 F. Supp. 2d 217 (S.D. N.Y. 2003).

sooner. Under the circumstances of the instant case, the passenger experienced chest pains shortly after the flight departed Budapest, Hungary for New York, and requested assistance from the carrier's crew. The crew located a passenger-physician who injected a painkiller and checked the passenger's vital signs on several occasions, observing no change. After administering the injection, the physician informed the pilot that although the passenger appeared to be feeling better, he could not predict how the passenger would feel during the remainder of the flight. The pilot decided not to divert the flight to England so that the passenger could receive medical treatment based on consultation with the physician-passenger. The passenger claimed at trial that he asked a crew member to divert the flight to England, but in contrast the carrier claimed that both the passenger and the physician-passenger felt diversion was unnecessary. The court found, on the basis of the trial testimony and the corresponding record that the passenger did not meet the burden of proving a violation of operational standards by the carrier's personnel. According to the carrier's procedures for tending to sick passengers, the absolute decision-making authority to divert the plane was left to the captain, who was required to endeavor to

obtain a medical opinion from a passenger, determine whether the sick passenger required urgent medical assistance, and if so, contact the nearest suitable airport and make preparations for an emergency landing. The court regarded the carrier's procedures substantially similar to industry standards. According to the court, the pilot's decision to continue with the flight was a decision made after taking into account, in addition to all other considerations of safety and convenience of other persons on board, the overall thrust of the physician's advice that the passenger appeared stable and that his condition did not warrant diversion of the flight. The court was unpersuaded that the passenger proved that the pilot gathered insufficient information to make his decision. Regardless of whether the physician conveyed the passenger's medical history to the pilot, the court pointed out, there was no evidence that the pilot's decision would have been any different, especially since the physician was not a cardiac specialist and may not have known the necessary implications of the passenger's prior medical history.

The court was also unpersuaded that even if the passenger actually made a request to divert the flight, the request was demonstrative enough to indicate that his medical condition was so severe as to warrant an emergency diversion. The passenger's

single request to one crew member, not specifically adopted or endorsed by the physician who assessed his medical condition, was not sufficient to establish an urgent matter, the court reasoned, and his failure to repeat himself could have been reasonably interpreted by others on board either as a change of mind or as a signal that his condition had improved or was not sufficiently severe in the first place. Consequently, the court was unable to conclude that the carrier ignored the passenger's requests for a diversion in a manner that violated its own policies or procedures or any relevant industry standard.

*Abramson v. Japan Airlines Co., Ltd.*²⁵³

The Third Circuit court held that the alleged acts and omissions of an airline and its employees in responding to a passenger's attack from a preexisting hiatal hernia during a routine flight did not constitute an "accident" for which the Warsaw Convention imposed liability on the carrier. The passenger and his wife testified that the passenger could alleviate an attack by a "self-help" remedy and by lying down, and that the wife asked a flight attendant for a place where he could lie down and employ his remedy, but he was advised that

²⁵³ 739 F.2d 130 (3d Cir. 1984).

there were no empty seats. Discovery revealed, however, that there were nine empty seats in the first-class section. The passenger alleged that without the opportunity to employ self-help his condition worsened, and he was hospitalized on arriving at his destination. The court of appeals reiterated the definition of "accident" within the meaning of Article 17 set forth in DeMarines v. KLM Royal Dutch Airlines,²⁵⁴ as an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things; if the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident; to constitute an accident, the occurrence on board the aircraft must be unusual, or unexpected, an unusual or unexpected happening.

The appellate court rejected the passenger's argument that, although the airline did not cause his hiatal hernia injury, the alleged aggravation of the injury by the airline employees' acts and omissions constituted an unusual or unexpected happening within the definition. Emphasizing that the injury was suffered during the course of a routine and normal flight, the appellate court stated that, in the absence of proof of abnormal external factors, aggravation of a preexisting injury during the course of

²⁵⁴ 580 F.2d 1193, 3 Fed. R. Evid. Serv. 575, 26 Fed. R. Serv. 2d 226 (3d Cir. 1978).

a routine and normal flight should not be considered an accident within the meaning of Article 17. The appellate court stated further that the injury the passenger suffered was not a risk either associated with or inherent in aircraft operation. Although affirming the entry of summary judgment for the airline on the Warsaw Convention claim, the court of appeals vacated the entry of summary judgment for the airline on the passenger's state law claims and remanded the action.

*Krys v. Lufthansa German Airlines*²⁵⁵

Rejecting a carrier's claim that a passenger's state law claim of negligence, based on the failure of the crew of an aircraft on an international flight to make an unscheduled landing to treat the passenger's heart attack, was preempted by the Warsaw Convention because the incident was an "accident" within the meaning of Article 17 of the Warsaw Convention, the Eleventh Circuit stated that if, in the instant case, the aggravating event was the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, then it seemed clear that the aggravation injury arose not from an unexpected or unusual happening, but rather from the passenger's own internal

²⁵⁵ 119 F.3d 1515 (11th Cir. 1997).

reaction to the usual, normal, and expected operation of the aircraft.

The appellate court identified the relevant event by asking what precise event or events allegedly caused the damage sustained by the passenger and found it clear that, if the passenger in the instant case suffered damage as a result of any external event, that event was the continuation of the flight and the resultant delay in hospitalization. Acknowledging that the question was close, the appellate court was convinced that the proper approach was indeed to look at a purely factual description of the events that allegedly caused the aggravation injury suffered by the passenger. The appellate court stated that such an approach was in accord with the plain meaning of the phrase "event or happening" as used in the definition of "accident" in *Saks*. In addition, the appellate court thought that looking at the factual events, as opposed to an assertion of "crew negligence," was in accord with the design of the Warsaw Convention, which provides carriers a "due care" defense.²⁵⁶ Having provided for a defense turning on the absence of

²⁵⁶ Under Article 20(1) of the Warsaw Convention, carriers may defend claims on the grounds that they took all necessary measures to avoid a passenger's injury or that it was impossible to take such measures. The appellate court noted that the Montreal Agreement requires carriers to waive this "due care" defense for international flights that originate, terminate, or have stopping points in the United States, but found that waiver immaterial to its rationale with respect to the occurrence of an accident.

negligence, the appellate court thought it unlikely that the drafters of the Warsaw Convention intended that the initial "accident" inquiry be resolved by reference to negligence, both because the word "accident" is located in a separate article and because determining the occurrence of an accident involves an inquiry into the nature of the event that caused the injury rather than the care taken by the airline to avert the injury. The court of appeals thus concluded that looking solely to a factual description of the aggravating event in the instant case, the continuation of the flight to its scheduled point of arrival, compelled a conclusion that the aggravation injury was not caused by an unusual or unexpected event or happening that was external to the passenger.

2-8-3. Will health risks of international flights be an "accident"

Approximately 30,000 people a year succumb to pulmonary emboli triggered by blood clots, and 10% of victims are alleged to have developed Deep vein thrombosis (DVT) following a long haul flight. DVT is an abnormal formation of blood clots that may travel through the blood stream to the heart or lungs and cause serious injury. Medical evidence is currently inconclusive that air travel increases the risk of DVT and some

studies suggest that there is no connection at all, nevertheless, whatever it is, DVT already be the subject of lawsuits worldwide and fast becoming a major issue in aviation litigation. Courts have suddenly had to classify this ailment under existing rules, the main issue is whether DVT is an "accident" per Warsaw-Montreal System. The cases below led to widespread press coverage of "economy class syndrome", which is something of a misnomer as the condition has also occurred amongst first-class travelers.

*Rodriguez v. Ansett Australia Ltd.*²⁵⁷

The court held that an airline passenger's development of deep vein thrombosis (DVT) during an international flight resulted from the passenger's own internal reaction to the aircraft's usual, normal, and expected operation, rather than from an unexpected or unusual event, and thus was not caused by an "accident" within the meaning of the provision of the Warsaw Convention addressing air carrier liability for harm to passengers, notwithstanding the passenger's lack of a pre-existing condition when she boarded the airplane.

²⁵⁷ 383 F.3d 914 (9th Cir. 2004), cert. denied, 125 S. Ct. 1665 (U.S. 2005), affirming *Rodriguez v. Ansett Australia Ltd.*, 2002 WL 32153953 (C.D. Cal. 2002).

Louie v. British Airways, Ltd.²⁵⁸

In an action under the Warsaw Convention by an airline passenger who suffered a stroke after taking an international flight that he alleged was caused by a deep vein thrombosis that was the result of an "accident" within the meaning of Article 17, specifically, that the design of the seat's leg rest restricted blood flow to his legs and that his business class seat was so comfortable that he did not want to get up, the court granted the carriers' motion for summary judgment, holding that a comfortable seat with a leg rest was not an unexpected or unusual event in business class and thus could not qualify as an accident.

Miller v. Continental Airlines²⁵⁹

Where international airline passengers asserted, in their actions against carriers under the Warsaw Convention, that as a result of the carriers' seating configurations, the passengers developed Deep Vein Thrombosis either during or after the flight, the court granted the carriers' motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim on which relief can be granted, holding that the allegations that the

²⁵⁸ 2003 WL 22769110 (D. Alaska 2003).

²⁵⁹ 260 F. Supp. 2d 931, Prod. Liab. Rep. (CCH) 16709 (N.D. Cal. 2003).

passengers' injuries resulted from an "accident" under Article 17 were unacceptably vague and conclusory. At most, the court observed, the passengers made only passing and conclusory reference to the carriers' negligent design, construction, and transportation. Nevertheless, the court refused to dismiss the passengers' claims under the Warsaw Convention with prejudice because it was unable to conclude that the passengers would be unable to amend their complaints with additional and consistent facts to supply a ground for relief. The passengers were accordingly granted leave to amend their complaints, and the court advised that they would be required to present a factual basis for any allegation that the accident was unusual or unexpected.

*Povey v. Qantas Airways Ltd*²⁶⁰ (Australian Case)

The High Court of Australia in a joint judgment affirming QANTAS Ltd v. Povey,²⁶¹ in which the appellant alleged that, "during the course of or following the flights" from Sydney to London and return, he suffered from deep venous thrombosis (DVT), "caused by the conditions of and procedures relating to passenger travel upon the flights," including cramped seating

²⁶⁰ 2005 WL 1460709 (HCA 2005).

²⁶¹ 2003 WL 23000692 (VCA 2003), Special leave to appeal granted by, 2004 WL 3222486 (HCA 2004).

from which it was not easy to move, the discouraging of movement about the cabin, and the offering of alcohol, tea, and coffee during the flights, held that the allegations which the appellant makes, if proved, would not establish a cause of action against the carriers.

The court noted that that conclusion is consistent with the decisions reached in intermediate courts of appeal in the United States and in England about the application of the Warsaw Convention and subsequent treaties to cases of DVT. The court noted that in the Deep Vein Thrombosis case *infra*, the Court of Appeal of England and Wales held that the word "accident" in the Warsaw Convention as modified by the Hague Protocol was to be given a natural and sensible, but also flexible and purposive, meaning in its context and that for there to be an accident within the meaning of the relevant article, there had to be an event external to the passenger which impacted on the body in a manner which caused death or bodily injury and the event had to be unusual, unexpected, or untoward. The conditions in which passengers travelled on flights (with cramped seating and the like) were not capable of amounting to an event that satisfied the first limb of the definition of an

accident which "took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The High Court of Australia further noted that in the United States, the Court of Appeals for the Fifth Circuit, in Blansett v. Continental Airlines, Inc.,²⁶² and the Court of Appeals for the Ninth Circuit, in Rodriguez v. Ansett Australia Ltd.,²⁶³ have also held that development of DVT was not, in the circumstances alleged in those cases, an accident within the meaning of the Warsaw Convention. Although the appellant sought to gain some comfort from a statement made in the opinion in Rodriguez to the effect that the court did not need to decide whether an airline's failure to warn of DVT can constitute an accident, that aspect of the court's opinion was no more than a reflection of the narrowness of the issue tendered for its decision, and it is not, as the appellant's argument tended to suggest, to be translated into any positive proposition of law. For these reasons, it was held that appeal to the High Court should be dismissed with costs.

²⁶² 379 F.3d 177 (5th Cir. 2004), cert. denied, 125 S. Ct. 672, 160 L. Ed. 2d 498 (U.S. 2004).

²⁶³ See supra note 257.

*Deep Vein Thrombosis and Air Travel Group Litigation, Re*²⁶⁴

(UK Case)

Where a group of international airline passengers alleging that a group of carriers was liable to them under the Warsaw Convention for the occurrence of deep vein thrombosis (DVT) resulting from traveling in the carrier's aircraft, the United Kingdom court held that the alleged provision of cramped seating, inadequate air pressure, and uncomfortable atmosphere and temperature in the cabin, integral features of carriage pertaining throughout the flight, were not capable of amounting to an accident for purposes of Article 17. The existence of those permanent features of the aircraft or the subjecting of the passengers to carriage in an aircraft with those features was not capable of amounting an event that satisfied the first limb of the definition of an accident taking place on board an aircraft or in the course of any of the operations of embarking or disembarking, the court stated. For that reason alone, the court concluded, the flight itself, even assuming that it caused the DVT, was not capable of amounting to an accident under Article 17.

²⁶⁴ 2003 WL 21353471 (CA (Civ Div) 2003)..

2-8-4. *Will failure to warn the risks associated with international flight be an "accident"*

Whether failure to warn the risks associated with international flight could be a Warsaw Convention Article 17's "accident", the global courts said "no", except one US case, *Miller* (infra), the court held differently. These cases are mainly concerned about DVT as well, except one case, re UAL Corp (infra), concerned the issue of exposure to pesticides.

*Miller v. Continental Airlines, Inc.*²⁶⁵

Allegations of international airline passengers in their amended complaints that the failure of the defendant carriers failed to warn them of risk of deep vein thrombosis (DVT) despite the customary procedure and policy of the carriers to warn passengers of the risks of contracting DVT during lengthy flights and to warn or advise of the simple steps that passengers could take to minimize the risks of DVT constituted an "accident" under Article 17 of the Warsaw Convention were sufficient, the court held, to withstand the carriers' motion to dismiss the passengers' Warsaw Convention claims under Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim on which relief

²⁶⁵ 2003 WL 21557678 (N.D. Cal. 2003).

can be granted. The court rejected as immaterial the carrier's argument that the passengers' allegations had no factual basis since, under Saks, the occurrence of an accident is a fact-intensive inquiry that should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries, an evaluation not appropriate on a motion to dismiss.

Rodriguez v. Ansett Australia Ltd.²⁶⁶

The court held that the air carrier's alleged failure to warn the passenger about the risks of developing deep vein thrombosis (DVT) during long flights was not an "accident" within the meaning of the Warsaw Convention, given the absence of evidence of either an industry standard or airline policy requiring the air carrier to issue such warnings, and of a showing that the air carrier's conduct rose to the level of an unexpected or unusual event or happening external to the passenger, who developed DVT during the international flight.

Louie v. British Airways, Ltd.²⁶⁷

Holding that a carrier's alleged failure to warn an international airline passenger of the risk of deep vein

²⁶⁶ 383 F.3d 914 (9th Cir. 2004), cert. denied, 125 S. Ct. 1665 (U.S. 2005).

²⁶⁷ 2003 WL 22769110 (D. Alaska 2003).

thrombosis (DVT) associated with long periods of sitting was not an "accident" within the meaning of Article 17 of the Warsaw Convention, the court granted the carriers' motion for summary judgment in an action under the Warsaw Convention alleging that the passenger suffered a stroke after his flight caused by a blood clot which had traveled to his brain. A failure to warn, the court ruled, cannot constitute an unexpected or unusual event in the absence, as in the instant case, of an established industry standard to do so. The passenger presented the affidavit of an expert to show the existence of an industry standard to warn but, the court emphasized, noticeably absent in that affidavit was any reference to an industry standard in place in 2000 when the flight in question was taken by the passenger.

*Blansett v. Continental Airlines, Inc.*²⁶⁸

The plaintiff, who traveled from Houston, Texas, to London, England on a flight operated by the defendant, during the flight, suffered an episode of deep vein thrombosis ("DVT"), resulting in a cerebral stroke that left him permanently debilitated, sued the defendant, alleging that it was liable for his injury under Article 17 of the Warsaw Convention, to which the

²⁶⁸ 379 F.3d 177 (5th Cir. 2004), cert. denied, 125 S. Ct. 672, 160 L. Ed. 2d 498 (U.S. 2004), reversing *Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002).

United States is a signatory, held that the defendant's failure to provide DVT warnings and instructions could not have constituted an "accident" under Article 17. The pertinent question was whether the defendant's failure to provide warnings and instructions concerning DVT could have constituted a covered "accident" under Article 17. The court noted that because the Convention was written in French and against the background of French law, the Supreme Court has looked to French law to interpret the meaning of "accident" in Article 17 (citing Saks). In French law, "accident" is usually given to mean a "fortuitous, unexpected, unusual, or unintended event." The Supreme Court noted, accordingly, that an accident under Article 17 is an "unexpected or unusual event...." The Supreme Court also noted that the Convention speaks of an "accident which caused" an injury rather than an accident that is an injury, and accordingly, a qualifying "unusual or unexpected event" must be distinct from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." The court noted that in Olympic Airways v. Husain,²⁶⁹ the Supreme Court concluded that, under some circumstances, an "accident" may constitute an omission or refusal to act. The

²⁶⁹ 540 U.S. 644, 124 S. Ct. 1221, 157 L. Ed. 2d 1146, 4 A.L.R. Fed. 2d 709 (2004).

court noted that the situation in the instant case differs markedly from that in *Husain*. Here, no request was made of the airline; the flight staff was entirely passive. The Supreme Court noted that facts similar to those here are at least distinguishable from those in *Husain*. Justice Scalia's dissent pointed to decisions in several foreign jurisdictions concluding that a failure to warn and instruct of DVT risks is not an "event" under Article 17. The Supreme Court stated that the failure to give warning in the foreign Warsaw Convention cases involving DVT, as distinguished from a specific refusal to lend requested aid in *Husain*, was enough to prevent conflict between them. The court held that the defendant's failure to warn of DVT was not an "unusual or unexpected event" and not a qualifying "accident." The court noted that though many international carriers in 2001 included DVT warnings, it was undisputed that many did not, and, moreover, the defendant's battery of warnings was in accord with the policies of the Federal Aviation Administration ("FAA"), which prescribes what warnings airlines should issue to passengers. The court thus held that no jury may be permitted to find that the defendant's failure to warn of DVT constituted an "accident" under Article 17, as the defendant's policy was far from unique in 2001 and was fully in accord with the

expectations of the FAA, and its procedures were neither unexpected nor unusual.

Re UAL Corp.²⁷⁰

The court held that personal injuries that the airline passenger allegedly sustained due to her exposure to pesticides applied in furtherance of the airline's legal obligation to exterminate insects that might be present on planes flying to Australia and New Zealand did not result from any "unexpected" or "unusual" event, as required for injuries to arise from an "accident" and to be compensable under the Warsaw Convention, though the passenger may not have been aware that the airline routinely applied such pesticides in planes flying to Australia and New Zealand as a result of the airline's failure to inform her of this fact; accordingly, the personal injury claim filed in the debtor-airline's Chapter 11 case for such injuries had to be disallowed, as invalid under governing law.

Povey v Qantas Airways, Ltd.²⁷¹ (Australian Case)

A joint judgment of the High Court of Australia held that the alleged failure of the carrier to provide the passenger with

²⁷⁰ 310 B.R. 373, 43 Bankr. Ct. Dec. (CRR) 31 (Bankr. N.D. Ill. 2004).

²⁷¹ 2005 WL 1460709 (HCA 2005).

information or any warning about the risks of DVT did not constitute an "accident" within the meaning of Article 17. The joint judgment noted that references to "failure" to warn in this context were irrelevant and unhelpful. They were irrelevant because they had to proceed from unstated premises about the content or origin of some duty to warn. The joint judgment noted that there was no basis for introducing, for example, concepts of the common law of negligence to the construction or application of an international treaty like Montreal No. 4. The joint judgment noted that unless there is resort to some standard of legal behavior to determine whether what happened was a "failure," the description of what happened as a failure is, in truth, no more than an assertion that there was no warning. The joint judgment further noted that the references to failure were unhelpful because they suggested that the only point at which some relevant warning could or should have been given was on board the aircraft. But if some warning was necessary or appropriate, it is not apparent why it should not have been given at a much earlier point of making arrangements to travel by air, rather than on board the aircraft. Further, the joint judgment noted, reference to failure was unhelpful because it diverts attention from what it is that happened on board to what might

have, could have, or perhaps should have happened there and why that should be so; if it is appropriate to ask "what happened on board?" the answer in this case is that the appellant alleged that nothing unexpected or unusual happened there.

The lower court in Qantas Ltd. v Povey,²⁷² noted that following the definition of the word "accident" by the U.S. Supreme Court in Saks, the word accident requires proof of a specific incident or occurrence that can be characterized as fortuitous. Noting that the passenger's allegations started out in relatively simple terms largely derived from a description of the flight conditions particularized in five different but cumulative ways and a bald allegation that there was "an accident which took place on board the aircraft," the lower court said an allegation that the passenger had not been provided with any information or warning about the risk of DVT or about measures to reduce that risk, on its own, certainly could not amount to an accident. The reason, the lower court declared, was not only that it referred to a nonevent and mere inaction, but also that it described a state of affairs which did not change from the start to the end of each flight. On their own or in combination, the flight conditions alleged by the passenger seemed far removed

²⁷² 2003 WL 23000692 (VCA 2003), affirmed by 2005 WL 1460709 (HCA 2005).

from the description of an accident given in Saks because they were merely the broad description of circumstances attending the flights. At the end of the day, the lower court commented, one was left with a description of the conditions and circumstances of the flight rather than anything that could in ordinary language be described as an event, occurrence, and more particularly, an accident. Moreover, the lower court stated, the concentration on the carrier's behavior and whether it was either expected or unexpected, or usual or unusual, missed the point because Article 17 is directed toward the occurrence of an accident which must take place on board the aircraft. It was thus irrelevant, the lower court continued, who caused the accident. The strict or presumptive liability of Article 17 does not seek an answer to that question as long as the accident occurs in one of the designated places, which is why acts of hijackers satisfy Article 17 although there may be no responsibility in common law on the part of the carrier. If the allegations in the instant case go at all beyond nonaction, the lower court concluded, they must consist in the describing of the alleged circumstances in colored terms such that the alleged behavior becomes unusual or unexpected but the complaint did not turn the allegations into an

accident, i.e., a fact, event, happening, or incident of a fortuitous kind for which Article 17 otherwise provides compensation.

McDonald v. Korean Air²⁷³ (Canadian Case)

An action under the Warsaw Convention by an airline passenger against a carrier for injury caused by deep vein thrombosis (DVT) during an international flight, the Ontario Superior Court of Justice held that the failure of the carrier to warn and educate passengers on lengthy flights that they may be exposed to DVT did not constitute an unusual and unexpected operation of the aircraft, that the failure did not mark a breach of duty of care of carriers to their passengers, and that the breach of such duty was not an accident within the meaning of Article 17. While noting that a carrier may be negligent in not advising passengers of the risk they assume, the court said that such negligence is not in itself an accident within the meaning of Article 17 in the sense that the DVT sustained by the passenger was not linked to an unusual or unexpected event external to the passenger.

²⁷³ 2002 WL 1861837 (Ont. S.C.J. 2002), summarily affirmed by, 2003 WL 8203 (Ont. C.A. 2003), leave to appeal refused by, 2003 WL 22006338 (Can. 2003).

*Deep Vein Thrombosis and Air Travel Group Litigation, Re*²⁷⁴

(UK Case)

The United Kingdom held in an action by a group of international airline passengers alleging that a group of carriers was liable to them for the occurrence of deep vein thrombosis (DVT) resulting from traveling in the carrier's aircraft, that the failure to warn of the risk of DVT or to advise on precautions which would avoid or minimize that risk could not be categorized as an accident under Article 17. Rather, the court explained, it was simply something that did not happen, a nonevent.

2-9. Other events

2-9-1. Can the conduct of another passenger be an "accident"

Can the conduct of another passenger be an accident under Warsaw Convention Art. 17? Under the pressure of Warsaw-Montreal System's power of exclusivity, since recovery for personal injury if not allowed under Warsaw Convention, is not available at all,²⁷⁵ courts usually interpret the meaning of "accident" in a broad fashion after the US Supreme

²⁷⁴ 2003 WL 21353471 (CA (Civ Div) 2003).

²⁷⁵ See Tseng, 525 U.S. at 161, (1999).

Court's decision of Tseng. From 1999 to present date, only one case held the conduct of other passenger was not an Article 17's "accident", O'Grady infra.

*Schneider v Swiss Air Transport Co. Ltd.*²⁷⁶

The court stated that the full reclining of two seats in front of the plaintiff, coupled with the refusal of the occupants of the seats to raise their seats when requested to do so, and the refusal of the flight attendant to intervene when requested to do so, could be considered by the fact-finders to have been external to the plaintiff and beyond the usual, normal, and expected operation of an aircraft and, finding that genuine issues of material fact remained as to whether the carrier's personnel refused to intervene, denied the carrier's motion for summary judgment, in which the carrier claimed that the plaintiff's injury was not caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.

*Wallace v Korean Air*²⁷⁷

Holding that sexual molestation by a fellow passenger constituted an "accident" within the meaning of Article 17 of the

²⁷⁶ 686 F. Supp. 15 (D. Me. 1988).
²⁷⁷ 214 F.3d 293 (2d Cir. 2000).

Warsaw Convention, the Second Circuit reversed the district court's order granting summary judgment in favor of the carrier in the plaintiff's action under the Warsaw Convention based on an incident in which the person sitting next to her unzipped and unbuttoned her shorts and placed his hand in her underpants while she slept. The court remarked that the struggle with the Supreme Court's definition of "accident" in *Saks*, as an unexpected or unusual event or happening that is external to the passenger is particularly difficult where putative injuries are caused by torts committed by fellow passengers. Without taking a position on the propriety of the standard applied by the district court, that an accident under Article 17 must arise from risks that are characteristic of air travel, the court found that even under that narrow approach, an accident occurred in the instant case. It was plain, the court thought, that the characteristics of air travel increased the plaintiff's vulnerability to the fellow passenger's assault: when she took her seat, she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator, the lights were turned down, and the sexual predator was left unsupervised in the dark. Equally important, in the court's view, was the manner in which the fellow passenger was able to carry out his assault. The court

pointed out that his actions could not have been brief even for the nimblest of fingers, and they could not have been entirely inconspicuous yet for the entire duration of the attack not a single flight attendant noticed a problem. Finally, the court said it was not insignificant that when the plaintiff awoke, she could not get away immediately and had to endure another attack before clambering out into the aisle.

*Lahey v Singapore Airlines, Ltd.*²⁷⁸

Where the plaintiff, a passenger on an international flight, sought damages under Article 17 of the Warsaw Convention for injuries sustained in an alleged assault by a fellow passenger, the court held that the assault in the instant case was an "accident" within the meaning of Article 17. The fellow passenger, who was seated behind the plaintiff, pushed and kicked the back of the plaintiff's seat on several occasions. Refusing to switch seats, the fellow passenger subsequently punched the plaintiff through a gap in her row of seats, threw a food tray at her, and struck her head with a plastic entrée dish causing a laceration of the plaintiff's scalp. The plaintiff pressed charges against the fellow passenger and he was arrested when

²⁷⁸ 115 F. Supp. 2d 464 (S.D.N.Y. 2000).

the aircraft landed. Contrary to the position the carrier advanced at trial, the court said the actions of the crew were not relevant to a determination of whether the assault was an "accident" because it was clear that nothing in the term "accident" suggests a requirement of culpable conduct on the part of the airline crew. Noting the plaintiff's testimony that she was "shocked and surprised" when she was struck on the temple from between the seats and that no member of the crew expected that the fellow passenger would throw his tray at the plaintiff, the court declared that the incident was certainly "unexpected and unusual" and "external" to the plaintiff and, as such was an accident under Article 17.

*Oliver v. Scandinavian Airlines System, Inc.*²⁷⁹

The court held that an accident within the meaning of Article 17 of the Warsaw Convention occurred when a fellow passenger fell unexpectedly on the plaintiff-passenger, and thus the Warsaw Convention applied in the action of the injured passenger against the airline. The court stated that, although the alleged cause of the accident, the continued availability of alcohol on the plane, may not have been accidental, the proper

²⁷⁹ Av. Cas. (CCH) 18,283 (D. Md. 1983).

focus was on what happened to the injured passenger. The court stated that, while the Warsaw Convention does not itself define the term "accident," the facts in the instant case met the definition found in Demarines v KLM Royal Dutch Airlines,²⁸⁰ that an accident is "an unexpected and sudden event that takes place without foresight." The court concluded, however, that the filing of that claim more than two years after the alleged accident was time barred, because the passenger's claim was governed by the terms of the Warsaw Convention, and accordingly granted the airline's motion to dismiss.

Tsevas v Delta Air Lines, Inc.²⁸¹

Where a passenger sought to recover damages under the Warsaw Convention for injuries suffered in a sexual assault by another passenger, contending that the carrier's flight attendants continued to serve the assailant alcoholic beverages despite being notified of the assailant's behavior, and that the flight attendants refused to move her to another seat until after the assault, the court recognizing the Supreme Court's definition of

²⁸⁰ 433 F. Supp. 1047 (E.D. Pa. 1977). Although the Third Circuit reversed the district court in DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 3 Fed. R. Evid. Serv. 575, 26 Fed. R. Serv. 2d 226 (3d Cir. 1978), the court of appeals stated that the trial court's definition of "accident" properly presented the jury with the correct legal standard for determining the occurrence of an accident.

²⁸¹ 1997 WL 767278 (N.D. Ill. 1997).

"accident" under Article 17 of the Warsaw Convention in *Saks*, as an unexpected or unusual event or happening that is external to the passenger, held that the unwanted advance of another passenger, coupled with the refusal of the carrier's flight attendants to intervene when requested to do so, constituted an unexpected event external to the passenger that was beyond the usual and normal operation of the aircraft. In the instant case, the court observed, the passenger's injuries clearly did not result from her internal reaction to normal airplane operations, but rather from a combination of unexpected and unusual events external to her. According to the complaint, the carrier's employees served alcohol to the assailant to the point where he became intoxicated or otherwise uninhibited. When the passenger informed the flight crew that the assailant was intoxicated, they took no action and continued to serve him drinks. Thereafter, when the assailant began to make unwanted and unsolicited advances toward her, the passenger advised the flight crew of the situation and asked to be moved. Again, the carrier's employees failed to act by either subduing the assailant or moving the passenger to a different seat on the plane. The court rejected the carrier's argument that an assault by a fellow passenger cannot be an accident, an argument based on Stone v

Continental Airlines, Inc.,²⁸² the court distinguished Stone from the instant case, pointing out that there was no indication in Stone that the carrier's flight attendants failed to provide any service to the plaintiff that would have defused the situation or that the situation allowed the carrier's employees an opportunity to prevent the assault. Finding that the passenger's alleged injuries, if established, could be the result of an accident within the meaning of Article 17 of the Warsaw Convention, the court denied the carrier's motion to dismiss her claims under the Warsaw Convention.

Morris v. KLM Royal Dutch Airlines²⁸³ (UK Case)

An action under Article 17 of the Warsaw Convention by a 15-year old female international airline passenger who allegedly was touched in an inappropriate manner by a fellow male passenger seated next to her, that the incident which befell the passenger was an "accident" within the meaning of Article 17. Specifically, it was agreed that the passenger was seated next to two men who were speaking French to each other. After a meal, she fell asleep and woke to discover the hand of the man next to her was caressing her between her hip and knee and his fingers

²⁸² 905 F. Supp. 823 (D. Haw. 1995).

²⁸³ 2001 WL 483072 (CA (Civ Div) 2001).

dug into her thigh. She got up, walked away, and told an air hostess what had occurred. The court took judicial notice of the fact that those who travel economy have to accept relatively cramped conditions which bring them into close proximity with their neighbors and the circumstances are rare that result in a 15 year-old girl settling down to sleep in close proximity to an unknown man. The court did not doubt that incident exemplified a special risk inherent in air travel and that, whatever the precise test may be, it constituted an accident.

O'Grady v British Airways²⁸⁴

The court denied the motion for a new trial of an international airline passenger following an adverse jury verdict on her action under Article 17 of the Warsaw Convention based on an alleged assault by a fellow passenger, ruling that although the courts in Wallace v Korean Air²⁸⁵ and Lahey v Singapore Airlines, Ltd.²⁸⁶ found that the passenger on passenger violence in those cases constituted an accident under the Warsaw Convention, those cases do not lend support to the proposition that this Court was required to instruct the jury that an accident under the Warsaw Convention includes, as a matter of law, an

²⁸⁴ 134 F. Supp. 2d 407 (E.D. Pa. 2001).

²⁸⁵ See supra note 277.

²⁸⁶ See supra note 278.

assault committed upon a seated plaintiff by a fellow airline passenger. In fact, in *Wallace*, the Second Circuit explicitly stated that “we have no occasion to decide whether all co-passenger torts are necessarily accidents for the purposes of the Convention.” The fact that neither court made the bold assertion that an assault committed upon a seated plaintiff by a fellow airline passenger was ipso facto an accident under the Warsaw Convention belies Ms. O’Grady’s argument. In addition, the fact that the decisions of neither court are directly binding upon this Court further negates Ms. O’Grady’s argument. As such, Ms. O’Grady’s argument that the Court erred by not instructing the jury that the definition of accident includes, as a matter of law, an assault committed upon a seated plaintiff by a fellow passenger during an international flight is without merit.

These cases serve as fair warning to air carriers that their immunity from liability of passenger actions continues to be severely limited to circumstances that do not lend themselves in any way to being labeled as an unusual or unexpected event. The rulings above demonstrate that courts have rejected the airlines’ argument that the Warsaw Convention was not intended to impose absolute liability on air carriers for the unforeseeable acts of passengers. Under the Saks definition of

“accident”, an injury passenger need only prove that some link in the chain of causation was an unusual or unexpected event external to the passenger. Courts will impose liability on air carriers where a link in the chain of causation was some act or omission on the part of the airline or its employees. The recent trend in the law indicates that air carriers may avoid liability only when courts adopt the “inherent in air travel requirement” and then find that passenger torts are either not “characteristic risk of air travel” or have no relationship with the “operation of the aircraft”.

As in the 1970’s and 1980’s, the courts responded to hijackings, terrorist attacks, and bombings on board international aircrafts by imposing liability for passenger injuries caused by these “accident”. At the turn of twenty-first century, the courts are again responding to the rise in violent incidents aboard aircrafts by extending liability for “accident” caused by the violent intentional acts of passengers. Commercial air carriers are in the best position to enact and implement safety and security measures that would deter dangerous passenger behavior. To avoid liability for violent passenger behavior, air carriers must be proactive rather than reactive. Airlines must adopt a “zero tolerance” policy or assaults.

2-9-2. Will turbulence be an "accident"

Can turbulence be an accident under Warsaw Convention Art. 17? The US courts more likely to answer it as "yes", however, outside of the US, such as Canada, courts are more likely to answer it as "no".

*Magan v. Lufthansa German Airlines*²⁸⁷

Reversing the district court's order granting summary judgment in favor of a carrier in an action by a passenger under the Warsaw Convention for an injury received during a flight when he bumped his head on the cabin ceiling while the aircraft encountered turbulence, the court held that the plaintiff presented a genuine issue of material fact as to the degree of turbulence experience by the aircraft and whether his injury was an "accident" within the meaning of Article 17 of the Warsaw Convention. In the instant case, the district court decided that, as a matter of law, injuries sustained in the course of "light" or "moderate" turbulence as described by the turbulence reporting criteria of the Federal Aviation Administration (FAA) can never qualify as resulting from an "accident" under the Warsaw

²⁸⁷ 339 F.3d 158 (2d Cir. 2003).

Convention for purposes of imposing liability on a carrier and determined that there was no genuine issue of material fact regarding the degree of turbulence experienced by the flight on which the plaintiff was injured. Noting the Supreme Court's exhortation in *Saks*, to apply its definition of accident as an unexpected or unusual event or happening that is external to the passenger flexibly, the court rejected the carrier's view, adopted by the district court, that turbulence will not constitute an accident under Article 17 unless it is established that the turbulence was "severe" or "extreme" as defined by the FAA as well as the plaintiff's view that the degree of turbulence is irrelevant to the accident inquiry as long as it results in an impact, an event external to the passenger. Observing nothing in the Supreme Court's various formulations of an accident suggesting that a bright-line rule of liability should be or necessarily can be, established for particular weather events and all their attendant consequences, the court said that the district court's attempt to graft weather-reporting criteria for pilots, which the court characterized as not regulatory and established for purposes wholly independent of the Warsaw Convention, namely to facilitate pilot reporting to a national weather database, was misplaced. Contrary to the district court's

conclusion, based on FAA information on several web sites, that light and moderate turbulence are a normal part of any routine flight while severe and extreme turbulence are not, the court thought that such a determination was a factual matter more appropriately addressed at trial.

Furthermore, the court ruled that the record in the instant case was far from settled regarding the amount of turbulence actually experienced by the flight. While the pilot described the turbulence as both light and medium in the log, the plaintiff indicated that he found walking almost impossible, a hallmark of severe turbulence, a fellow passenger described the turbulence as significant, and the plaintiff presented expert testimony suggesting that the aircraft may have encountered momentarily severe turbulence. By concluding that the flight experienced only light or moderate turbulence, the court reasoned, the district court essentially credited the pilot's characterization over the plaintiff's contrary evidence, an approach that was not appropriate at the summary judgment stage when the record was to be construed in the light most favorable to the plaintiff.

*Brunk v. British Airways PLC.*²⁸⁸

Rejecting the defendant carrier's contention that it was entitled to judgment as a matter of law on the plaintiff international airline passenger's claim under the Warsaw Convention that the turbulence which the plaintiff claimed caused her knee injury was not sufficiently severe to constitute an "accident" within the meaning of Article 17, the court held that the evidence, viewed in a light most favorable to the plaintiff, showed that a reasonable juror could find that the plaintiff's injury was caused by an unusual or unexpected event, a precipitous drop of the aircraft during moderate to severe turbulence, and not be her own internal reaction to the usual, normal, and expected operation of the aircraft. In particular, the court noted, there was evidence that the plaintiff sustained an injury caused by a jolt of turbulence substantial enough to cause her to leave her feet and fall to the floor of the aircraft with such an impact that the ligaments of her knee were torn. Moreover, the court observed, it was claimed that the turbulence caused a sensation likened to that resulting from the dip of a roller coaster which, in addition to causing the plaintiff to fall, dislodged several of the passengers' food trays. Applying the definition of

²⁸⁸ 195 F. Supp. 2d 130 (D.D.C. 2002).

accident under Saks, and elementary summary judgment principles, the court denied the carrier's motion for summary judgment.

*Koor v. Air Canada*²⁸⁹ (Canadian Case)

An action by a passenger on an international flight under the Warsaw Convention for injury suffered when the aircraft encountered turbulence while she was attempting use a lavatory, causing her to fall and fracture her ankle, the court held that the turbulence in the instant case did not constitute an "accident" within the meaning of Article 17. The court noted a "Turbulence Reporting Criteria Table" produced by Transport Canada with the purpose of providing guidelines for reporting cases of various levels of turbulence which described four different degrees of turbulence: light, moderate, severe, and extreme, as well as a flight report filed by the crew indicating moderate turbulence for six or seven seconds. Observing that the witnesses were not unanimous in their description of weather conditions, the court found it more probable that there was only light turbulence at the very most during the 10 to 15 minutes that the seatbelt lights had been on prior to the passenger's fall

²⁸⁹ 2001 WL 452006 (Ont. S.C.J. 2001).

and that what caused her fall was a violent, sudden, and extremely brief increase in the intensity to the point where the turbulence for six or seven seconds was of the high moderate classification bordering on the severe. Accordingly, the court ruled, since the turbulence was short of severe, the passenger's injury was not caused or contributed to by any accident within the meaning of Article 17.

Quinn v. Canadian Airlines International Ltd.²⁹⁰ (Canadian Case)

Where a 72-year-old international airline passenger, suffering from severe chronic osteoporosis, brought an action against a carrier both in contract and tort after she sustained compression fractures of three vertebrae in her back allegedly caused by a pocket of turbulence encountered by the aircraft, the Ontario Court of Justice ruling that to succeed, the passenger was required to establish that her injuries were suffered during the flight and that her injuries were the result of an "accident" within the meaning of Article 17 of the Warsaw Convention, held that the degree of turbulence encountered on the flight in

²⁹⁰ 1994 WL 1694773 (Ont. Gen. Div. 1994), Affirmed without opinion by, 1997 WL 1917376 (Ont. C.A. 1997), leave to appeal refused by, 1997 WL 1932474 (Can. 1997).

the instant case could not be said to have been unusual or expected and did not constitute an accident under Article 17.

The court referred to the testimony of the plaintiff and two other passengers that, in addition to the turbulence of the sort that they had often previously experienced and that they regarded as normal and expected, there was on the flight in question an incident of turbulence that was notably more severe, involving a sudden loss of altitude and a loud bump which made two of them think that the aircraft may have hit the ground. Remarking that air turbulence is neither unexpected nor unusual and that up to some level of severity it is a commonplace of air travel, the court found as a fact that the turbulence encountered on the flight in question, while greater than that previously experienced by three passenger-witnesses, including the plaintiff, did not amount to an accident, defined in *Saks*, as an unexpected or unusual event or happening that is external to the passenger. The court, relying on a "Turbulence Reporting Criteria Table" published by Transport Canada which classified turbulence intensity in four categories: light, moderate, severe, and extreme, the court opined that the degree of turbulence encountered on the flight in the instant case did not amount to severe turbulence. The court observed that the passenger herself did not report any

strain on her seatbelt, that the evidence did not show that objects were tossed about, and that the captain did not file any report of severe or extreme turbulence, a report that would have been required if such turbulence had been encountered.

2-9-3. Will acts of terrorism be an "accident"

Can acts of terrorism be accidents under Warsaw Convention Art. 17? The courts unanimously said "yes", terrorism acts are within the scope of the Warsaw Convention's "accident".

*Husserl v. Swiss Air Transport Company, Ltd.*²⁹¹

In an action by a passenger against an airline for bodily injury and mental anguish allegedly suffered by the passenger as a result of an aircraft hijacking, the court held that a hijacking was within the ambit of the term "accident" and sufficient to raise the presumption of liability under the Warsaw Convention as modified. The flight from Zurich to New York was hijacked to Amman, Jordan, where the passengers were forced to remain for approximately six days. The court declared that to invoke the Convention there must be an "accident" within the

²⁹¹ 485 F.2d 1240 (2d Cir. 1973).

contemplation of Article 17, and the burden of proof is on the plaintiff to establish that such an accident occurred. The airline argued strenuously that, if the cause of the damage is intentional, it is not an "accident." Rejecting this contention, the court based its construction of the word "accident" on the United States State Department press releases and orders of the United States Civil Aeronautics Board subsequent to the Montreal Agreement, which amends the Warsaw Convention. The court emphasized the wording of the State Department that "those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages," explaining that one is led to infer that the innocent victims of willful acts by others were to be able to recover from the carrier, even in respect to acts of sabotage to the aircraft. The court reasoned that the analogy between hijacking and sabotage is clear and that the airline had failed to indicate any logical basis for distinguishing the two. The court explained further that the policy underpinnings of the Warsaw Convention also led to its conclusion that the hijacking was an accident since the Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents since the carrier physically controls the

aircraft and access to it; the carrier is likewise the party most capable of assessing and ensuring against the risks associated with air transportation; and, finally, the carrier is the party most able to distribute the costs of the first two steps effectively. The court accordingly denied the airline's motion for dismissal of the complaint and for summary judgment.

Re Tel Aviv²⁹²

The court held that passengers who were injured in a terrorist attack in the baggage area of an airport terminal building were no longer in the course of disembarking, stated that the defendant airline conceded that the terrorist attack was an "accident" within the meaning of Article 17 of the Warsaw Convention.

Day v TWA²⁹³

Holding that the fact that a terrorist attack occurred inside a terminal building did not preclude coverage under the Warsaw Convention, the appellate court stated that it was undisputed that a terrorist attack is considered an "accident" within the purview

²⁹² 405 F. Supp. 154 (D.P.R. 1975).

²⁹³ 528 F.2d 31 (2d Cir. 1975).

of Article 17.²⁹⁴ The appellate court affirmed a judgment in favor of passengers who had been injured in the attack.

*Evangelinos v TWA*²⁹⁵

The court of appeals discussing whether a terrorist attack on airline passengers in an airport took place in the course of any of the operations of embarking, stated that the airline did not dispute the district court's conclusion that a terrorist attack on an airline's passengers is an "accident" within the meaning of Article 17 of the Warsaw Convention.²⁹⁶

*La Compagnie Nationale Air France, SA v Haddad*²⁹⁷ (French Case)

The French court determined that the term "accident" could not be restricted to technical or mechanical accidents affecting the aircraft. The court ruled that physical injuries resulting from hijackers aboard an international flight from Tel Aviv, Israel to Paris, France, was within the category of Article 17 compensable acts. The court found that the term applies to

²⁹⁴ The court cited without elaboration Husserl v. Swiss Air Transport Company, Ltd., supra note 291, as authority.

²⁹⁵ 550 F.2d 152 (3d Cir. 1977).

²⁹⁶ The trial court in Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95 (W.D. Pa. 1975), judgment rev'd on other grounds, 550 F.2d 152 (3d Cir. 1977), had stated that there was no attempt by the Montreal Agreement to limit the application of "an accident" as defined in Article 17 of the Warsaw Convention to exclude the criminal act of a third party.

²⁹⁷ CA Paris, June 19, 1979, E.C.C. 1981, 207.

troubles during a normal flight that result from "unforeseen intervention by malevolent third parties," such in the circumstances of a hijacking.

CHAPTER THREE

What Constitutes “From EMBARKING To DISEMBARKING” Under the Warsaw - Montreal System

3-1. Introduction

Article 17 of the Warsaw Convention 1929 provides:

“The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” (The Montreal Convention 1999 Art. 17 is substantially the same).

While the word “accident” describes the type of incident covered by the provisions of the Conventions, the terms “embarking” and “disembarking” delineate the points in time at which liability of the carrier begins and ends.

It makes no difference that the negligence occurred or that the contract was formed prior to embarkation, for Article 17 refers to the place in which the accident causing injury must take place in order for that article to cover the case and establish the presumption of liability for the injury. The actual, ultimate cause of the accident is irrelevant for purposes of Article 17... As long as, and only if, the accident which caused the injury ‘took place on board the aircraft or in the course of any of the operations of embarking or disembarking,’ the action is covered by Article 17.²⁹⁸

At the 1929 Warsaw Conference, the delegates were faced

²⁹⁸ See Husserl v. Swiss Air Transport Co., Ltd., 388 F. Supp. 1238, 13 CCH Avi 17603 (S.D. N.Y. 1975).

with two general proposals concerning the extent of carrier liability. One point of view was that liability attached from the moment the passenger entered the air terminal and extended until the passenger left the terminal at his destination. A more restrictive view was advanced which would have extended liability from the time the passenger boarded the aircraft until the time of deplaning. The broader plan of liability was rejected in favor of the language presently contained in Article 17.²⁹⁹ Perhaps the restrictive one too.³⁰⁰ Since the Guatemala Conference, in 1971, the use of the words "embarking" and "disembarking" were re-examined in the light of the absolute liability regime which had been established by the Montreal Interim Agreement, but it was apparently the consensus of opinion of the delegates that the wording needed no change.³⁰¹ Even in the new Montreal Convention 1999, the words are still the same.

Little difficulty has been encountered in the cases dealing with the phrase, "on board the aircraft," physical presence while

²⁹⁹ For useful background discussion of the views expressed at the 1929 Conference, see *Martinez Hernandez v Air France* (1976, CA1 Puerto Rico) 545 F2d 279, cert den 430 US 950, 51 L Ed 800, 97 S Ct 1592. *Infra*.

See also Note: *Warsaw Convention--Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*. 45 *Fordham L Rev* 369.

³⁰⁰ See *Day v Trans World Airlines, Inc.* (1975, CA2 NY) 528 F2d 31, 36 ALR Fed 477, cert den 429 US 890, 50 L Ed 172, 97 S Ct 246, reh den 429 US 1124, 51 L Ed 574, 97 S Ct 1162. *Infra*.

³⁰¹ As to discussion of "embarking" and "disembarking" by the delegates of the Guatemala Conference, see *Minutes of the International Conference on Air Law, Guatemala City (1971)*, ICAO Document 9040--LC/167-1, pp 31 et seq.

reboarding is sufficient to allow the carrier to avail of the Convention even though the claimed injury was assertedly caused by negligent activity of another airplane of defendant carrier--other than the one being reboarded in international transportation.³⁰² A somewhat more complicated problem as to construction of "on board the aircraft" occurs where a passenger claims damages for injuries also suffered while she was being confined in a hotel by hijackers after having been removed from the aircraft being hijacked. The Husserl opinion, in construing "on board the aircraft" to include the time spent in the city in question in the hotel, reasoned as follows:

The drafters of the Convention undoubtedly assumed that the time 'on board the aircraft' included all of the time between embarkation at the origin of a flight and disembarkation at a scheduled destination of a flight. Furthermore, the purpose of the Convention to limit liability is best served by such a construction. Presumably, if a third party caused the plaintiff injury while she was detained off the aircraft, the airline would

³⁰² Scarf v Trans World Airlines, Inc., 4 CCH Avi 17795 (1955, SD NY), app dismd, 4 CCH Avi 18076 (CA2 NY) 233 F2d 176.

See also Chutter v KLM Royal Dutch Airlines, 132 F. Supp. 611, 4 CCH Avi 17733 (S.D. N.Y. 1955), where the court held that the case fell within the Convention because the accident causing the damage had occurred on board the aircraft, etc., where the passenger had stepped out onto a ramp or loading stairs to wave goodbye to her daughter just as the ramp was being pulled away, and had fallen. *Infra*.

be subrogated to her claim against that party; but it would bear primary liability. In any case and particularly in this case, it would be extremely difficult to determine what part of plaintiff's alleged injuries was caused directly by the accident on the aircraft, what part was caused by events themselves proximately caused by the accident, and what part was caused by events not proximately caused by the accident, by the negligence of the carrier, or by a breach of contract. Therefore, all events which caused the plaintiff's alleged injuries and which occurred during the time between leaving Zurich (point of departure) and returning to Zurich shall be considered to have occurred 'on board the aircraft.'³⁰³

Until the present day, a huge number of cases have been strenuously contested as to the meaning of the terms "embarking" and "disembarking". Those cases have arisen in the United States and around the world. While some courts appear to have given more weight to the location factor, other courts will take into account the totality of circumstances at the time of the passenger injury, including such factors as the location of the passenger, the specific activities being performed by the

³⁰³ See Husserl v. Swiss Air Transport Co., Ltd., supra note 298. See also, Simons, a review of issues concerned with aerial hijacking and terrorism 63 JALC 731 (1998); Duncan, battling aerial terrorism and compensating victims 39 NAVLR 241 (1990); Gross, limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

passenger, and the degree of control being exercised over the passenger by the carrier.³⁰⁴ Hence, the courts have not been uniform in construing "in the course of ... embarking or disembarking" as used in Article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting. The advantages of international uniformity in the interpretation and application of the Warsaw Convention are well known,³⁰⁵ but this is difficult to achieve in the face of conflicting decisions of national courts, even within one Contracting State, as with the United States.

Generally, however, "Embarking and disembarking," for the purposes of the Warsaw Convention, does not include within its scope all injuries a passenger sustains from the time he or she first enters the airport of departure until he or she leaves the airport of arrival.³⁰⁶ The phrase "embarking and disembarking" connotes a close temporal and spatial relationship with the flight itself.³⁰⁷

Most of the cases wherein it was alleged that the passenger was killed or injured while embarking held that the injuries did

³⁰⁴ Day v Trans World Airlines, Inc. See supra note 299.

³⁰⁵ Fothergill v Monarch Airlines (1980) 2 All E.R. 696 (H.L.). JBL 1993, Jul, 396-397.

³⁰⁶ Beaudet v British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994).

³⁰⁷ McCarthy v Northwest Airlines, Inc., 56 F. 3d 313 (1st Cir. 1995).

in fact occur during the course of "embarking," as that word is used in Article 17. Except those people injured in the common areas of airports are found not to be embarking,³⁰⁸ and if an accident occurs more than an hour before the scheduled departure, it is generally not considered to have occurred in the course of embarking.³⁰⁹ However, in those cases wherein it was alleged that the passenger injuries occurred during the operation of disembarking, most of them were held that the allegation was not sustained under the particular circumstances involved.

Article 17 holds the carrier liable for accidents occurring during the course of "any of the operations of embarking or disembarking." A broad interpretation of that language might permit the conclusion that such peripheral activities as checking baggage, or waiting to pick it up, are indeed operations connected with embarking or disembarking from an aircraft.³¹⁰

³⁰⁸ McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995) (passenger injured on escalator in common area); Buonocore v. Trans World Airlines, Inc., 900 F.2d 8 (2d Cir. 1990) (passenger killed by terrorist in public area of airport after checking baggage); Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994) (passenger injured on escalator in common area of airport); Knoll v. Trans World Airlines, Inc., 610 F. Supp. 844 (D. Colo. 1985) (slip and fall near immigration area at least 300 yards from gate); Kantonides v. KLM Royal Dutch Airlines, 802 F. Supp. 1203 (D.N.J. 1992) (passenger injured on moving sidewalk in common area of airport); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990) (passenger injured on moving sidewalk in public area of airport); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988) (passengers in line to check baggage and receive boarding passes when terrorists attacked).

³⁰⁹ Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994) (1½ hours before flight); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990) (more than 1½ hours before flight); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988) (more than 1½ hours before flight); Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992) (more than one hour after landing and 2½ hours before next flight).

³¹⁰ Day v Trans World Airlines, Inc. See supra note 299. Discussed infra. The court observed that the French word "operation," as contained in the official version of the Warsaw Convention,

Arguably, the point could be made that the movements of a disembarking passenger are still under the control of the carrier's agents until the passenger picks up his baggage, for the passenger would certainly be loath to leave the terminal without his baggage. In fact, in many larger terminals, the passenger is not permitted to leave the baggage area with luggage until an agent of the airline has examined the baggage check stubs to ascertain whether they coincide with the claim checks attached to the luggage items.³¹¹

In those cases that present a close factual question as to whether the client was "embarking" or "disembarking," when the injury occurred, the attorney might consider the possibility of proceeding against either the carrier or the airport authorities, or both, on a premises liability theory. While such a proceeding would not have the advantage of absolute liability under the Warsaw System, neither would it be subject to the limitation on liability or the two years time bar provided for in the Convention.³¹²

connotes a process composed of many acts, and that it has been defined in English as meaning "a group of procedures combined to achieve a result."

³¹¹ See, however, MacDonald v Air Canada (1971, CA1 Mass) 439 F2d 1402; and also Martinez Hernandez v Air France (1976, CA1 Puerto Rico) 545 F2d 279, cert den 430 US 950, 51 L Ed 800, 97 S Ct 1592, both discussed *infra*, in which the court held that under the circumstances involved in each case passengers killed or injured in the baggage claim area of an air terminal would not have the benefit of absolute liability under Article 17.

³¹² See Adatia v Air Canada (1992) 2 S&B AV. REP. Discussed *infra*.

3-2. View that total circumstances in each individual case are determinative in the US

Taking the position that the physical location of a passenger was not a sufficient sole criterion on which to determine whether a passenger was in the course of "embarking" or "disembarking" within the meaning of Article 17 of the Warsaw Convention, the courts in the cases below will look at the following factor:

(1) The activity of the passenger at the time of the accident or injury; whether the activity is related to boarding or leaving the plane;

(2) The passenger's whereabouts at the time of the injury; the physical proximity of the passenger to the gate and whether the passenger was in an area controlled by the carrier;

(3) The extent to which the carrier was exercising control over the passenger at the moment of injury; whether the passenger was acting at the direction of the carrier or was restricted by the carrier;

(4) The imminence of actual boarding or leaving the plane.³¹³

³¹³ McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995); Buonocore v. Trans World Airlines, Inc., 900 F.2d 8 (2d Cir. 1990); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441

3-2-1. Day v Trans World Airlines, Inc.³¹⁴ (The leading US case)

Injured passengers and the executrix of a passenger who died in a terrorist attack, filed an action against airline company in which they claimed that the TWA was liable for the injuries and the death under the Warsaw Convention. The TWA contended that the application of Article 17 should be determined by reference only to the area where the accident occurred. Liability under the Convention should not attach while the passenger is inside the terminal building. The very earliest time at which liability can commence is when the passenger steps through the terminal gate. Judge Briant, the trial judge, however, believed that 'the issue . . . is not where (the plaintiff's) feet were planted when the killing began, but, rather, in what activity was he engaged.' Applying a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location, the district judge determined that Article 17 covered the attack at the departure gate. And the appeal judges agreed.

Irving R. Kaufman, Chief Judge in the appeal, held that the

(S.D.N.Y. 1990); Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994); Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992).

³¹⁴ See supra note 299.

words 'in the course of any of the operations of embarking' do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location. Rather, the drafters of the Convention looked to whether the passenger's actions were a part of the operation or process of embarkation.³¹⁵

Article 17 does not define the period of time before passengers enter the interior of the airplane when the 'operations of embarking' commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the

³¹⁵ The French word 'operation' contained in the official version of the Warsaw Convention connotes a process composed of many acts. It is defined in the *Nouveau Petit Larousse* (1950) as 'Ensemble de moyens que l'on combine pour en obtenir un resultat,' or 'a group of procedures combined to achieve a result.'

passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, the court driven to the conclusion that the plaintiffs were 'in the course of embarking.'

Comparing this case with Macdonald v Air Canada³¹⁶, discussed *infra*, the court held:

"We find Macdonald v Air Canada clearly distinguishable. In MacDonald, the court declined to construe Article 17 as covering an elderly passenger who fell after disembarking. Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation. We do not, of course, indicate any views on the correctness of the MacDonald decision."

Moreover, a relatively broad construction of Article 17, affording protection to the plaintiffs under the Warsaw liability umbrella, is in harmony with modern theories of accident cost allocation. The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims.³¹⁷ Equally important, this interpretation fosters the goal of accident prevention.³¹⁸ The airlines, in marked contrast to individual passengers, are in a better posture to persuade, pressure or, if

³¹⁶ MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1970).

³¹⁷ See G. Calabresi, *The Costs of Accidents* at 39--45 (1970).

³¹⁸ See Union Oil Co. v. Oppen, 501 F.2d 558, 569--70 (9th Cir. 1974).

need be, compensate airport managers to adopt more stringent security measures against terrorist attacks.³¹⁹

Finally, the administrative costs of the absolute liability system embodied in the Warsaw Convention, as modified by the Montreal Agreement, are dramatically lower than available alternatives. If Article 17 were not applicable, the passengers could recover--if at all--only by maintaining a costly suit in a foreign land against the operator of the airport. The expense and inconvenience of such litigation would be compounded by the need to prove fault and the requirements of extensive pretrial investigation, travel, and other factors too difficult to anticipate. Such litigation, moreover, would often unduly postpone payments urgently needed by the seriously injured victim or his surviving dependents.³²⁰

The court stated that, in interpreting a treaty, one should look to its legislative history. The Warsaw Convention was the product of two international conferences, one held in Paris in 1925, and another in Warsaw in 1929.³²¹ The Paris conference appointed a small committee of experts, the Comite

³¹⁹ Calabresi at 150--152. *Supra* note 308.

³²⁰ See Rosenberg and Govern, *Delay and Dynamics of Personal Injury Litigation*, 59 *Colum.L.Rev.* 1115 (1959).

³²¹ The history of the Warsaw Convention is discussed in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv.L.Rev.* 497 (1967); and in Ide, *The History and Accomplishments of the CITEJA*, 3 *J.Air.L.* 27 (1932).

Internationale Technique d'Experts Juridique Aeriens (CITEJA), to prepare a draft convention for consideration by the delegates at Warsaw. The version proposed by CITEJA would have extended accident coverage to passengers from the time when they enter the airport of departure until the time when they exit from the airport of arrival.³²² At the Warsaw conference, several of the delegates criticized this draft. Alcibiades Pecanha, the Brazilian delegates, proposed that Convention liability not attach until the passengers were actually inside the aircraft.³²³ Prof. Georges Ripert, the French delegate, however, forcefully argued against both the CITEJA and the Brazilian proposals. It was, he observed, virtually impossible to draft a precise formula that would satisfactorily cover the myriad of cases that could arise. Prof. Ripert proposed that the article be recast in terms broad enough to allow the courts to take into account the facts of each case.³²⁴ The delegates voted to reject the CITEJA draft and to accept the French suggestion.³²⁵ The drafting committee then rewrote the CITEJA proposal in the form now set forth in Article 17.

³²² See Warsaw Minutes at 171.

³²³ Id. at 49.

³²⁴ Id. at 49--50, 53--54.

³²⁵ Id. at 57.

TWA argues that the rejection of the CITEJA draft manifested an intent to exclude from Warsaw coverage of all accidents occurring within a terminal building. The court did not agree. The court asserted that the delegates' action constituted a rejection of a rigid location-based test in favor of the more flexible approach espoused by Prof. Ripert. Even if one disregards this legislative history, the most the court could infer from the rejection of the CITEJA formula would be a reluctance to cover all accidents occurring inside a terminal, not a determination that no such accidents should be covered.

The minutes of the Warsaw proceedings thus undermine TWA's contention that the delegates wished to implement a rigid rule based solely on location of the accident. Rather, the court believes they preferred to provide latitude for the courts to consider the factual setting of each case by considering the elements which have been referred to above.

In interpreting a treaty, the court continues: Those called upon to construe a treaty should, in the words of Judge Clark, strive to 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties.'³²⁶ These expectations can, of course, change over time.

³²⁶ See Maximov v United States, 299 F. 2d 565, 568 (2d Cir. 1962), aff'd 373 U.S. 49, 83 S.Ct. 1054, 10 L.Ed. 2d 184 (1963).

Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787. Justice Holmes's counsel concerning Constitutional construction, set forth in his opinion in Missouri v Holland, applies with equal force to the task of treaty interpretation:

“(W)hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”³²⁷

The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions. A court might even feel obliged to sustain (the parties' later) construction of a treaty differing widely from that which it was in fact possible to prove to have been the design of the parties at the time when the agreement was concluded. In so acting, the court does not, of course, impose its own values upon the parties. Rather, the court does no more than respect and implement the goals and intentions of the parties.³²⁸

³²⁷ See Missouri v Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

³²⁸ See Pigeon River Improvement Slide & Boom Co. v Cox, 291 U.S. 138, 158—63, 54 S.Ct. 361, 78 L.Ed. 695 (1934); Harvard Research, Article 19; M. McDougal, H. Lasswell and J. Miller, *The Interpretation of Agreements and World Public Order* 56, 58 (1967); II. C. Hyde, *International Law* 72 (1922); Vienna Convention Art. 31(3).

In divining the purposes of the Warsaw treaty, the court found the adoption in 1966 of the Montreal Agreement particularly instructive. This Agreement did not alter the language of Article 17 of the Warsaw Convention. But it provides decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention.

Although it was the foreign airlines, and not their respective governments, who signed the agreement implementing these modifications (raise the Warsaw liability limit to \$75,000; and impose absolute liability), the governments whose carriers were to participate in the plan formally assured the United States, at the request of the State Department, that they would permit the new plan to go into effect.³²⁹

And as a conclusion, the court stated: "even if we restricted our interpretation to the intent and purposes of the Warsaw treaty as of 1929, we would reach the same result."

Since 1929, the risks of aviation have changed dramatically in ways unforeseeable by the Warsaw framers. Some commentators have suggested that when confronted with such genuine gaps in the parties' expectations, the interpreter should consider accepted policy goals, such as accident prevention, in

³²⁹ Lowenfeld and Mendelsohn at 594, 595. See supra note 312.

filling them. It is relevant in this connection that the technology of embarkation has also changed in ways unforeseeable to the Warsaw delegates. Moreover, airports are today far larger and boarding procedures substantially more complex than they were in 1929. And, many of the operations of embarking have been moved inside the terminal building. Indeed, even the boarding ladder, now being increasingly replaced by the jetway, may soon become an anachronism.

The court believes that the Warsaw drafters wished to create a system of liability rules that would cover all the hazards of air travel.³³⁰ The rigid location-based rule suggested by TWA would ill serve that goal. Under TWA's test, many claims relating to liability for the hazards of flying would be excluded from the Warsaw system and would be governed by local law. Rather than serving the drafters' intent of creating an inclusive system, TWA's proposal would frustrate it.

Moreover, the court also believes that the result it has reached furthers the intent of the Warsaw drafters in a broader sense. The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee.

³³⁰ See Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air. L. 1, 20 (1936); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air. L. 217 (1959).

They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes.

3-2-2. *Evangelinos v Trans World Airlines, Inc*³³¹.

Issues arising out of the same facts as Day case, supra, the court also rejected location of the passengers as the only test as to whether they were embarking or disembarking within the meaning of Article 17, and held that the passengers were in the course of embarking at the time the terrorist attack occurred.

The court noted that the undisputed facts revealed that at the time of the attack the passengers had completed virtually all the activities required as prerequisites to boarding, and were standing in line at the departure gate ready to proceed to the aircraft, and that the injuries were sustained while the passengers were acting at the explicit direction of airline employees and while they were performing the final act required as a prerequisite to taking boarding buses to the aircraft itself. The court also noted that at the time the boarding operations had commenced, the flight had already been called for final boarding, and that as a result, the passengers were no longer mingling over a broad area with passengers of other airlines, but were

³³¹ (1977, CA3 Pa) 550 F2d 152.

congregated in a specific geographical area designated by airline employees and were thus identifiable as a group associated with a particular flight. The court concluded that by announcing the flight, forming the group, and directing the passengers as a group to stand near the departure gate, the airline had assumed control over the group and caused them to congregate in the area where the attack occurred.

The court observed that adoption of a strict location test could lead to differing results based solely on the fortuity of where passengers are placed at the time of injury. The court stated that in its own view, three factors are primarily relevant to a determination of the question of liability under Article 17: (1) location of the accident; (2) the activity in which the injured person was engaged; and (3) the control by the defendant of such injured person at the location and during the activity taking place at the time of the accident. Although in so recognizing, the court stated that it would place less emphasis upon carrier control over passengers than did the Day Court, reasoning that while control remains at least equally as important as location and activity, it is an integral factor in evaluating both location and activity.

A dissenting opinion pointed out that a terrorist attack in an airport is no more likely to occur than the bombing of a restaurant, bank, or other place of public congregation, and that the conclusion of the majority that the passengers were injured as a result of a risk inherent in air travel was therefore unwarranted. The dissenting opinion further stated that operations of embarking could only include the actual boarding of the aircraft or, at most, movement across the traffic apron from the terminal building to the plane itself.

3-2-3. Maugnie v Compagnie Nationale Air France³³²

In 1971 Maugnie exited from the Air France plane and entered the Orly Airport terminal to make her Swiss Air connection. She proceeded down the only passenger corridor leading from the Air France gate to the main terminal area. In a hallway between the airline gate and the center of the terminal, appellant slipped and fell, incurring the injuries which gave rise to the complaint. The sole dispute of this case is whether Maugnie's injury come within the scope of disembarkation of the Warsaw Convention Article 17, the court said no.

³³² (1977, CA9 Cal) 549 F2d 1256, 39 ALR Fed 440, cert den 431 US 974, 53 L Ed 2d 1072, 97 S Ct 2939.

To arrive at a workable definition of the term "in the course of . . . disembarking" as used in Article 17, the court may properly look to the history and purpose of the Convention and subsequent interpretations thereof. The scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation, and must be determined from an examination of the "four corners of the treaty."³³³ Moreover, it is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties.³³⁴

Maugnie argues that since jurisdiction in this action is based on diversity of citizenship, the court should have consulted conflicts rules in interpreting the scope of Article 17. It is true that the Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged.³³⁵ Thus, conflicts rules are applicable in determining whether a cause of action exists. However, the determination of the scope of the Warsaw Convention is a matter of federal law and federal treaty

³³³ See American Trust Co. v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957); Husserl v. Swiss Air Transport Co., Ltd., 388 F.Supp. 1238, 1249 (S.D.N.Y.1975).

³³⁴ See Choctaw Nation v. United States, 318 U.S. 423, 431-432, 63 S.Ct. 672, 87 L.Ed. 877 (1943); Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 392, 358 N.Y.S.2d 97, 314 N.E.2d 848, 854 (1974).

³³⁵ See Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. den. 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); Komlos v. Compagnie Nationale Air France, 111 F.Supp. 393 (S.D.N.Y.1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953).

interpretation. Conflicts principles are not applicable in interpreting the words of the Convention; rather, the meaning of Article 17 should be ascertained from the intention of the drafters and the goals of the Convention.³³⁶

The Warsaw Convention, together with its modifications, function to protect passengers from the hazards of air travel and also spreads the accident cost of air transportation among all passengers. Taking a broad view of the term "accident," courts generally have extended air carrier liability to include injuries resulting from such modern air hazards as hijacking and terrorist attacks. However, the courts have not been uniform in construing "in the course of . . . embarking or disembarking" as used in Article 17.

In construing "disembarking," several courts have interpreted Article 17 as defining Warsaw coverage primarily by location of the passenger. In *MacDonald*³³⁷ case, injuries sustained by a passenger while awaiting her suitcase in defendant airline's baggage area were held to be outside the scope of the Convention. The First Circuit reaffirmed the *MacDonald* decision in *Hernandez v. Air France*³³⁸, and at the same time indicated its willingness to consider factors other than

³³⁶ See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 336-338 (5th Cir. 1967).

³³⁷ *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1970), *infra*.

³³⁸ (1976, CA1 Puerto Rico) 545 F.2d 279, cert den 430 US 950, 51 L Ed 2d 800, 97 S Ct 1592.

location of passenger in interpreting Article 17. Also in re Tel Aviv³³⁹, involved a terrorist attack on passengers who had deplaned and were waiting in the baggage area of the terminal building. Endorsing a test based primarily on physical location of passengers, the district court held that the Warsaw Convention did not apply. On the other hand, the Second and Third Circuits have refused to give a strictly geographical interpretation to the language of Article 17 with respect to "operations of embarking."³⁴⁰

Embarkation and disembarkation might be distinguished for purposes of Article 17, since the embarking passenger must perform certain required acts within the terminal as a condition of completing his journey. In contrast, the disembarking passenger normally "has few activities, if any, which the air carrier requires him to perform" once the passenger has entered the terminal building.³⁴¹ Similarly, other courts have denied Warsaw coverage to in-terminal accidents in the context of disembarkation.³⁴²

³³⁹ 405 F. Supp. 154 (D.P.R. 1975).

³⁴⁰ See Day v TWA, and Evangelinos v TWA, supra notes 314 and 34.

³⁴¹ See Day v TWA, supra note 314.

³⁴² See Felismina v. Trans World Airlines, Inc., 13 Avi.Cas.17,145 (S.D.N.Y.1974) (injury on escalator leading to lower level of terminal); Klein v. KLM Royal Dutch Airlines, 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974) (injury on baggage conveyor belt inside terminal); cf. Mache v. Air France, Rev. Fr. Droit Aerien 343 (Court d'Appel de Rouen 1967), aff'd Rev. Fr. Droit Aerien 311 (Cour de Cassation 1970) (injury in customs area off the traffic apron).

The court in present case held that a rule based solely on location of passengers is not in keeping with modern air transportation technology and ignores the advent of the mobile boarding corridors utilized by many modern air terminals. In construing the scope of the Convention, the court may properly consider changes in circumstances subsequent to the drafting of the treaty.³⁴³ Today the expandable boarding units have eliminated to a great extent the need for embarkation and disembarkation outside the terminal building. Thus, determining whether passengers were inside or outside the airport terminal at the time of injury should not end the analysis. Since the Convention drafters did not draw a clear line, the Court is also reluctant to formulate an inflexible rule. Rather, prefer an approach which requires an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17. Location of the passenger is but one of several factors to be considered.

However, even under the more flexible interpretation of the language of Article 17, Maignie's claim does not come within the scope of the Warsaw Convention. Maignie's situation contrasts sharply with the status of the passengers in Day and

³⁴³ See *Eck v. United Arab Airlines*, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964); ALI Restatement Second of Foreign Relations Law ss 147, 153.

Evangelinos. There the passengers had obtained their boarding passes and were standing in line at the departure gate, waiting to be searched immediately before boarding. On those facts, it was reasonable for the courts to conclude that the travelers were involved in embarkation operations. Maignie, on the other hand, had deplaned and was heading to the Swiss Air gate to make her connecting flight to Geneva at the time of injury. She had proceeded through a boarding lounge and into a common passenger corridor of Orly Airport which was neither owned nor leased by Air France. Furthermore, she was acting at her own direction and was no longer under the "control" of Air France. Under these circumstances, the court finds that appellant had completed disembarkation operations within the meaning of Article 17.

One important thing from present case should be bear in mind is Judge Wallace (who argues that Day test is seriously wrong) concurring that the majority recognizes that application of either the location-of-the-passenger MacDonald test, or the tripartite Day test results in the same disposition. It is therefore plainly unnecessary in this case to resolve an important question concerning an international treaty. The court ought not to be reaching out to do so. However, if choose he must, he would

choose the MacDonald test because he believes that test is more in keeping with both a fair reading of the language of Article 17 and the Article's historical derivation.

Courts defining "disembarking" have consistently refused to extend the coverage of the Warsaw Convention to encompass injuries occurring within the terminal. The principle announced in MacDonald and followed by the courts in Felismina v. Trans World Airlines, Inc.,³⁴⁴ and in re Tel Aviv³⁴⁵, created a standard which emphasized the passenger's location, thereby ending liability when the passenger has reached a "safe" point within the terminal.

The Day test, on the other hand, suffers from several serious flaws. First, the conclusions reached by Day rest upon a somewhat selective reading of the Warsaw minutes.³⁴⁶ In other words, the substantial portions of the legislative history, which favor the location test,³⁴⁷ were disregarded. Second, the Day test is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers. By relying on this theory of social engineering, "the Day court clearly injected policy arguments alien to the spirit of the

³⁴⁴ 13 Av.Cas. P 17,145 (S.D.N.Y.1974).

³⁴⁵ 405 F.Supp. 154 (D.P.R.1975).

³⁴⁶ See 45 Fordham L.Rev. at 380.

³⁴⁷ See Id at 380-381.

Warsaw convention when drafted in 1929.”³⁴⁸ Moreover, it is not possible to implement such a theory under the current terms of the Warsaw Convention without such a torturing of language as to constitute a redrafting. The court in Day, unfortunately, engaged in such contortions. If the signatories of the Convention wish to redraft it, they may do so, but the courts should not. Finally, it seems clear that the Day test was designed to extend a right of recovery to persons for whom sympathy inspires a method of compensation. The Day test was meant to be plaintiffs' law. Yet in many cases it may operate to thwart plaintiffs' attempts to recover the full value of their claims. The Warsaw Convention is a two-edged sword: the basis of liability is strict but at the same time the amount recoverable is limited.

3-3. Particular circumstances considered: “embarking”

3-3-1. The course of “embarking” established

Under the circumstances presented in each of the following cases, it was held that at the time of the incident that caused their death or personal injuries, the passengers involved in each case were in the course of “embarking,” as that word is used in

³⁴⁸ Id at 385.

Article 17 of the Warsaw Convention, and that the provisions of the Convention were therefore applicable to death or personal injury actions arising out of the particular incident.

*Chutter v KLM Royal Dutch Airlines*³⁴⁹

wherein a passenger who, after boarding an airplane and being escorted to her seat, and while the "fasten seat belt" sign was lighted, got up from her seat and proceeded to the rear toward the open door of the aircraft in order to wave a farewell to relatives, was "on board the aircraft or in the course of any of the operations of embarking or disembarking," as that phraseology is used in Article 17. At the very moment that the passenger appeared at the doorway to wave the farewell, the ramp or loading stairs were being pulled away from the plane by employees, and the passenger fell from the plane as she went to step on the ramp which was no longer there. Without going into a detailed analysis of the law, the court merely stated that to hold otherwise in the instant case would be an unwarranted dissection of minute and almost undefinable areas from the coverage of the Convention.

³⁴⁹ (1955, DC NY) 132 F Supp 611.

Shen v Japan Airlines³⁵⁰

Airline passengers were "embarking" within meaning of Article 17 when they were wrongfully detained and tortured by airline for 15 hours at hotel near airport and then wrongfully deported by airline.

Rajcooar v. Air India Ltd.³⁵¹

Passenger was in process of embarking on airplane, for purposes of applying the Warsaw Convention, where he was proceeding to departure gate when he suffered heart attack, he had completed virtually all steps required to board, and he was in part of airport accessible only to passengers on international flights.

Leppo v Trans World Airlines, Inc.³⁵²

Also arising out of the same incident as the Day and Evangelinos Cases, the court affirmed the granting of a summary judgment in favor of the plaintiffs to the extent of finding the airline absolutely liable under Article 17 of the Warsaw Convention. Noting that the precise issue before it was

³⁵⁰ (1994, SD NY) 918 F Supp 686.

³⁵¹ 89 F. Supp. 2d 324 (E.D.N.Y. 2000).

³⁵² (1977) 56 App Div 2d 813, 392 NYS2d 660.

whether the terrorist attack took place in the course of "operations of embarking or disembarking," the court cited the opinions in the Day and Evangelinos cases, both *supra*, and expressed the view that while tenable arguments could be made for the point of view opposite that reached by those courts, it would be inadvisable for a state court to reach a different decision from that which the two United States Courts of Appeals rendered with respect to the identical incident, particularly where, as in the instant case, the question presented was one of federal treaty law.

3-3-2. The course of "embarking" not established

Under the circumstances presented in each of the following cases, it was held that at the time of the incident that caused their death or personal injuries, the passengers involved in each case were *not* in the course of "embarking," as that word is used in Article 17 of the Warsaw Convention, and that the provisions of the Convention were therefore inapplicable to death or personal injury actions arising out of the particular incident.

*Marotte v. Am. Airlines, Inc.*³⁵³

³⁵³ 296 F.3d 1255.

The husband and the wife, along with their son and his girlfriend, attempted to board their scheduled flight from Miami to New York, which was the final leg of their round-trip travel from New York to the Bahamas. The wife was unable to find their tickets and the husband asked the attendant on duty if they could board because the tickets had been paid for and the seats were already assigned. The attendant called over the supervisor, who refused to allow them to board the plane. The wife eventually found the tickets and when the party attempted to board the plane, the supervisor assaulted the husband. The husband was taken by ambulance to the hospital where he remained for a number of days. Four years after this event took place the husband and the wife brought the instant action. The court of appeals held that based on the total circumstances surrounding the incident in question, with particular emphasis placed on location, activity, control, and the imminence of the intended flight, the injury that the husband suffered due to the attack by the supervisor occurred in the process of embarking, as contemplated by the Warsaw Convention. Therefore, the husband and the wife's claims were barred by the Warsaw Convention's two-year limitations period.

The court noted that the terms "embarking" and

"disembarking" are not specifically defined in the Convention. Despite the Marottes's contention to the contrary, however, the court held that the definition of the term "embarking" within the Warsaw Convention is a question of law to be decided by the court, not one of fact to be decided by the jury.³⁵⁴ That is, its interpretation is left up to the courts and is dependant upon the facts of each case.³⁵⁵

Generally, when determining whether an airline is liable under Article 17 of the Warsaw Convention, courts employ a totality of the circumstances approach.³⁵⁶ In making this determination, three factors are particularly relevant: (1) the passenger's activity at the time of the accident; (2) the passenger's whereabouts at the time of the accident; and (3) the amount of control exercised by the carrier at the moment of the injury.³⁵⁷ Additionally, courts also consider the imminence of the passenger's actual boarding of the flight in question.³⁵⁸ Under this analysis, no single factor is dispositive, and the three factors form a "single, unitary [analytical] base."³⁵⁹ However, because the term "embarking" evokes a "close temporal and

³⁵⁴ See *Blake v Am. Airlines, Inc.*, 245 F. 3d 1213, 1215 (11th Cir. 2001). ("Construction of the Warsaw Convention is a question of law.")

³⁵⁵ See *Schmidkunz v Scandinavian Airlines Sys.*, 628 F.2d 1205, 1207 (9th Cir. 1980).

³⁵⁶ See *Maugnie v Compagnie Nationale Air France*, (1977, CA9 Cal) 549 F2d 1256, 39 ALR Fed 440, cert den 431 US 974, 53 L Ed 2d 1072, 97 S Ct 2939.

³⁵⁷ See *Id.*

³⁵⁸ See *Buonocore v Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990).

³⁵⁹ See *McCarthy*, 56 F. 3d at 317.

spatial relationship with the flight itself," a close connection between the accident and the physical act of boarding the aircraft is required.³⁶⁰

Seemingly ignoring these cases mentioned above, the Marottes asks the court "to adopt the view that a passenger is only 'embarking' after the ticket has been collected and honored for travel and the passenger is passed through [the] gate check where the boarding stub is given the passenger to be examined by the attendant on the plane." In other words, the Marottes ask the court to draw a bright-line at, what appears to be, the actual doorway to the jetway leading to the aircraft. Such a position based on arbitrary line-drawing "is both too arbitrary and too specific to have broad application"³⁶¹ Because treaties should generally be read to have broad applicability, the court rejected the Marottes's position and adopted the broader position of at least five other circuits.

Viewing the total circumstances surrounding the incident in question, with particular emphasis placed on location, activity, control, and the imminency of the intended flight, leads the court to the firm conclusion that any injury that Mr. Marotte suffered due to the attack by Barrett occurred in the process of

³⁶⁰ See *Id.* at 316.

³⁶¹ See *Evangelinos*, 550 F.2d at 155. (drafters of the Warsaw Convention "intended a flexible approach which would adapt to the changing conditions of international air travel over the years").

embarking, as contemplated by the Warsaw Convention. First, the party had their boarding passes in hand and were attempting to board the plane when the attack took place. This is significant because it shows that the Marottes had already passed through security and were in a section of the airport that is not open to the general public, but rather only to ticketed passengers.³⁶² Further, it evinces that the Marottes had satisfied almost all of the conditions precedent to boarding.³⁶³ Second, the door into which Mr. Marotte was pushed was the door leading to the actual aircraft he had hoped to board, evincing an extremely close spatial relationship between the attack and the aircraft. Third, as the facts clearly show, American Airlines exerted much control over the Marottes. By taking their boarding passes and tickets and forbidding them access to the jetway that led to the airplane they wished to board, American Airlines, through its employee Barrett, exerted control over the entire Marotte party. Furthermore, by jumping on top of Mr. Marotte, Barrett physically prevented him from boarding his intended flight. It is difficult to imagine a situation that more clearly establishes control than the act of physical restraint. Finally, it is apparent from the facts before the court that the flight in which the

³⁶² See McCarthy, *supra* note 343, at 318.

³⁶³ See *Id.* at 317.

Marottes were attempting to board was imminent. All the Marottes had to do was pass through the glass door, which Barrett ordered closed, walk down the jetway, and take their seats. The fact that they were prevented from doing so, without more, does not take this case out of the purview of the Warsaw Convention. Viewing the surrounding facts in totality, the court concluded that the Warsaw Convention applies to the Marottes's claims, and therefore those claims are barred by the Convention's two-year limitations period.

*Upton v Iran Nat. Airlines Corp.*³⁶⁴

Taking into account steps required by airline to complete embarkation, test for liability is based upon three elements, activity (what passengers were doing), control (at whose direction), and location; passengers had not entered into control of carrier where they were in public waiting area, not in restricted area reserved for departing passengers, and were free to proceed to restaurant, visit with nonpassengers, or exit building at time when roof of airport terminal collapsed causing death and injury to passengers.

³⁶⁴ (SD NY) 450 F Supp 176.

Kantonides v KLM Royal Dutch Airlines³⁶⁵

In action against international air carrier in which airline passenger alleged that she had been injured as result of fall within airport terminal building, court granted carrier's motion for summary judgment where fall occurred on moving walkway within common area of airport terminal building, so accident did not occur during "course of any of the operations of embarking or disembarking" from plane, and action thus was not covered by Warsaw Convention; passenger's injury occurred approximately one-half hour before her flight had been scheduled to depart, she had been injured about 200 to 500 feet from her departure gate, passengers for plaintiff's flight had not yet been congregated into specific geographical area, and there was no suggestion that carrier's personnel had been near moving walkway, monitoring it, or instructing passengers to use it.

Schmidkunz v Scandinavian Airlines System³⁶⁶

Passenger was not embarking as defined by Article 17 of Warsaw Convention, where she left airplane on which she had arrived, walked not closer than approximately 500 yards from boarding gate to airliner that she was to take, was still within

³⁶⁵ (1992, DC NJ) 802 F Supp 1203.

³⁶⁶ (1980, CA9 Cal) 628 F2d 1205.

common passenger area of terminal, did not receive boarding pass, was not imminently preparing to board plane, and was not at that time under direction of airline personnel.

*Stovall v Northwest Airlines, Inc.*³⁶⁷

Plaintiff daughter brought an action against defendant international air carrier after she was injured and her mother was killed when they fell off a bus in route to the domestic air terminal where they were to board a connecting flight. The sole issue is whether Stovall and Shaleen were injured "in the course of any of the operations of embarking or disembarking." Neither the text of the convention, nor its history, clearly defines the scope of liability for accidents in and around an airport terminal.

Some courts, looking only to the passenger's location at the time of the accident, have defined the scope of liability narrowly. Thus, a passenger who fell in the baggage area of an airport was deemed to have disembarked from "the time he had descended from the plane by the use of whatever mechanical means had been supplied and had reached a safe point inside of the terminal, even though he may have remained in the status of a passenger of the carrier while inside the building."³⁶⁸ However, with the

³⁶⁷ (1992) 33 Mass App 1, 595 NE2d 330.

³⁶⁸ See MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir.1971).

growing risk of airport terrorism, courts have been called upon to extend the protection of the treaty to passengers within airport terminals.³⁶⁹ In *Day* case, and numerous other cases following it, courts have held that coverage would depend upon the particular facts analyzed on the basis of a number of factors: (1) the activity in which the passenger was engaged at the time of the accident; (2) the degree of control the airline had over the passenger at the time; (3) the physical proximity of the passenger to the aircraft; and (4) the closeness of the time of the accident to the passenger's entering or leaving the airplane.³⁷⁰

Even under the more expansive *Day* test, which is now routinely applied whether the issue raised relates to embarkation or debarkation, the plaintiff in this case may not prevail. The accident occurred while the two women were engaged in the activity of travelling on a public bus from one terminal to another. True, they were required to travel between terminals to continue their flight, but the activity in which they were engaged presented none of the dangers generally associated with air travel with which the Warsaw Convention was concerned. Airline personnel exerted some restrictions and control over Stovall and Shaleen's activities by providing them with vouchers

³⁶⁹ See e.g., *Shinn v. El Al Israel Airlines*, 21 Av.Cas. (CCH) 18,331 (D.Col.1989); *Sweis v. Trans World Airlines, Inc.*, 681 F.Supp. 501 (N.D.Ill.1988).

³⁷⁰ See *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir.1977).

and escorting them to the Massachusetts Port Authority bus. The airline did not tell them they were required to take that particular bus, however, and they were free to proceed by any means of transportation to the domestic terminal.³⁷¹ If any agency was directly in control of the two women at the time of the accident, it was the Massachusetts Port Authority, operating the bus, rather than Northwest, the airline. With regard to the relative proximity of the accident scene to the aircraft, the accident occurred a considerable distance from the airplane, the tarmac, or even the type of secure passenger waiting area on occasion found to be covered.³⁷² Finally, with regard to the time factor, more than an hour had elapsed since the flight from London had landed, and the Minneapolis flight was not scheduled to depart for yet another two and a one-half hours.³⁷³

The plaintiff emphasizes the facts, different in some respects from those in the numerous cases cited by Northwest in which no liability was found, that at the time of the accident

³⁷¹ See Martinez Hernandez v. Air France, 545 F.2d 279, 284 (1st Cir.1976); Knoll v. Trans World Airlines, Inc., 610 F.Supp. 844, 846-847 (D.Colo.1985); Rabinowitz v. Scandinavian Airlines, 741 F.Supp. 441, 446 (S.D.N.Y.1990); Curran v. Aer Lingus, 17 Av.Cas. (CCH) 17,560, 17,562 (S.D.N.Y.1982).

³⁷² See Martinez Hernandez v. Air France, 545 F.2d at 282; Maugnie v. Compagnie Nationale Air France, 549 F.2d at 1262; Buonocore v. Trans World Airlines, Inc., 900 F.2d 8, 9 (2d Cir.1990). Contrast Ricotta v. Iberia Lineas Aereas De Espana, 482 F.Supp. 497, 499-500 (E.D.N.Y.1979) ("accident occurred immediately after plaintiff had descended the steps of the aircraft" and "prior to time that she entered any common passenger area").

³⁷³ Compare Schmidkunz v. Scandinavian Airlines Sys., 628 F.2d 1205, 1207 (9th Cir.1980); Buonocore v. Trans World Airlines, Inc., 900 F.2d at 10; Rabinowitz v. Scandinavian Airlines, 741 F.Supp. at 446.

Stovall and Shaleen remained passengers on the Northwest flight from London to Minneapolis, they were in possession of their boarding cards, their baggage was in custody of the airline, and Northwest had made arrangements for their transportation between terminals. The plaintiff contends, therefore, that the women were on one continuous journey to their final destination.

However, the court held:

“The entire duration of a stop-over in the course of such a journey, however, is not necessarily included within ‘the operations of embarking or disembarking’ as that phrase is used in the Warsaw Convention.³⁷⁴ Where an accident occurs, as this one did, outside any airport terminal building while the passengers are on a public bus, substantially removed both in time and space from their flight, the court thinks the uniform result in courts throughout this country would be that the accident is not covered by the Warsaw Convention. The risk that materialized was not a risk of aviation.”

Beaudet v British Airways, PLC³⁷⁵

Beaudet (the passenger) slipped and fell in a lounge owned by the airline, while awaiting an international flight that was scheduled to depart almost 2 hours later. The Defendant contends that this case falls within the scope of the Convention; Plaintiff contends that it does not. This type of dispute is a matter of federal law and federal treaty interpretation.³⁷⁶ In

³⁷⁴ See Rabinowitz v. Scandinavian Airlines, 741 F.Supp. at 447.

³⁷⁵ (1994, ND Ill) 853 F Supp 1062.

³⁷⁶ See Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 617 (7th Cir.1989) (quoting Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 (9th Cir.), cert. denied, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977)).

interpreting a treaty, the Court must begin "with the text of the treaty and the context in which the written words are used."³⁷⁷

The Article at question here is the Warsaw Convention 1929 Article 17. The court held, at minimum, Article 17's "embarkment" language does not extend to "all injuries a passenger sustained from the time he first entered the airport of departure until the moment he left the airport of arrival."³⁷⁸ Such a proposal was expressly rejected by the delegates of the Convention.³⁷⁹ Beyond this, the federal courts have adopted multifactor tests to determine whether a plaintiff may be said to have been injured during "any of the operations of embarking."

In the Seventh Circuit, the proper test for determining the scope of "any of the operations of embarking" requires the Court to look at the total circumstances surrounding the Plaintiff's accident, "with particular emphasis on location, activity, and control."³⁸⁰ And the court concluded that under the Seventh

³⁷⁷ Air France v. Saks, 470 U.S. 392, 396-97, 105 S.Ct. 1338, 1340-41, 84 L.Ed.2d 289 (1985).

³⁷⁸ See *id.*

³⁷⁹ See Martinez Hernandez v. Air France, 545 F.2d 279, 283 (1st Cir.1976), *cert. denied*, 430 U.S. 950, 97 S.Ct. 1592, 51 L.Ed.2d 800 (1977), and Day v. Trans World Airlines, Inc., 528 F.2d 31, 35 (2d Cir.1975), *cert. denied*, 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed.2d 172 (1976).

³⁸⁰ This approach represents a combination of the multi-factor test applied by the Second Circuit in Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir.1975), *cert. denied*, 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed.2d 172 (1976) (using a "triparte test" considering activity, control, and location), and employed by both the First and Third Circuits and district courts in this district, see Martinez Hernandez v. Air France, 545 F.2d 279, 282 (1st Cir.1976), *cert. denied*, 430 U.S. 950, 97 S.Ct. 1592, 51 L.Ed.2d 800 (1977); Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 155 (3d Cir.1977); Sweis v. Trans World Airlines, Inc., 681 F.Supp. 501 (N.D.Ill.1988), with a "total circumstances" test employed by the Ninth Circuit in Maugnie v. Compagnie Nationale Air France, 549 F.2d at 1262 (indicating that the proper inquiry under Article 17 was not limited to the *Day* analysis).

Circuit approach, or either of the other Circuits, the Plaintiff in this case was not performing "any of the operations of embarking."

Looking first to the three factors emphasized in *Day*, the Court finds that these factors favor a finding that the plaintiff was not in the course of embarking. First, location. This factor originated with a now rejected rule that required solely an inquiry into the passenger's location. Once the passenger had reached a "safe" point within the terminal, the Convention no longer applied.³⁸¹ While the location of a passenger at the time of injury is but one factor to be considered, generally, the closer a passenger is to the gateway, or jetway or "jetty", the more likely the passenger is performing "any of the operations of embarking."³⁸² Also, location may include a reference to an area owned or leased by the defendant.³⁸³ Here, the Plaintiff was nowhere near the gateway. In fact, she was on a different level of the airport, potentially hundreds of yards away from any gate from which she might board her plane. Plaintiff argues that she was "elevator rides, passageways, and potentially in excess

³⁸¹ See *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir.1971).

³⁸² See, e.g., *Jefferies v. Trans World Airlines, Inc.*, No. 85-C-9899, 1987 WL 8168, 1987 U.S. Dist. LEXIS 2053 (N.D.Ill. March 13, 1987) (finding that the plaintiff was in the course of embarking when she was injured twelve feet from the gate room of her departing flight).

³⁸³ See *Schroeder v. Lufthansa German Airlines*, 875 F.2d at 618 (indicating that one reason Article 17 did not govern the plaintiff's case was because her injury occurred outside neither owned nor leased by the airline defendant).

of ten football fields from the departure gate." The Defendant virtually ignores this point, but does point out that Plaintiff was injured in an area controlled by the Defendant. This fact is counterbalanced, however, by the other two factors.

Second, control. The more a passenger is acting at the direction of an airline in boarding an airplane, the more the passenger may be said to be in the course of embarking.³⁸⁴ Here, the Plaintiff was acting entirely at her own direction. She was free to leave and re-enter the Lounge at any time and there was nothing in the Lounge that the airline considered a prerequisite to boarding. While the Defendant controlled whether or not a given passenger could enter the Lounge, that fact has no bearing on the Plaintiff's boarding her flight. Had she so desired, the Plaintiff need never have entered the Lounge. Even if the Defendant had directed her to stay in the Lounge, it is unlikely that Plaintiff could be said to be in the Defendant's control, since she had not been segregated from other passengers on other flights or airlines.³⁸⁵

³⁸⁴ See, e.g., Jefferies v. Trans World Airlines, Inc., No. 85-C-9899, 1987 WL 8168 at *4, 1987 U.S. Dist. LEXIS 2053 at *11 (finding that the plaintiff was in the course of embarking when she was "in the process of completing acts required of her by the defendant."); see also Sweis v. Trans World Airlines, Inc., 681 F.Supp. 501, 505 (N.D.Ill.1988) (stating that the passengers' standing in line at the direction of the Defendant's employee was not necessarily within the Defendant's control).

³⁸⁵ See Sweis, 681 F.Supp. at 505.

Third, activity. The more a passenger's actions relate to the purpose of boarding, the more likely the passenger may be said to be in the course of embarking.³⁸⁶ Plaintiff was relaxing when she was injured. Her purpose was to get some reading material, not board any plane. While Defendant correctly points out that another of her purposes was that of waiting for her flight, it is the opinion of the Court that this notion of "activity" is too broad to assist in the current inquiry. Otherwise, any passenger waiting for a plane might be said to be in the course of embarking. As any air traveler is well aware, waiting for a plane and starting to get on it are two different things.

Extending this inquiry to other factors does not assist the Defendant. In Sweis,³⁸⁷ Judge Shadur read *Day* to include an "imminence" factor, that is, any inquiry into how soon the plane was to be boarded. Here, boarding was not imminent when the Plaintiff was injured. At best, Plaintiff was injured one and a half hours before her flight was to leave, and a half of an hour before the flight even was to be called for boarding. At worst, the flight was a full two hours from departure and a full hour

³⁸⁶ See, e.g., *Jefferies v. Trans World Airlines, Inc.*, No. 85-C-9899, 1987 WL 8168 at *4, 1987 U.S. Dist. LEXIS 2053 at *11. (finding that the plaintiff was in the course of embarking when her actions "were solely related to the purpose of boarding.")

³⁸⁷ See supra note 378.

from boarding. Under either view, boarding was not "imminent".³⁸⁸

Plaintiff was injured in a Lounge maintained and operated by the Defendant, but used for passengers on multiple of the Defendants' flights and by passengers on other airlines. She was injured not less than one and one half hour before her flight was to leave and a half hour before it was to board. She was not doing anything at the Defendant's direction or for the purpose of boarding. And, she was on a level of the airport that differed from the gate level at the time she was injured. In these circumstances, the Court must conclude that she was not engaged in "any of the operations of embarking."

In an analogous case, *Buonocore*,³⁸⁹ the Second Circuit held that Article 17 did not govern an injury to a passenger who had only checked in at a ticket counter and was injured in a public area. There, as here, the plaintiff was unrestricted in his movement. The fact that Plaintiff here was injured in a location maintained by the Defendant is not dispositive. In *Sweis*,³⁹⁰ the plaintiffs were under more control of the airline than was

³⁸⁸ Compare *Sweis v. Trans World Airlines, Inc.*, 681 F.Supp. at 505 (stating that boarding was not "imminent" when departure was scheduled for two hours after the plaintiff's injury) with *Day*, 528 F.2d at 32-34 (indicating that when passengers were injured while in line at the gate of departure, boarding was imminent).

³⁸⁹ *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir.1990).

³⁹⁰ See supra note 378.

Plaintiff here, yet the Court held that the Convention did not apply. Other authorities also support this conclusion.³⁹¹

The two cases most favoring Defendants, *Day*³⁹² and *Jefferies*,³⁹³ are distinguishable. In both cases, the Court found that Article 17 applied to a passenger's claim for damages. In *Day*, passengers were killed and injured when terrorists attacked them while they stood in line at a departure gate, waiting to be searched before entering their airplane. At the time of the attack, the passengers had surrendered their tickets, passed through passport control, and entered the areas reserved for departures on international flights, just like Plaintiff here. In addition, however, they were assembled at the departure gate "virtually ready to proceed to the aircraft" and they were required to stand in line at the airline's directions, and boarding was imminent. Plaintiff here was subject to none of these last conditions.

³⁹¹ See *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.1977) (holding that Article 17 did not govern passenger injured in public area not under the "control" of the air line, despite fact that passenger was on way to connecting flight), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977); *Kantonides v. KLM Royal Dutch Airlines*, 802 F.Supp. 1203 (D.N.J.1992) (holding that passengers were not "in the course of the operations of embarking" when they were injured on a moving walkway when en route to connecting flight; passengers had not yet been segregated); *Rolnick v. El Al Israel Airlines, Ltd.*, 551 F.Supp. 261 (E.D.N.Y.1982) (holding that Article 17 did not govern passenger injured on elevator in public area while proceeding to his gate); *Upton v. Iran Nat'l Airlines, Corp.*, 450 F.Supp. 176 (S.D.N.Y.1978) (holding that Article 17 did not govern passenger injured under the collapse of a roof after being directed to wait in a public area by the defendant's personnel because the passengers were free to move about the airport), *aff'd*, *Upton v. Iran Nat'l Airlines Corp.*, 603 F.2d 215 (2d Cir.1979).

³⁹² *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir.1975), *cert. denied*, 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed.2d 172 (1976).

³⁹³ *Jefferies v. Trans World Airlines, Inc.*, No. 85-C-9899, 1987 WL 8168, 1987 U.S. Dist. LEXIS 2053 (N.D.Ill. March 13, 1987).

Similarly, in *Jefferies*, the plaintiff was injured while completing acts required by the airline, was twelve feet from her departure gate room, and her actions were "solely related to the purpose of boarding." None of these conditions are similar to those of the plaintiff here.

For the foregoing reasons, the Court holds, as a matter of law, that Plaintiff was not "in the course of any of the operations of embarking" when she was injured.

*Buonocore v Trans World Airlines, Inc.*³⁹⁴

Appellant parents filed an action against appellee airline, arguing that appellee was liable for the death of their son due to a terrorist attack at a Rome airport, pursuant to Article 17 of the Warsaw Convention. The language of Article 17, however, is not so clear. Reasonable people may differ as to whether the focus should be on "embarkation", so that only the physical act of enplaning is covered. Alternatively, a focus on "any operations" can be broad enough to cover almost any transaction between a passenger and an airline relating to the passenger's eventual walk onto the airplane. Reference to the treaty's history therefore is appropriate.³⁹⁵

³⁹⁴ 900 F.2d 8 (1990, CA2 NY).

³⁹⁵ See Choctaw Nation v. United States, 318 U.S. 423, 431, 63 S.Ct. 672, 677, 87 L.Ed. 877

The court held that consistent with a flexible approach, such as *Day* case, several factors should be assessed to determine whether a passenger was "in the course of any of the operations of embarking". The factors to be considered are: (1) the activity of the passengers at the time of the accident; (2) the restrictions, if any, on their movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passengers to the gate.

The *Day* test has come under some criticism over the years on the ground that it construed Article 17 too broadly in favor of liability.³⁹⁶ Aside from the rule that one panel of the Court is not free to overrule the holding of a previous one,³⁹⁷ the court hold that the *Day* analysis is still the correct one. A side-by-side comparison of the facts in *Day* with the facts in the instant case leads the court to believe that a different outcome is warranted.

The first factor enunciated in *Day* is the activity of the passengers at the time of the accident. The *Day* passengers were actively engaged in preparations to board the plane. By contrast, Buonocore here had only checked in at the ticket counter and

(1943).

³⁹⁶ *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9 Cir.) (Wallace, J., concurring), *cert. denied*, 431 U.S. 97497 S.Ct. 2939, 53 L.Ed.2d 1072 (1977); *Martinez Hernandez v. Air France*, 545 F.2d 279, 283-84 (1 Cir.1976), *cert. denied*, 430 U.S. 95097 S.Ct. 1592, 51 L.Ed.2d 800 (1977); *Sweis v. Trans World Airlines, Inc.*, 681 F.Supp. 501, 504 (N.D.Ill.1988).

³⁹⁷ See e.g., *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 788 (2 Cir.1980.), *aff'd*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).

was in the public area near a snack counter. The second factor is the restrictions on the passengers' movement. The *Day* passengers had been herded in line and risked missing the flight if they strayed. Buonocore had ample time to roam freely about the terminal before his flight was called. The third factor is the imminence of actual boarding. The *Day* passengers were within minutes of boarding. Buonocore's flight was to depart almost two hours later. The fourth factor is the proximity of passengers to the gate. The *Day* passengers were at the gate. Buonocore was nowhere near the gate.

Appellants here place great emphasis on the fact that the *Day* passengers, like Buonocore, had not yet gone through security inspection, although they acknowledge that, unlike Buonocore, the *Day* passengers had gone through passport and immigration control. The disparity in physical layout between the Rome and Athens airports explains why this similarity is relatively unimportant. At the time of the *Day* terrorist attack, passengers in Athens could not avail themselves of security inspection until immediately before they boarded the plane. They had no choice but to remain exposed to the risks associated with an area open to the public. By contrast, the Rome airport has the configuration more familiar to the

contemporary traveler. That is, passengers may use the services (restaurants, newsstands, and the like) in the airport's public areas, and wait until the last minute to go through the security checkpoint (i.e., when the passengers walk through the metal detector and submit their carry-on bags for x-ray screening). Alternatively, if they choose to undergo security inspection earlier, they can find the same services in the "secured" or "sterile" area. Since passengers are free to exercise that option, it would not be consistent with Article 17 to hold airlines liable to those passengers who elect to remain in the area open to the general public. If the court was to adopt appellants' claim, for practical purposes the court would be imposing Article 17 liability on airlines for *all* accidents that occur in airport terminals. The drafters of Article 17 specifically rejected such liability.

Appellants and TWA do not agree whether TWA instructed Buonocore to arrive at least two hours prior to departure. On appeal from summary judgment in favor of TWA, the court assumes all inferences favorable to appellants, including the assumption that the airline did so instruct Buonocore. Nevertheless, the analysis of *Day* above leads the court to hold

that this one factor in favor of Article 17 liability is insufficient by itself to tip the balance in favor of appellants.

“This court has applied the *Day* test once before.³⁹⁸ In *Upton*, the passengers had checked in and were waiting for their delayed flight in the airport's public area when the roof collapsed, killing several. The case was similar to the instant one in all material respects other than the cause of the injuries. The district court, applying *Day*, ruled for the airline, due primarily to the fact that the passengers were in the airport's public area and not under any immediate supervision by the airline.³⁹⁹ We affirmed without opinion.

Appellants contend that the distinction between a terrorist attack and a roof collapse is significant for Article 17 liability. They fail to point to any basis for such distinction in the treaty's text or history. Instead they merely assert that terrorism is a more serious danger in modern air travel. While they may be correct, that strikes the court as having no apparent relevance to the issue of the construction of a treaty.

The court aware, as was the district court, of the well-reasoned opinion in *Sweis*⁴⁰⁰, *infra*, which involved an action for damages arising from the same terrorist attack as in the instant case. *Sweis* criticized the *Day* test, but applied it anyway. It held in favor of TWA on a motion for summary judgment. We find the analysis in *Sweis*, while not binding, to be persuasive.”

Appellants attempt to distinguish *Sweis* on the ground that Buonocore had received his boarding pass and baggage claim check, while the *Sweis* passengers were in line waiting for theirs. To the extent that this distinction is relevant, it cuts both ways. The *Sweis* passengers were at an earlier stage of the check-in process than was Buonocore, but they were under greater restriction of movement by TWA than was Buonocore.

For the reasons above, the court held that Buonocore has not in “any operation of embarking”.

³⁹⁸ See *Upton v. Iran Nat'l Airlines Corp.*, 450 F.Supp. 176 (S.D.N.Y.1978), *aff'd mem.*, 603 F.2d 215 (2 Cir.1979).

³⁹⁹ See *id* at 178.

⁴⁰⁰ *Sweis v. Trans World Airlines, Inc.*, 681 F.Supp. 501 (N.D.Ill.1988).

*Sweis v Trans World Airlines, Inc.*⁴⁰¹

Terrorists attacked the airline's terminal at an Italian airport at around 9:10 a.m. The travelers were injured in that attack, and filed suit against the airline. The only issue in this case is: Did the accident that caused the injuries take place "in the course of any of the operations of embarking"?

Sweises (the passengers) say because they were checking their baggage and obtaining boarding passes at the time of the attack, they were engaged in one of the operations of embarking. That does not overly strain the word "embark" taken alone--two of its accepted meanings are "to make a start" and "to engage, enlist or invest in an enterprise"⁴⁰². But that certainly cannot be the meaning of the word in the context of a treaty fixing air carriers' liability to their passengers. After all, Sweises "embarked" in that same sense when they started for the airport. Certainly the Convention did not contemplate carrier liability that far afield. Moreover, the term "embark" is paired with "disembark," a word of narrow meaning: It is defined only as "to go ashore out of a ship" and "to get out of any vehicle".⁴⁰³ Normal reading would treat the terms as a matching pair, so that

⁴⁰¹ See id.

⁴⁰² See Webster's Third New International Dictionary at 739 (1976).

⁴⁰³ See id at 648.

the correspondingly limited meaning of "embark" would also apply.

By examining the famous *Day* case, which emphasizes four factors: activity, control, imminence, and location. TWA says *Day* was wrongly decided and mounts a frontal attack on its doctrine. TWA reads the legislative history and contemporaneous understanding of Article 17 as applying strict liability only when passengers are actually boarding or "deplaning" the aircraft (and perhaps when they are crossing from aircraft to terminal). TWA's argument has plausibility and, while no United States court has held Article 17 is that limited, several judges and commentators have criticized *Day's* interpretation of the legislative history. However, the court held that to decide this case it is unnecessary to choose between the *Day* approach and TWA's position. Neither alternative imposes liability on TWA under the Convention.

As for the first factor--the activity in which the passenger is engaged--in *Day* the passengers were standing in line to be searched before boarding, which the court characterized as a "condition of embarkation".⁴⁰⁴ Sweises were checking their baggage and obtaining boarding passes, also conditions of

⁴⁰⁴ 528 F.2d at 33.

embarkation. But compared to the *Day* plaintiffs, Sweises' activities were several steps further removed from actual boarding. They still had to go through passport control and a security check, make their way to the boarding gate and wait for their flight to be called. No case applying *Day* has found Article 17 to apply at a stage of the departure process so remote from physical embarkation.

As for the second factor--carrier restriction of the passengers' movements-- the *Day* plaintiffs were told by airline personnel to stand in line at the boarding gate. They had to obey if they wanted to go on their flight. Sweises stress that factor, noting that TWA required them to obtain boarding passes and chose the location of the ticket counter outside a sterile area. But Sweises were not in TWA's control in the same sense as the plaintiffs in *Day*. TWA employees had not told them to go someplace at a specific time as in *Day*. Rather, TWA required them to get a boarding pass at its counter at some time. It is also unclear that each of the Sweises had to go to the counter to get a pass. Sayel (one of the passengers) had gone elsewhere. Finally, unlike the situation in *Day*, TWA had not segregated its passengers from those on other flights (or even other airlines):

Michael (one of the passengers) was with the rest of the family and he was not a TWA passenger.

As for the third factor--the imminence of actual boarding--in *Day* the plaintiffs were a few moments from getting on the aircraft. Here departure was not scheduled until two hours after the attack. Boarding can hardly be said to have been imminent.

As for the final factor--physical proximity to the plane or the boarding gate--in *Day* the plaintiffs were a few feet from the boarding gate and 250 meters from the plane. Here Sweises were about 620 feet (by the most direct route) from the boarding gate, and their plane had not yet even landed in Rome.

Thus, on all four factors identified in *Day* this case presents no really persuasive reason to apply Article 17--each factor has a far more attenuated nexus than in *Day* to the primary "embarkation" concept of physical boarding of the aircraft. And there is another practical reason supporting the conclusion that Article 17 should not apply. When the Convention governs, its provisions supplant local law. There may be substantial variance between the agreed international rule and the local rule. It makes sense that there ought to be a point at which the Convention's

provisions attach at the beginning of the trip, and another where they end once the trip is over.

Yet to accept Sweises' position would have passengers "wandering" in and out of the Convention's coverage. Passengers might be seen as under a carrier's control or in sufficient proximity to the gate at any number of points after arriving at the airport, but not at others.⁴⁰⁵ For example, had Sweises left the check-in counter to go to a lunchroom elsewhere in the airport once they had obtained boarding passes, the analysis they urge would treat them as no longer being in an operation of boarding. Then when going through security they might again be boarding (depending on how the *Day* factors are assessed). Then when left to their own devices in the Transit Hall, they would again not be boarding and would be subject to local law. Obviously the variations could be multiplied.

It is always necessary to draw lines in shaping legal rules, even if it is not possible to say precisely where the lines should be drawn before a specific case presents itself. Yet it is generally preferable to draw fewer lines rather than more--if only for the sake of simplicity and certainty. The court stated that:

⁴⁰⁵ See, e.g., Rolnick v. El Al Israel Airlines, Ltd., 551 F.Supp. 261, 263-64 (E.D.N.Y.1982), where passengers were injured while walking to passport control, after having obtained boarding passes and checked their bags. Applying *Day*, the Court found Article 17 nonapplicable.

“We need not resolve whether the one line needed to give Article 17 meaning should be drawn at the terminal wall, as TWA suggests. Rather it is enough to say that the Convention has clearly drawn the line at some point much closer to actual boarding than where Sweises were.”

3-4. Particular circumstances considered: “disembarking”

3-4-1. The course of “disembarking” not established

Under the circumstances presented in each of the following cases, it was held that at the time of the incident that caused their death or personal injuries, the passengers involved in each case were *not* in the course of "disembarking," as that word is used in Article 17 of the Warsaw Convention, and that the provisions of the Convention were therefore inapplicable to death or personal injury actions arising out of the various incidents.

In the following cases from the First Circuit, the courts appeared to place more emphasis on the location factor, but did not foreclose the consideration of other criteria in determining the applicability of the terms "embarking" and "disembarking" to particular circumstances.

*MacDonald v Air Canada*⁴⁰⁶

⁴⁰⁶ (1971, CA1 Mass) 439 F2d 1402.

This is the most often cited case by other courts as advocating a strict location test. The passenger, a 74-year-old woman in apparent good health and who was accompanied, fell in the baggage area while awaiting her suitcase. The airline had leased rights to the baggage delivery and customs clearance area along with other carriers who used it simultaneously. The passenger had made no request for any assistance and gave no appearance of needing any. On appeal, the court held that there was no negligence on the part of the airline because the airline should not have known that the passenger needed volunteer attention. The court held further that the airline was not liable under the Warsaw Convention, holding that there was no basis for finding an accident, which was the first requirement under the Convention.

In addition, even if there was evidence of an accident, the Convention required that the accident occur in the course of disembarking operations. The court held that if these words were given their ordinary meaning, it would seem that the operation of disembarking had terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside of the terminal, even though he may remain in the

status of a passenger of the carrier while inside the building. Examination of the Convention's original purposes reinforces this view. The most important purpose of the Warsaw Conference was the protection of air carriers from the crushing consequences of a catastrophic accident, a protection thought necessary for the economic health of the then emerging industry. Partially in return for the imposition of recovery limits, and partially out of recognition of the difficulty of establishing the cause of an air transportation accident, the Conference also placed the burden on the carrier of disproving negligence when an accident occurred.⁴⁰⁷ Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft. Without determining where the exact line occurs, it had been crossed in the case at bar.

Martinez Hernandez v Air France⁴⁰⁸

It was held that passengers killed or injured by a terrorist attack in the baggage claim area of an airport in Tel Aviv, Israel, were not in the course of disembarking insofar as that word is

⁴⁰⁷ II Conference International De Droit Prive Aerien, 4-12 Octobre 1929, at 135-36 (1930); Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934).

⁴⁰⁸ (1976, CA1 Puerto Rico) 545 F2d 279, cert den 430 US 950, 51 L Ed 2d 800, 97 S Ct 1592.

used in Article 17 of the Warsaw Convention. The facts indicated that on arrival at the airport, the plane came to a halt about 1/3 to 1/2 mile from the terminal building, the passengers then descending movable stairs to the ground from where they walked or rode a bus to the terminal. Once at the terminal, they presented their passports for inspection by Israeli immigration officials and then passed into the main baggage area of the terminal. It was while the passengers were awaiting the arrival of the baggage that three terrorists removed their luggage from the conveyor belt, produced submachine guns and hand grenades, and opened fire upon persons in the baggage area.

In rejecting the passengers' claim that the case cited by the District Court as controlling precedent⁴⁰⁹ should be re-examined in light of recent decisions involving the applicability of Article 17 to injuries sustained in a terrorist attack on departing passengers,⁴¹⁰ the court stated that it did not view its holding in the precedential decision as necessarily foreclosing the adoption of the tripartite test used to determine the applicability of Article 17 in the other terrorist attack cases, and further expressed the view that the nature of a plaintiff's

⁴⁰⁹ The case cited was MacDonald v Air Canada, supra.

⁴¹⁰ The decisions specifically referred to were Day v Trans World Airlines, Inc. (1975, CA2 NY) 528 F2d 31, 36 ALR Fed 477, cert den 429 US 890, 50 L Ed 172, 97 S Ct 246, reh den 429 US 1124, 51 L Ed 574, 97 S Ct 1162; and Evangelinos v Trans World Airlines, Inc. (1977, CA3 Pa) 550 F2d 152, both discussed supra.

activity when injured, its location, and the extent to which the airline was exercising control over the plaintiff at the time of the injury are certainly relevant considerations in determining the applicability of the Article.

Applying the tripartite test to the facts of the instant case, the court noted that at the time of the attack all that remained to be done before the passengers left the airport was to pick up their baggage, and that passengers who either carry no luggage or carry their luggage on the plane, would have no occasion to retrieve their baggage, it seeming therefore, that such activity could not constitute a necessary step in becoming separated from a plane. The court felt that the passengers' location also militated against Article 17 coverage since the attack occurred inside the terminal building located approximately 1/3 to 1/2 mile from the point where the aircraft was parked. The control factor also weighed against holding the carrier liable, stated the court, since in sharp contrast to the factual situations in the other terrorist attack cases cited by the passengers, they were not here segregated into a group at the direction of airline employees, there being no indication that airline personnel were dictating to the passengers how they were to go about retrieving their baggage or leaving the terminal, and that, rather, the passengers

appeared to have been "free agents roaming at will through the terminal."

The court also rejected the plaintiffs' suggestion that the operation of disembarking continues until the passengers retrieve their baggage, such suggestion being based on Article 18, in which a carrier's liability for damage to baggage extends until the baggage is retrieved, the court noting that the history of the Warsaw Convention indicates that the questions of baggage liability and personal injury liability were intended to be absolutely distinct. Referring to the intentions of the framers of the Convention, the court concluded that while the drafting history did not determine the precise meaning of Article 17, it was quite clear that the delegates understood embarkation and disembarkation as essentially the physical activity of entering or exiting from an aircraft, rather than as a broader notion of initiating or ending a trip.

The court added that a fundamental premise of the argument for expanding carrier liability in this case is that the risk of death or injury in a terrorist attack is appropriately regarded as a characteristic risk of air travel, but the court felt that this could not be said of the sort of senseless act of violence involved in this case, since the risk of violence at the hand of

zealots could occur in any public place, whether it be a bank, courthouse, university campus, Olympic village, or airport. Unlike the risk of hijacking, stated the court, where the aircraft and the fact of air travel are prerequisites to the crime, the risk of a random attack such as that which gave rise to this litigation is not a risk characteristic of travel by aircraft, but rather a risk of living in today's world. Finally, the court observed that to expand carrier liability under Article 17 to include all terrorist attacks at airports would produce anomalous results, since, under Article 17, only passengers could have a right to recover, and that any nonpassengers injured in the same attack would not have the benefit of the absolute liability provisions of the Convention.⁴¹¹

*Turturro v. Continental Airlines.*⁴¹²

Airline passenger who requested to deplane pre-departure due to anxiety had fully disembarked within meaning of Warsaw

⁴¹¹ Affirmed by the Martinez Hernandez Case was Re Tel Aviv (1975, DC Puerto Rico) 405 F Supp 154, in which the court expressed the view that whatever uncertainties there may be as to the precise line drawn by Article 17, the legislative history of the Convention indicated that Article 17 was not intended to be applicable to accidents occurring after the passenger "has reached a safe point inside of the terminal," and "which are far removed from the operation of the aircraft."

The court in Maugnie v Compagnie Nationale Air France (1977, CA9 Cal) 549 F2d 1256, 39 ALR Fed 440, cert den 431 US 974, 53 L Ed 1072, 97 S Ct 2939, supra, disapproved of the position taken by the court in Re Tel Aviv, as expressing a point of view too closely related to a strict location test, the Maugnie Court preferring the tripartite test initially set out in the Day and Evangelinos Cases, both supra.

⁴¹² 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

Convention at time that airline employees allegedly caused, via conversations with police, passenger's false imprisonment in mental hospital; conversations occurred in terminal after passenger was out of airline's control, and thus airline could not be liable under Convention's accident provisions for employees' statements.

*Knoll v Trans World Airlines, Inc.*⁴¹³

Passenger who, after leaving airplane, walked approximated 100 yards to first moving sidewalk and then traveled on two more moving sidewalks approximately 100 yards each and who, as she approached immigration area, slipped and fell on some liquid sustaining injuries including fractured elbow, did not fall while disembarking airplane for purposes of Article 17 of Warsaw Convention. Airline did not have exclusive use of area where accident occurred as plaintiff was in concourse of airport which was not near enough to airline gate from which she had walked to warrant finding of liability and she was not under control of airline agents at that point but involved in activity of looking for immigration; plaintiff's actions in going through immigration and customs were not

⁴¹³ (1985, DC Colo) 610 F Supp 844.

conditions imposed by airline for her disembarking but by host country in which plaintiff and her husband were traveling.

*Klein v KLM Royal Dutch Airlines*⁴¹⁴

An action arising out of an infant's injuries caused by a conveyor belt in an airport, the court held in a memorandum opinion that the plaintiffs, having gotten off the aircraft and having arrived safely within the terminal, had disembarked within the meaning of Article 17 of the Warsaw Convention.

3-4-2. The course of "disembarking" established

Under the circumstances presented in each of the following cases, it was held that at the time of the incident that caused their death or personal injuries, the passengers involved in each case were in the course of "disembarking," as that word is used in Article 17 of the Warsaw Convention, and that the provisions of the Convention were therefore applicable to death or personal injury actions arising out of the various incidents.

*Ricotta v Iberia Lineas Aereas de Espana*⁴¹⁵

Ricotta (the passenger) had flown on a flight operated by

⁴¹⁴ (1974) 46 App Div 2d 679, 360 NYS2d 60.

⁴¹⁵ (1979, ED NY) 482 F Supp 497.

the airline, when the flight arrived, the passenger boarded a bus that was to drive the passenger, and the others from the flight, to the airport terminal, the passenger fell when the bus moved, and the passenger sustained personal injuries. The passenger filed an action against the airline, but the complaint was filed more than two years after the accident. The only issue here is whether the accident occurred while plaintiff was "disembarking" within the meaning of Article 17 of the Convention. If plaintiff was injured during the course of operations of disembarking, then the rights of the parties are governed by the provisions of the Warsaw Convention. The two year period of limitations contained in Article 27 of the Convention would therefore be applicable to the damage action and the failure to commence suit within the two year period perforce would extinguish plaintiff's remedy.

It is well established that on a motion for summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.⁴¹⁶ Yet an action to determine the precise meaning of the terms of the Warsaw Convention is to be treated by the court as a question of law and not as a triable

⁴¹⁶ United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Friedman v. Meyers, 482 F.2d 435 (2d Cir. 1973).

issue of fact.⁴¹⁷ The scope of the Convention is a matter of federal law and federal treaty interpretation.⁴¹⁸

Here, plaintiff had descended from the plane, but she had neither reached a safe point inside the terminal nor left the control of Iberia personnel. The area where the incident occurred was not a public portion of the airport and only aircraft passengers, airline staff and airport ground personnel were permitted in the area. Further, the accident occurred immediately after plaintiff had descended the steps of the aircraft and prior to the time that she entered any common passenger area. Plaintiff had not proceeded through Spanish immigration or customs and had not located her baggage. She was not roaming at will but was within the control of Iberia personnel who were directing passengers to board airport buses owned and operated by Iberia. The buses were located near the plane and the terminal was some distance from the aircraft. Significantly, on the date of the accident, the Iberia bus driver completed an Iberia accident report in accordance with Iberia company policy. Under such factual circumstances, the court finds that plaintiff was in the

⁴¹⁷ Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), Cert. denied, 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968); Evangelinos v. Trans World Airlines, Inc., 396 F.Supp. 95 (W.D.Pa.1975), Rev'd on other grounds, 550 F.2d 152 (3d Cir. 1977). See generally Strong v. United States, 518 F.2d 556, 563, 207 Ct.Cl. 254 (1975); Citizen Band of Potawatomi Indians v. United States, 391 F.2d 614, 618, 179 Ct.Cl. 473 (1967), Cert. denied 389 U.S. 1046, 88 S.Ct. 771, 19 L.Ed.2d 839 (1968).

⁴¹⁸ Husserl v. Swiss Air Transport Co., Ltd., 388 F.Supp. 1238 (S.D.N.Y.1975).

course of disembarking as envisioned by Article 17.

The court's determination is further supported both by the French text and the purpose of the Convention. The binding meaning of the terms of the Convention is the French legal meaning.⁴¹⁹ The French word "operation" contained in the official version of the Convention connotes "a process of many acts" combined to achieve a result.⁴²⁰ Finally, the minutes of the Convention proceedings undermine any contention that the delegates wished to implement a narrow construction or a rigid rule in determining accident coverage pursuant to Article 17.⁴²¹

Accordingly, the Warsaw Convention is applicable to the accident in question. The claim is therefore barred by the two year time period of Article 29(1) and summary judgment is granted on behalf of the defendant.

*People ex rel. Compagnie Nationale Air France v Giliberto.*⁴²²

Removal of passengers from airplane by hijackers at point which was neither intended destination nor intended intermediate stop cannot realistically be looked upon as

⁴¹⁹ See *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), Cert. denied, 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968).

⁴²⁰ See *Nouveau Petit Larousse* (1950).

⁴²¹ See Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv.L.Rev.* 497 (1967).

⁴²² 74 Ill 2d 90, 23 Ill Dec 106, 383 NE2d 977, cert den 441 US 932, 60 L Ed 2d 660, 99 S Ct 2052.

"disembarkation" which would terminate airline's liability under article 17 of Warsaw Convention.

Lyons v American Trans Air, Inc.⁴²³

When Lyons fell, she had just deplaned and was walking down a corridor under the control and supervision of ATA and Sceptre agents or employees. Lyons was not free to move about the terminal, nor was she in a common public area. Rather, she was being escorted by airline personnel to customs, a necessary step in the disembarking process. It is therefore clear that, since the injury occurred "in the course of...the operations of...disembarking" from an international flight, the Warsaw Convention governs the claims.

3-5. Location is the crucial factor, if not the only factor, in English approach

Probably due to the different attitude to process a lawsuit in court, English courts have seldom occasions to consider the meaning of "embarking" or "disembarking" in the Article 17 of the Warsaw Convention. Until the present day, there is no

⁴²³ 231 A.D. 2d 689, 647 N.Y. S.2d 845 (2d Dep't 1996).

authority on “embarking”, nevertheless, there is a landmark case⁴²⁴ on the issue of “disembarking”, from which, the English Court of Appeal express the opinion that location is the crucial factor, if not the only factor to determine the extent of from embarking to disembarking.

*Adatia v Air Canada*⁴²⁵. (The leading English case)

The plaintiff arrived at Heathrow Airport from Toronto and suffered injury on the moving walkway while proceeding from the aircraft to the immigration and customs hall. More than two years after the accident, she issued a writ against Air Canada alleging negligence, which raised fairly and squarely the question whether, at the time of the accident, she had been “in the course of disembarkation,” in which case the Warsaw Convention applied and with it the two-year time-bar of Article 29. The English Court of Appeal affirmed the judgment of the County Court that the plaintiff had not suffered the injury in the course of disembarkation and that the Warsaw Convention, with two-year time-bar, did not apply.

The Warsaw Convention is given the force of law in the UK by section 1 of the Carriage by Air Act 1961, as there is no

⁴²⁴ *Adatia v Air Canada*, May 21, 1992. Lloyds Aviation Law, vol. 11, No. 13, July 1, 1992.

⁴²⁵ See Id.

dispute in this case that the defendants are vicariously liable for such negligent acts, the only question is whether the two year period provided for by the Convention applied, so as to render the plaintiff's claim out of time. This depended on whether the claim fell within Article 17.

As the judge said, the point to be resolved was whether her injuries, which sustained on the travelator, were caused "in the course of any of the operations of . . . disembarking". There is no English authority which specifically deals with the meaning of those words. In the absence of such authority, the judge concluded: "One has to construe them in their ordinary English meaning and disembarking, either from a ship or aircraft, in my judgment means leaving the ship or aircraft and actually stepping on to dry land or that part of the non-movable part of the airfield or aerodrome or terminal." The judge derived support for this conclusion from an American authority, MacDonald v Air Canada.⁴²⁶

The equivalent phrase of Article 17 in the French text⁴²⁷ reads: "*Au cours de toutes operations d'embarquement et de debarquement*". It is thus plain that the draftsman contemplated that the process of disembarking, as well as that of embarking,

⁴²⁶ MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1970).

⁴²⁷ Which must prevail if there is any inconsistency with the English text -- see section 1(2) of the Carriage by Air Act 1961.

may in some circumstances be capable of including at least some activities beyond the mere actual ascent or descent of the steps of an aircraft or use of an equivalent device. Problems, however, may arise in determining what other location should be treated as the point where the process of embarkation begins or the process of disembarking ends.

While there appears to be no relevant English authority, the problem has given rise to extensive case law in other jurisdictions. The object of the Convention as thereby described is "the unification of certain rules relating to international carriage by air". So far as possible, therefore, uniformity of interpretation must be desirable and it is common ground that the courts of the UK, in interpreting and applying Article 17, should have due regard to the case law in other jurisdictions.⁴²⁸

Then the court examined a list of US cases and one decision of the Brussels Court of Appeal relating to the construction and application of Article 17. The English Court of Appeal agreed with MacDonal Test, i.e. the location factor is decisive. In MacDonald v Air Canada⁴²⁹, the US court held that if the words in Article 17 were given their ordinary meaning, it would seem that the operation of disembarking had terminated

⁴²⁸ This case law is helpfully analysed in paragraphs 155, 155.1 and 155.2. of Shawcross & Beaumont on Air Law (4th Edition).

⁴²⁹ MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1970).

by the time the passenger reached a safe point inside of the terminal. A similar test was applied by the United States Court of Appeals in *Klein v KLM Royal Dutch Airline*⁴³⁰, in holding that the phrase "operations of disembarking" did not cover injuries sustained where a passenger was hurt by a conveyor belt in a baggage pickup area. In the present case, the judge concluded that the position was the same at English law. He said: "...you have disembarked when you have left the aircraft and you are in and within the terminal."

A number of subsequent United States' authorities suggest that the mere fact that a passenger is at a particular time within the limits of the air terminal does not necessarily preclude him from being in the course of any of the operations of embarking or disembarking within the meaning of Article 17.⁴³¹ However, Sir Christopher Slade held that assuming for the moment that the judge should have applied a test based on activity, location and control, he first consider location. As he said: "We have a plan which shows this long corridor with two passenger conveyors or travelators. Regrettably nobody thought to give us a scale, but I am satisfied that that was quite long and it was at the end of this travelator quite a fair distance from where the

⁴³⁰ 360 NYS 2d 60, 1973.

⁴³¹ See section 3-2. *supra*.

aeroplane had docked that the accident occurred." This fair distance was plainly one not of a mere few yards, but of a substantial number of yards.

As to the contention that the plaintiff at the time of her accident was under the control of Air Canada's employee, after compared with two US cases,⁴³² the judge made a finding of fact as follows:

"Whatever that means I am not exactly clear but I am satisfied that after she left the plane she was a free agent and not under the control of anyone at all. The passengers just follow each other like sheep and no doubt the stewardess had the de facto control of the plaintiff's mother because she was wheeling her but that lady had no control whatsoever either factually or legally or in any other circumstance of the plaintiff."

If in any given case an activity is a condition imposed by an airline itself (rather than by the country of departure or host country) for permitting embarkation or disembarkation, such activity might well be regarded as part of the process of embarkation or disembarkation as the case may be.⁴³³ This is

⁴³² In Curran v Air Lingus (17 Avi Cas 17560), the United States' District Court (New York) found that merely assisting passengers off the plane and towards Customs, Air Lingus did not control the plaintiff's movements. The court went on to state that "It is not clear what tests should be used to determine whether plaintiff was in the operation of disembarking. Some courts have looked solely to the victim's location at the time of the accident . . . Other courts have looked to several factors, including the victim's location at the time of the accident, what he was doing when he was injured and whether he was acting under the control and at the direction of the airline . . . I need not decide which test to apply because I conclude that defendant would not be liable to plaintiff under either test."

In Rabinowitz v Scandinavian Airlines 741 F Supp 441 (SDNY 1990), the same court observed: "Here, too, the plaintiff's allegation that an SAS employee directed them toward the moving sidewalk does not give rise to any level of control by SAS. Where the Curran court deemed there to be no airline control in formal customary practice of directing and assisting passengers upon arrival, plaintiffs in this case were plainly not under SAS control. Plaintiffs asked someone whom they believed to be an SAS employee in which direction to head for connection with their departing flight and that employee pointed the way. Such a responsive instruction does not satisfy the control factor set forth in Day."

⁴³³ Compare Knoll v Trans World Airlines Inc 610 F Supp 844 (DC Colo 1985) the United States District Court for the District of Colorado held that a passenger who had sustained injuries when

the potential possible relevance of the element of control in the context of Article 17. In the present case, however, there is no evidence that the defendants had any right whatever to instruct the plaintiff to use the travelator on which the accident occurred, and the judge's findings of fact as to control were plainly right. Her activity at the relevant time was merely that of proceeding towards immigration in accordance with UK immigration requirements, and she was doing so as a free agent.

As is pointed out in *Shawcross*⁴³⁴ modern conditions governing embarkation and disembarkation at different international airports may well differ widely. While not minimising the importance of foreign decisions in this context, the courts should be cautious before placing a gloss on the words of Article 17 and that in any case such as the present, the ultimate question is whether, on the wording of that Article, the passenger's movements through airport procedures (including his physical location) indicates that he was at the relevant time engaged upon the operation of embarking upon or disembarking from the particular flight in question.

Although be viewed as English courts applied location

she slipped when approaching the immigration area at Heathrow Airport did not fall while disembarking the aeroplane, saying: "The courts have consistently refused to extend coverage of the Warsaw Convention to injuries incurred within the terminal, except in those cases in which plaintiffs were clearly under direction of the airlines."

⁴³⁴ See supra note 61, para 155.

criterion solely, the English Court of Appeal however concluded: "...the judge in the present case was right to conclude that the plaintiff at the time of her accident was not still engaged upon the operation of disembarkation. Of the two tests which have been suggested to us, I find it unnecessary to express a view as to whether the MacDonald test or the tripartite Day is to be preferred. Indeed, I am not sure that they are inconsistent with one another. I merely say that on an application of the tripartite test, which is more favourable to the defendants, or indeed any other test, I would uphold the judge's finding that the plaintiff when she fell was not "in the course of any of the operations of disembarking" within the meaning of the words of Article 17."

As a final comment to this section, although there is no authority on the issue of "embarking" in English case law, according to the criteria set force in the Adatia case, the author believes that the most likely point to start embarkation followed by the UK approach is when a passenger hand in the boarding pass, of course, this consideration under further observation of future English case law.

3-6. The civil law jurisdictions' approaches

Other than the US and UK common law approaches, no matter which test the courts adopted, locational or tripartite, in considering the interpretation and application of the Warsaw Convention Article 17, the civil law jurisdictions' courts adopted similar but different approaches. They frequently pay some regard to the question whether the relevant accident related to the activity of aviation, in another word, whether there is any aviation risk. They also attach considerable importance to the question whether at the relevant time the passenger was under the control of the carrier. The following cases may serve as some examples.

*Mache v Cie Air France*⁴³⁵

In this case the French court held that the physical injuries received as a result of the passenger falling into a manhole when crossing the apron to customs did not take place in the course of disembarkation since there is no aviation risk.

*Air-Inter v. Sage et al.*⁴³⁶

A passenger slipped and fell in an airport entrance hall, while he was in front of the check-in counter before proceeding

⁴³⁵ 17 RFDA 353, 20 RFDA 228, (1966); 21 RFDA 343, (1967); 24 RFDA 311, (1970) Cour de Cassation.

⁴³⁶ Cour d'Appel de Lyon (France), February 10, 1976; RFDA 266.

to the departure lounge. The fall was caused by the passenger slipping over a pool of whisky split on the ground by a previous traveler. The French court held that the fall could not be blamed on the carrier, since the airport entrance hall is a public place and not subject to the carrier's control and management. Consequently, the preparatory stage of air transport could not be considered as having commenced.

*Consorts Zaoui v. Aeroport de Paris*⁴³⁷

The French Court of Appeal has, for good reason, rejected the request for compensation from an airline for injuries sustained by passengers who used the escalator situated in the airport entrance hall; it noted that the people applying for compensation were, at the time when the accident occurred, in airport buildings used by different airline companies and where the carrier's agents had not yet taken over responsibility for those persons.

*Blumenfeld v BEA*⁴³⁸

Unlike the French approach illustrated above, the German court adopted a rather extensive interpretation as to the Warsaw

⁴³⁷ Cour de Cassation (1re Ch. Civ.), May 18, 1976; [1976] RFDA 394.

⁴³⁸ (Federal Republic of Germany), March 11, 1961; [1962] ZLW 78.

Convention Article 17. In this case, an aircraft of the defendant airline had been unable to take off on schedule due to thick fog, so the passengers had to wait for some time. When the flight was finally called the plaintiff, who alone with other passengers hurried down the steps of the air terminal building in order to board the aircraft, slipped and fell; she boarded the aircraft with bruises on her leg and ankle. The plaintiff then claimed and received compensation for the accident, because the court ruled that when the airline company calls its passengers to board the aircraft it takes full charge of the passengers.

*Adler v Austrian Airlines*⁴³⁹

In this case, the Brussels Court of Appeal held that where the passenger who slipped on ice disembarking from a bus in order to embark on the aircraft was in the course of embarking.

3-7. “From embarking to disembarking” vis-à-vis “from entering to alighting”

It is a general understanding that insurance is closely associated with international air carriers’ risk management, air

⁴³⁹ [1986] 1 S & B A v R VII/191 (Brussels CA).

carrier's liability to passengers is one of them. As to the duration of form what time to what time a air carrier should liable, while the Warsaw Convention and the Montreal Convention Article 17 requires "from embarking to disembarking", the London Aircraft Insurance Policy (which is a world wide standard policy) section 3.1 and the other similar aviation insurance policies around the world provide:

"The Insurers will indemnify the Insured ... in respect of accidental bodily injury (fatal or otherwise) to passengers whilst *entering, on board, or alighting* from the Aircraft..."

Like the Warsaw Convention, the London Aircraft Insurance Policy did not draw the exactly line as to when the "entering" starts and when the "alighting" ends. And there is no case law to interpret "entering"; however, there is a case concern about the meaning of "alighting".

In the case of *Gustafson v National Insurance Underwriters*,⁴⁴⁰ the court held that the allegations in the petition of Nancy Bischofs (the injured person) allege she was in very close proximity to the airplane, and a minimum of time had elapsed from her being on the plane and the accident. Nancy Bischofs' allegations in her petition establish conclusively that she had taken no action to leave the proximity of the airplane, nor completed the acts normally performed by average person in

⁴⁴⁰ 517 S.W. 414, 1974 Tex. App.

getting away from an airplane.

Accordingly, the word of "alighting" means close to the aircraft, and "entering" may the same approach. So, there is a gap between "from embarking to disembarking" and "from entering to alighting", the Warsaw Convention's scope is broader than the London Aircraft Insurance Policy. This may result future conflicts as to who, the air carrier or the insurer, should pay the compensation to the injured passenger. Nevertheless, every day's practice shows no urgent necessity to solve this problem. Air carriers and insurers sympathize with status in quo as to insurers pay the compensation to the accidents which happened really close to the aircraft, at the mean time, for the accidents which happened not so close to the aircraft (but close enough for air carriers to liable) hit air carriers themselves.

CHAPTER FOUR

What Constitutes “BODILY INJURY” Under the Warsaw - Montreal System

4-1. Introduction

A passenger is required to satisfy three conditions to recover damages for any injury or death under the Warsaw - Montreal system:⁴⁴¹ (1) the passenger suffered an 'accident'; (2) The accident occurred aboard the international flight or in the course of embarking or disembarking the international flight; (3) The accident caused the passenger to suffer 'death or wounding . . . or any other bodily injury.' Having examined the first two conditions in previous chapters, this chapter concentrates on the third condition.

Although 'death' has its clear meaning, whether 'bodily injury' encompasses emotional distress under the Warsaw - Montreal liability regime becomes one of the heaviest debated issues within the field. Courts have attempted for years to interpret and solidify the meaning of ambiguous phrasing and terminology, and the debate has yet to be resolved satisfactorily.

Ever since the Warsaw Convention was opened for signature seventy-seven years ago, dissatisfaction has been so widespread that there have been numerous multilateral attempts to amend, supplement, and modify the convention's sometimes

⁴⁴¹ Warsaw Convention 1929, Art. 17. See also Montreal Convention 1999, Art. 17.

unreasonable provisions.⁴⁴² One of these areas of dissatisfaction deals with whether compensation for damages arising from emotional distress is available under the Warsaw Convention. A number of decisions, most notably Eastern Airlines, Inc. v. Floyd⁴⁴³, have indicated that there can be no recovery for purely mental injuries.⁴⁴⁴ In Floyd, for example, the Supreme Court not only rejected the view that there can be any recovery for purely mental injuries under the limited liability provisions of the Warsaw Convention, but also concluded that unless a passenger was made to "suffer death, physical injury, or physical manifestation of injury," an air carrier could not be held liable.⁴⁴⁵

However, while Floyd effectively served to rule out recovery for purely mental injuries, the court expressly declined to state its views concerning whether passengers could recover for mental injuries accompanied by physical manifestations of injury.⁴⁴⁶ This left the court in Carey v. United Airlines⁴⁴⁷ to

⁴⁴² Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497, 498-99 (1967).

⁴⁴³ Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

⁴⁴⁴ See Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108, 112 (3d Cir. 1998) (characterizing the plaintiff's injuries as "purely psychic injuries that do not qualify as bodily injuries under the Warsaw Convention"); Turturro v. Continental Airlines, 128 F. Supp. 2d 170, 178 (S.D.N.Y. 2001) (absent any "physical wounds, impacts, or deprivations, or any alteration in the structure of an internal organ, then any subsequent shortness of breath, sleeplessness, or inability to concentrate may safely be characterized as psychosomatic and is not compensable").

⁴⁴⁵ Floyd, 499 U.S. at 552.

⁴⁴⁶ See *Id.*

⁴⁴⁷ Carey v. United Airlines, 255 F.3d 1044, 1052 (9th Cir. 2001).

attempt to answer "the question of whether such physical manifestations satisfy the 'bodily injury' requirement" of the Warsaw Convention's Article 17. The Court of Appeals for the Ninth Circuit determined that physical manifestations of emotional distress do not satisfy the bodily injury requirement, and the Warsaw Convention, therefore, leaves the plaintiff without remedy.⁴⁴⁸

In reaching its conclusion, however, the Carey court failed to make any clear distinction between the plaintiff's physical manifestations of emotional distress and other cases wherein recovery was available to plaintiffs unable to demonstrate claims flowing from a physical injury, but were able, nevertheless, to satisfy the bodily injury requirement.⁴⁴⁹ Consequently, while the court's decision purports to resolve this issue, the debate continues.

On the issue left unanswered by the Supreme Court, apart from Carey case, several district courts have held that merely claiming that physical injuries led to psychological damages in the aftermath of an accident occurring in the course of international transportation is insufficient for recovery under the

⁴⁴⁸ Id, at 1053.

⁴⁴⁹ Id, at 1053-54.

Warsaw Convention.⁴⁵⁰ For example, the Alvarez court adopted a similar reasoning requiring that a passenger, who suffers psychological injuries accompanied by physical injuries, prove a strong causal nexus between mental and physical injuries. Other federal courts refuse to hold that psychological injuries that are coupled with physical injuries, but not caused by them, are not recoverable under the Warsaw Convention.⁴⁵¹ Instead, these courts hold that recovery for psychological injuries, even if unrelated to the physical trauma, is allowed as long as there are some physical injuries.⁴⁵²

The following sections of this chapter will analyze those reported cases in which courts have considered whether, and to what extent, recovery for psychological injury is available under the Warsaw Convention.

4-2. Article 17 and the 'bodily injury' requirement

Article 17 of the Warsaw Convention 1929 provides:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (The Montreal

⁴⁵⁰ See *Alvarez v. American Airlines*, (S.D.N.Y. Sept. 7, 1999).

⁴⁵¹ See, e.g. *In re Aircrash Disaster Near Roselawn, Indiana* on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997).

⁴⁵² See *id.*

Convention 1999 Art. 17 is substantially the same).

From its inception the 'bodily injury' requirement has proved contentious in its application as courts adjudicating claims under Article 17 have conservatively interpreted the phrase "bodily injury" as either pure physical injury or mental suffering accompanied by physical injury where the latter was a causative factor in bringing about the former.⁴⁵³

Most courts have applied this standard and have been unwilling to venture beyond the requirement that a passenger be made to "suffer death, physical injury, or physical manifestation of injury" before permitting recovery against an airline for bodily injury under the Warsaw Convention.⁴⁵⁴ Only recently have courts attempted to answer the question of whether mental injuries accompanied by physical manifestations of injury are within the purview of Article 17.⁴⁵⁵

Part of the difficulty arises from the tendency of courts to try to determine the intention of the drafters of the Warsaw Convention and the meaning of the French term 'lesion corporelle' (translated into English as "bodily injury") incorporated into the original treaty document.⁴⁵⁶ The Carey

⁴⁵³ Ruwantissa I.R. Abeyratne, *Mental Distress in Aviation Claims-- Emergent Trends*, 65 *J. Air L. & Com.* 225, 225 (2000).

⁴⁵⁴ *Floyd*, 499 U.S. at 552.

⁴⁵⁵ *Carey*, 255 F.3d at 1051-52.

⁴⁵⁶ Gregory C. Fisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle*, 25 *Tex. Int'l L.J.* 12 (1990).

court, for example, relied heavily on the conclusions drawn in Terrafranca v. Virgin Atlantic Airways, Ltd.,⁴⁵⁷ wherein the court agreed with the Floyd analysis that 'lesion corporelle' was correctly translated as 'bodily injury' and held that because the plaintiff could not demonstrate direct, concrete, bodily injury, it did not satisfy the conditions for liability under the Warsaw Convention.⁴⁵⁸

Despite the contention arising from the language of Article 17, the majority of proposed changes and amendments to the Warsaw Convention have dealt with the liability limitations of Articles 20 and 22.⁴⁵⁹ The limited debates addressing the language of Article 17 have not centered on the bodily injury requirement, but on the distinction between the application of the term "accident" as opposed to such alternate terms as "occurrence" or "event."⁴⁶⁰ Nevertheless, early drafts of the Montreal Convention's Article 17 would have expressly included liability for mental injury.⁴⁶¹ Later drafts even introduced the element of personal injury designed to

⁴⁵⁷ Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108 (3d Cir. 1998).

⁴⁵⁸ Carey, 255 F.3d at 1052. It should be noted that many of these conclusions were drawn, in turn, from Floyd.

⁴⁵⁹ See Warsaw Convention, *supra* note 1, arts. 20 and 22.

⁴⁶⁰ Tory A. Weigand, Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention, 16 Am. U. Int'l L. Rev. 891, 914-19 (2001).

⁴⁶¹ Blanca I. Rodriguez, Recent Developments in Aviation Liability Law, 66 J. Air L. & Com. 21, 36 (2000).

encompass both physical and mental injuries.⁴⁶² For example, the provision (then Article 16) of the first draft of the Montreal Convention corresponding to Article 17 of the Warsaw Convention read:

"The carrier is liable for damage sustained in case of death or bodily injury or mental injury of a passenger upon condition only that the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger."⁴⁶³

Other drafts of the convention even included the term "personal injury"; however, after further deliberations, the ICAO removed both "mental injury" and "personal injury" from the provision, choosing, instead, to leave the language virtually unchanged.

4-3. Recovery for pure emotional injury

Prior to the Supreme Court's decision in *Floyd*, courts were split as to whether a plaintiff could recover for pure psychic injuries. In one of the earlier cases, Rosman v. Trans World Airlines, Inc.,⁴⁶⁴ New York's highest court considered the claims of passengers involved in the hijacking of a flight from

⁴⁶² Ruwantissa I.R. Abeyratne, *Mental Distress in Aviation Claims-- Emergent Trends*, 65 J. Air L. & Com. 225, 225 (2000).

⁴⁶³ *Id.* at 226-27 (quoting Report of the Rapporteur on the Modernization and Consolidation of the Warsaw System, *Aviation Q.*, July 1997, at 286, 313) (emphasis added).

⁴⁶⁴ Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848 (N.Y. 1974).

Tel Aviv to New York. The claims were brought under Article 17 for emotional injury accompanied by physical injury. The plane was hijacked on September 6, 1970, and plaintiffs were held hostage for six days by guerillas armed with rifles and hand grenades.

Plaintiffs claimed that they suffered "severe psychic trauma" and that they were damaged "by the physical circumstances of their imprisonment aboard the aircraft."⁴⁶⁵ Additionally, plaintiffs alleged that they suffered physical injury as a result of the forced immobility, inadequate sanitary facilities, and scarcity of food and water. The alleged physical injuries included backache, swollen feet, boils, skin irritation, weight loss, dehydration, and sleep deprivation.⁴⁶⁶ The defendant airline argued that the liability scheme of the Warsaw Convention did not allow recovery because phisic injury, "with or without palpable physical manifestation," is not 'bodily injury' within the meaning of Article 17, and that 'the physical injuries claimed did not result from any impact and in any case are so slight as not to amount to compensable bodily injury.'⁴⁶⁷

The court began by examining the meaning of Article 17 in its original French and found that there was no dispute that the

⁴⁶⁵ Id, at 850.

⁴⁶⁶ Id.

⁴⁶⁷ Id, at 852.

words "mort, de blessure, ou de toutes autres lésion corporelle" were properly translated as "death or wounding or any other bodily injury."⁴⁶⁸ For purposes of the plaintiffs' claims, the meaning of "bodily injury" was at issue. The court acknowledged that the French legal usage of the term lésion corporelle should be considered, but declined to apply French law to determine the meaning of the term. The first step in the court's analysis was to determine whether "the treaty's use of the word 'bodily,' in its ordinary meaning, can fairly be said to include 'mental.'"⁴⁶⁹

The court found that the ordinary meaning of the term "bodily injury" connotes "palpable, conspicuous physical injury, and excludes mental injury with no observable 'bodily,' as distinguished from 'behavioral,' manifestations."⁴⁷⁰ Given the plain meaning of the term, the court concluded that "the compensable injuries must be 'bodily' but there may be an intermediate causal link which is the 'mental' between the cause - the 'accident' - and the effect - the bodily injury."⁴⁷¹ Once the causal link is established, the court reasoned, damages sustained as a result of the 'bodily injury' - whether mental or physical -

⁴⁶⁸ Id.

⁴⁶⁹ Id, at 855.

⁴⁷⁰ Id.

⁴⁷¹ Id, at 857.

are compensable under the Warsaw Convention. The court found that the airline was liable for the palpable, objective bodily injuries, "including those caused by the psychic trauma of the hijacking," and for the damages caused by them, but not "for the trauma as such or for the non-bodily or behavioral manifestations of that trauma."⁴⁷²

On the other hand, in Floyd v. Eastern Airlines, Inc.,⁴⁷³ the Court of Appeals for the Eleventh Circuit held that the phrase "lésion corporelle" in the authentic French text of Article 17 encompassed purely emotional distress.⁴⁷⁴ Similarly, a host of trial courts interpreted the Convention to permit damages for purely emotional injury.⁴⁷⁵

Although the Supreme Court had decided cases under the Warsaw Convention several times before,⁴⁷⁶ it was not until its review of the Eleventh Circuit's decision in Floyd v. Eastern Airlines,⁴⁷⁷ that the Court established the framework for the recovery of emotional injuries under the Warsaw Convention. The case was brought by passengers of an Eastern Airlines flight

⁴⁷² Id.

⁴⁷³ Floyd v. E. Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989).

⁴⁷⁴ Id. at 1471.

⁴⁷⁵ See Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 977 (S.D.N.Y. 1977); Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1251 (S.D.N.Y. 1973); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322 (C.D. Cal. 1975).

⁴⁷⁶ See El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 160 (1999); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 218 (1996); Air France v. Saks, 470 U.S. 392 (1985).

⁴⁷⁷ E. Airlines, Inc. v. Floyd, 499 U.S. 530, 533 (1991).

from Miami to the Bahamas.

Shortly after takeoff, one of the engines lost oil pressure and, as part of the normal emergency protocol, the flight crew shut down the engine and returned to Miami. The two remaining engines then failed, and the flight crew informed the passengers that the plane would be "ditched" in the Atlantic Ocean. As the plane was descending, the crew was able to restart one of the engines and the plane landed safely at Miami International Airport.⁴⁷⁸ The passengers brought suit to recover damages solely for their mental distress. The district court concluded that pure psychic injury was not compensable under the Warsaw Convention.⁴⁷⁹ The Eleventh Circuit reversed, holding that the phrase "lésion corporelle" encompassed "purely emotional distress."⁴⁸⁰

The Supreme Court granted certiorari to resolve the conflict between the Eleventh Circuit and the New York Court of Appeals decision in Rosman v. Trans World Airlines.⁴⁸¹ The Supreme Court reversed the Eleventh Circuit, ultimately holding that recovery for pure psychic injury was not permitted under

⁴⁷⁸ Id.

⁴⁷⁹ In re E. Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983, 629 F. Supp. 307 (S.D. Fla. 1986).

⁴⁸⁰ Floyd, 872 F.2d at 1480.

⁴⁸¹ See Rosman, 314 N.E.2d at 850 (holding that purely psychic trauma is not compensable under Article 17).

the Warsaw Convention.

The Court applied long-accepted methods of treaty interpretation, considering the text of the treaty, its context, as well as the "history of the treaty, the negotiations, and the practical construction adopted by the parties."⁴⁸² The narrow issue reviewed by the Supreme Court was whether mental or psychic injury alone satisfies the requirements of 'lésion corporelle.'⁴⁸³

The Court examined the French text and its English translation. French dictionaries, the English translation of the treaty as ratified by Congress, and the United Kingdom's translation of the term all define the term "lésion corporelle" as "bodily injury."⁴⁸⁴ In the absence of disagreement as to its proper English translation, the Supreme Court next turned to the French legal interpretation of the text. The Court applied the same principles that would have been applied by contemporary French lawyers to interpret the text - "(1) legislation, (2) judicial decisions, and (3) scholarly writing."⁴⁸⁵ The Court found that the term "lésion corporelle" was not in use in French legislative texts at the time of the Warsaw Convention.⁴⁸⁶ Second, the

⁴⁸² Floyd, 499 U.S. at 552.

⁴⁸³ Id.

⁴⁸⁴ Id. at 536-37.

⁴⁸⁵ Id. at 537.

⁴⁸⁶ More recent French cases have used the term "lésion corporelle," generally, in the context of

Court found no French court decisions explaining the meaning of the phrase. Third, the Court found no supplemental materials or scholarly writing prior to the Convention discussing the meaning of the term "lésion corporelle."⁴⁸⁷ Since neither Article 17 nor the traditional methods of interpretation suggested that the term "lésion corporelle" should be translated as anything but "bodily injury," the Court then examined the negotiating history of the Convention.

The protocol established by the Paris Convention in 1925 would have held air carriers liable for a broad range of injuries, including emotional distress.⁴⁸⁸ At the Warsaw Convention, CITEJA drafted the more narrow provision that was ultimately adopted, although the negotiating history does not provide an explanation as to why the language was revised or of the meaning of the term "lésion corporelle." The Floyd Court's review of the documentary record "confirms - and courts and commentators appear universally to agree - that there is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or

automobile accidents. *Id.* at 538. The Court found that the recent cases "tend to support the conclusion that, in French legal usage, the term "lésion corporelle" refers only to physical injuries." *Id.* at 538.

⁴⁸⁷ Although some scholarly writings discussed "lésion corporelle" subsequent to the Convention, the Court found the analysis unpersuasive. *Id.*

⁴⁸⁸ Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for French Legal Meaning of Lésion Corporelle*, 25 *Tex. Int'l L.J.* 127, 142 (1990)).

the meaning of 'lésion corporelle.'" The Court was persuaded by the "unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Convention. On balance, the evidence of the post-1929 'conduct' and interpretations of the signatories . . . supports the narrow translation of 'lésion corporelle.'" After examining subsequent amendments to the Convention as well as case law from other Signatory States, the Court concluded that there was no support for a broader reading of the term. The Court ultimately held that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury or physical manifestation of injury," but expressed "no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries."⁴⁸⁹

In cases subsequent to *Floyd*, courts have consistently found that pure emotional distress is not actionable. In *Fishman v. Delta Air Lines, Inc.*,⁴⁹⁰ plaintiffs--an infant child and her mother--brought an action against an airline for damages sustained by the infant when a stewardess applied a cup containing a warm cloth over the child's ear to alleviate the child's pain from changes in air pressure. When the stewardess

⁴⁸⁹ *Floyd*, 499 U.S. at 552.

⁴⁹⁰ *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 140 (2d Cir. 1998).

applied this to the child's ear, scalding water dripped onto the child, causing burns.⁴⁹¹ The crew declined to administer first aid upon arrival, and eventually, the child was rushed to the first aid station at the airport and was treated. The court's primary focus was whether the alleged torts arose from an "accident" under the Warsaw Convention and whether the statute of limitations was tolled during the child's infancy. Relying on the Supreme Court's Decision in *Air France v. Saks*,⁴⁹² the court found that the claim fell within the scope of the meaning of accident as the injury was caused "by an unexpected or unusual event or happening that is external to the passenger."⁴⁹³

In an attempt to bring her claim outside of the Warsaw Convention, the child's mother argued that her claims were solely for emotional harm and, therefore, outside the scope of Article 17.⁴⁹⁴ Because the claim arose out of an accident, it was within the ambit of Article 17. In fact, the court found that all claims for both infant and mother were accident claims under the Warsaw Convention.⁴⁹⁵ However, because the mother's claims were solely for emotional distress they were not compensable under the Warsaw Convention.

⁴⁹¹ Id.

⁴⁹² *Air France v. Saks*, 470 U.S. 392 (1985).

⁴⁹³ *Fishman*, 132 F.3d at 141 (quoting *Saks*, 470 U.S. at 405).

⁴⁹⁴ Id. at 142.

⁴⁹⁵ Id.

In Lee v. American Airlines, Inc.,⁴⁹⁶ an individual brought a putative class action under Article 19 of the Warsaw Convention⁴⁹⁷ on behalf of himself and other similarly situated passengers on a flight from New York to London. The flight was delayed and eventually cancelled, and the plaintiff alleged a variety of "inconveniences" under Article 19 of the Warsaw Convention arising from the delay. The inconveniences he suffered included: "(1) having to remain in the holding area without adequate food, water, restroom facilities and information; (2) having to stay in a substandard motel; (3) having to 'be subjected' to misinformation about the flight status; (4) having to obtain alternative means of transportation; and (5) losing out on a refreshing, memorable vacation."

While acknowledging that economic damages arising from delay were compensable under Article 19 of the Warsaw Convention,⁴⁹⁸ the court found that the plaintiff's alleged damages were nothing more than pure mental injuries arising "from discomfort, annoyance, and irritation" suffered as a result of the delay. As such, the Lee court relied on Floyd and Daniel v.

⁴⁹⁶ Lee v. Am. Airlines, Inc., (N.D. Tex. 2002).

⁴⁹⁷ Warsaw Convention Article 19 provides that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage, or goods."

⁴⁹⁸ "Because the Warsaw Convention is premised upon a 'contract' between the passenger and the airline, courts permit recovery of economic damages arising out of the delay itself (i.e., rental, hotel accommodation, taxis, etc.) under Article 19." See Pakistan Arts & Entm't Corp. v. Pakistan Int'l Airlines Corp., 660 N.Y.S.2d 741, 743 (N.Y. App. Div. 1997).

Virgin Atlantic Airways Ltd.,⁴⁹⁹ and concluded that plaintiff could not recover for mental injuries under the Warsaw Convention.⁵⁰⁰

In another Article 17 case, Croucher v. Worldwide Flight Services, Inc.,⁵⁰¹ the court reviewed a claim for emotional distress resulting from a passenger coming into contact with biomedical waste in an air sickness bag that was allegedly left from a prior flight. The plaintiff also alleged emotional distress from the fear of contracting a disease from the waste. Plaintiff alleged no bodily injury, and the court rejected the plaintiff's arguments as having no basis in law.⁵⁰²

In El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng⁵⁰³, where a former passenger claimed that an intrusive 15-minute search left her sick and upset during the flight, emotionally traumatized and

⁴⁹⁹ Daniel v. Virgin Atlantic Airways Ltd., 59 F. Supp. 2d 986, 992- 93 (N.D. Cal. 1998) (dismissing claims of emotional distress including anxiety, exhaustion, frustration, humiliation, mental anguish and physical discomfort arising out of a flight delay).

⁵⁰⁰ Under Article 19 of the Warsaw Convention, courts have allowed recovery for inconvenience as a result of delay. See Daniel, 59 F. Supp. 2d at 994 ("Damages for inconvenience do not fall within the rubric of 'emotional distress.' Time is money, after all, and the Court finds that the inconvenience of being trapped for hours in an unfamiliar airport is a compensable element of damages for delay in air travel under the Warsaw Convention and domestic law, even in the absence of economic loss or physical injury."); see also Pakistan Arts & Entm't Corp., 232 A.D.2d at 32 (holding that "damages resulting from the delay in transporting a passenger are the type permitted to be recovered under the Convention"); Harpalani v. Air India, Inc., 622 F. Supp. 69 (N.D. Ill. 1985) (holding that Article 19 of the Warsaw Convention provided a cause of action for delay where plaintiffs were "bumped" from their scheduled flight and the airline did not provide transportation for six days).

Notably, the cases that have rejected recovery under Article 19 of the Warsaw Convention for pure emotional injury arising from delay have relied on Floyd, which denied recovery under Article 17 of the Convention based on the meaning of "lésion corporelle," a term that is not used in Article 19.

⁵⁰¹ Croucher v. Worldwide Flight Servs., Inc., 111 F. Supp. 2d 501, 502 (D.N.J. 2000).

⁵⁰² Id. at 507.

⁵⁰³ 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

disturbed during her month-long trip in Israel, and resulted in medical and psychiatric treatment, the Court noted that she was not entitled to compensation under Article 17 of the Warsaw Convention because she sustained no bodily injury and could not recover for her solely psychic or psychosomatic injuries.

In Li v. Quraishi,⁵⁰⁴ the court accepted the airline's argument that the Warsaw Convention bars recovery for purely psychological damages even if caused by intentional misconduct, then dismissed the claims of a former passenger for severe emotional and psychological damage to herself and her infant that resulted from being urinated upon by an intoxicated passenger.

After examined the case law, the conclusion could be draw like that pure emotional distress is not recoverable under the Warsaw – Montreal liability system of the modern aviation.

4-4. Emotional injury manifested in physical injury

Although the Supreme Court has never decided whether emotional injury that manifests itself in physical injury is compensable under Article 17, lower federal courts have

⁵⁰⁴ 780 F. Supp. 117 (E.D. N.Y. 1992).

generally agreed that, like pure emotional injury, emotional injury that manifests itself in physical injury is not compensable under Article 17.

For instance, in Hermano v. United Airlines⁵⁰⁵, the plaintiff brought an action for unlawful arrest, defamation, and negligent infliction of severe emotional distress. The plaintiff checked several bags--some of which contained motorcycle parts--on a flight from Los Angeles to Miami with a connecting flight to Brazil. While on board the aircraft, the plaintiff was approached by a uniformed airline employee and questioned about whether he had any firearms in his checked bags. After denying the claim, the plaintiff was asked to deplane the aircraft, which he did. After the bags were re-examined and no firearms were found, the airline employee located another flight for the plaintiff and the rest of his trip proceeded without further incident. Plaintiff sought damages for "severe and enduring mental distress and anguish, emotional shock to his nervous system, and monetary expenditures for medical treatment." Relying on Floyd and Tseng, the court found that plaintiff's "physical manifestations of alleged emotional distress" were insufficient to constitute bodily injury under the Convention.⁵⁰⁶

⁵⁰⁵ Hermano v. United Airlines, (N.D. Cal. 1999).

⁵⁰⁶ See id.

Similarly, in Terrafranca v. Virgin Atlantic Airways, Ltd.⁵⁰⁷, a passenger sought damages for extreme emotional distress, post traumatic stress disorder (PTSD), and anorexia. During her flight to London, the captain became aware of a bomb threat against the plane; it was classified as a "nonspecific warning which could be related to one or more targets but where there could be doubt as to its credibility or the effectiveness of existing security measures."⁵⁰⁸ In accordance with the airline's protocol, the captain informed the passengers of the threat, and the plane landed safely as scheduled in London.⁵⁰⁹

There was no dispute that the event constituted an "accident" under Article 17, and the only question was whether plaintiff's injuries were compensable under the Convention.⁵¹⁰ The plaintiff relied on a sentence at the very end of the Floyd opinion, which states: "We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."⁵¹¹

In light of the last phrase, "physical manifestation of injury," the plaintiff asserted that her injuries were compensable

⁵⁰⁷ Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108, 109 (3d Cir. 1998).

⁵⁰⁸ *Id.*, at 108.

⁵⁰⁹ *Id.*, at 109.

⁵¹⁰ *Id.*, at 110.

⁵¹¹ Floyd, 499 U.S. at 552 (emphasis added).

under the Convention. Rather than claim that PTSD was the physical manifestation of injury, the plaintiff relied on her weight loss as the actual physical manifestation of the injury. The Terrafranca court rejected the plaintiff's argument, relying on the central holding of Floyd - that a passenger cannot recover absent bodily injury.⁵¹² The court concluded that the text of Article 17 requires "bodily injury" as "a precondition to recovery" and that the plaintiff "must demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety."⁵¹³ Since the plaintiff's claims of post traumatic stress disorder complicated by anorexia and weight loss were found to be purely psychic, they did not qualify as "bodily injuries" under Article 17.⁵¹⁴

In Turturro v. Continental Airlines,⁵¹⁵ a plaintiff's pocketbook was stolen prior to boarding a flight to Costa Rica. The pocketbook contained plaintiff's medication, Xanax, which plaintiff regularly took to treat panic attacks, anxiety, and nervousness. Plaintiff boarded the aircraft, but became concerned that the medication would wear off during the flight, and asked the flight attendant if she could disembark. The flight

⁵¹² Terrafranca, 151 F.3d at 111.

⁵¹³ Plaintiff's psychiatrist classified plaintiff's injuries-- fear, anxiety and isolation--as emotional. Id. at 112.

⁵¹⁴ Id.

⁵¹⁵ Turturro v. Continental Airlines, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

attendant denied her request, despite the fact that they had not yet pushed back from the gate. After her third request was denied, plaintiff began to feel terrified. She started to sweat and as alleged, began to "feel dizzy, nauseated, and short of breath." She had a rapid heartbeat and pain in her stomach.⁵¹⁶ The plaintiff dialed "911" from her cell phone and eventually the police contacted the pilot and the aircraft returned to the gate. An airline employee "announced over the loudspeaker that an 'unruly' passenger wished to leave; some fellow passengers then greeted plaintiff with hisses and jeers." The plane returned to the gate, and the plaintiff disembarked, where she was treated by EMS technicians and transported to a nearby psychiatric emergency room.⁵¹⁷

Plaintiff claimed she suffered "embarrassment, humiliation, loss of liberty, psychological injury, pain, suffering emotional distress and mental anguish."⁵¹⁸ She also claimed that she suffered post traumatic stress, psychological injury and pain, and that she continued to suffer physical manifestations⁵¹⁹ after her release from the hospital, including "insomnia, restlessness,

⁵¹⁶ Id, at 173.

⁵¹⁷ Id.

⁵¹⁸ Id, at 174.

⁵¹⁹ Evidence of plaintiff's diagnosis by her psychiatrist was confusing, as she made two different diagnoses - acute stress disorder and generalized anxiety disorder, each with different manifestations. Id.

inability to concentrate, and unexplained aching in her arms and legs."⁵²⁰

The court reasoned that, in *Floyd*, although not expressly alleged, many of the plaintiffs suffered what "we may call 'psychosomatic' sequelae (such as insomnia or weight loss) as a result of their acute fear while airborne."⁵²¹ The court reasoned that *Floyd* bars recovery for "physical manifestations" of emotional distress where the accident causes "no direct physical injury but rather merely terrifies the passengers (even when the terror later leads to physical symptoms, such as weight loss)."⁵²² The court determined that this reading is bolstered by the Supreme Court's narrow reading of *lésion corporelle*, which respected the Convention's primary purpose of limiting the liability of air carriers and maintaining uniformity.⁵²³ The court held that to "the extent that plaintiff throughout her ordeal did not receive any physical wounds, impacts, or deprivations, or any alteration in the structure of an internal organ, then any subsequent shortness of breath, sleeplessness, or inability to concentrate may safely be characterized as psychosomatic and is not compensable."⁵²⁴

⁵²⁰ *Id.*

⁵²¹ *Id.*, at 175.

⁵²² *Id.*, at 177.

⁵²³ *Id.* (citing *Floyd*, 499 U.S. at 547).

⁵²⁴ *Id.*, at 178.

The Turturro court also considered sua sponte whether the accident caused the plaintiff to develop PTSD. In its review, the court acknowledged new medical advances that make it possible to document the physical effects of PTSD, including changes to brain cell structure, and "that under some circumstances a diagnosis of chronic PTSD may fall within the Convention's definition of 'bodily injury.'"⁵²⁵ While ultimately concluding that the plaintiff did not adequately plead PTSD, as she did not proffer "reliable evidence beyond her purely subjective experience of panic, . . . somatic complaints, . . . and conflicting diagnoses," the court held that plaintiff's claims are not compensable under the Warsaw Convention. The court's conclusion may represent a significant development in the ability of plaintiffs to recover for PTSD under Article 17 since the court recognized that its finding might open the "floodgates of litigation" unless claims of PTSD are carefully scrutinized.⁵²⁶

In more recent cases, plaintiffs have begun bringing claims that PTSD is tantamount to physical injury, based on new medical technologies that suggest that injuries traditionally considered "purely psychic" or "purely emotional" parallel physiological manifestations. However, most of the cases were

⁵²⁵ Id at 179.

⁵²⁶ Id.

unsuccessfully established that PTSD is tantamount to physical injury except the Weaver case, *infra*.

In Bobian v. CSA Czech Airlines⁵²⁷, plaintiffs alleged that they suffered emotional injuries and physical manifestations of emotional trauma during a flight through severe turbulence related to a hurricane. Plaintiffs generally alleged that PTSD, like other stress-related disorders, "causes 'biochemical and structural changes' in the brain."⁵²⁸ The court divided the alleged injuries into several categories, none of which were compensable under Article 17. First, several injuries were "patently and purely emotional" and, as such, they were non-compensable under Floyd's construction of Article 17.⁵²⁹ The second category of injury included "manifestations of emotional injury--either physical (nausea, cold sweats) or mental (nightmares, lack of concentration)."⁵³⁰ The court found that these claims were expressly precluded by *Terrafranca*⁵³¹, which required direct, concrete, bodily injury. While evidence was offered to suggest that severe turbulence could directly cause physical symptoms such as nausea and cold sweats, plaintiffs did not allege that such symptoms were a direct result

⁵²⁷ Bobian v. CSA Czech Airlines, 232 F. Supp. 2d 319 (D.N.J. 2002).

⁵²⁸ *Id.*, at 322.

⁵²⁹ *Id.*, at 325.

⁵³⁰ *Id.*

⁵³¹ See *supra* note 67.

of the severe turbulence encountered by the aircraft. Plaintiffs also alleged that the mere experience of G-forces amounted to bodily injury under the Convention. The court rejected this argument, noting that "while such forces may of course cause injury, experiencing them does not in itself constitute bodily injury."⁵³²

The Bobian court also declined to apply the reasoning in *Turturro*, instead relying on *Terrafranca* and concluding that PTSD is purely an emotional injury, despite plaintiffs' attempt to re-characterize PTSD in terms of its effect on the brain. However, unlike *Terrafranca* where the plaintiff did not allege physical injury from her PTSD, in *Bobian*, the plaintiffs presented evidence that PTSD and other stress-related disorders are associated with biochemical and structural changes in the brain.⁵³³ The plaintiffs in *Bobian* presented general evidence that PTSD and other emotional disorders are tantamount to physical injuries, but they did not present specific evidence such as MRIs or other medical evidence of their particular injuries. Other lower courts presented with such evidence have allowed the actions to proceed.

⁵³² *Bobian*, at 326.

⁵³³ *Id.*

For example, in Weaver v. Delta Airlines,⁵³⁴ the District Court for the District of Montana awarded damages to a plaintiff whose emotional injury resulted in a simultaneous brain injury. In Weaver, the defendant airline made an emergency landing during a flight from London. The plaintiff alleged that she was terrified during the emergency landing and had to subsequently seek treatment for emotional and physical injuries attributable to the accident.⁵³⁵ She was subsequently diagnosed with PTSD. The plaintiff argued that recent developments in medicine have determined that "extreme stress causes actual physical brain damage, i.e., physical destruction or atrophy of portions of the hippocampus of the brain."⁵³⁶ Plaintiff also presented evidence sufficient to meet her burden of showing "an absence of any factual issue that the emergency landing physically impacted" her brain, while the defendant did not raise a genuine issue that the plaintiff's injury was non-physical.⁵³⁷ As such, no material issue of fact existed and the court focused on whether the plaintiff was entitled to a judgment as a matter of law. The Weaver court concluded that, because plaintiff's PTSD manifested as a brain injury, she sustained a bodily injury within

⁵³⁴ Weaver v. Delta Airlines, 56 F. Supp. 2d 1190 (D. Mont. 1999).

⁵³⁵ Id. at 1190-91.

⁵³⁶ Id. at 1191.

⁵³⁷ Id. at 1192.

the meaning of Article 17. Cognizant, as was the Turturro court, that its decision could open the "floodgates of litigation," the court reasoned that because claims must be based on a "definite diagnosis of a disorder that arises from a physical injury that is medically verifiable," there would be no flood of litigation arising out of its holding.⁵³⁸

In Carey v. United Airlines⁵³⁹, the Ninth Circuit distinguished Weaver. In Carey, a passenger brought a claim against an airline arising out of a confrontation with a flight attendant. The passenger was seated in first class, while his three daughters were seated in coach. During the flight, two of his daughters experienced ear aches and attempted to seek their father's assistance in first class. A flight attendant prevented them from reaching their father. The father alleged that the flight attendant refused to assist him and humiliated him in front of the other first-class passengers.⁵⁴⁰ The passenger alleged emotional and mental distress and claimed that he suffered "physical manifestation including nausea, cramps, perspiration, nervousness, tension and sleeplessness." The lower court concluded that the passenger's sole remedy was under the Warsaw Convention and that the alleged injuries were not

⁵³⁸ Id.

⁵³⁹ Carey v. United Airlines, 255 F.3d 1044 (9th Cir. 2001).

⁵⁴⁰ Id., at 1046.

compensable. This is consistent with the holding in *Weaver and Chendrimada v. Air India*,⁵⁴¹ although the lower court in *Carey* did not require medical evidence of "physical injury" of the emotional injury in order to sustain the action.

On appeal, the *Carey* court affirmed the Third Circuit's reasoning in *Terrafranca* that the physical manifestations of the passenger's emotional distress and mental distress - nausea, perspiration, cramps, nervousness, tension and sleeplessness - did not satisfy the Article 17 "bodily injury" requirement. As in *Terrafranca*, the passenger did not demonstrate "direct, concrete bodily injury as opposed to mere manifestation of fear or anxiety."⁵⁴² The *Carey* court relied on the reasoning in *Floyd* with respect to the purpose of the Convention, i.e., to limit the liability of air carriers to foster industry growth.⁵⁴³ The court also referenced dicta in *El Al Israel Airlines, Ltd. v. Tseng*⁵⁴⁴ to support its conclusion that the "Supreme Court would hold that physical manifestations purely descended from emotional and mental distress do not satisfy the 'bodily injury' requirement of Article 17."⁵⁴⁵ Although other cases, including *Terrafranca*, cite to this same statement in *Tseng*, the issue of recovery for

⁵⁴¹ *Chendrimada v. Air India*, 802 F. Supp. 1089 (S.D.N.Y. 1992).

⁵⁴² *Carey*, 255 F.3d at 1052 (citing *Terrafranca*, 151 F.3d at 110).

⁵⁴³ *Id.* at 1052-53.

⁵⁴⁴ *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

⁵⁴⁵ *Carey*, 255 F.3d at 1053.

emotional distress was not before the Tseng Court.⁵⁴⁶ Again, as the plaintiffs did not provide concrete physiological medical evidence of their emotional injuries, the court was hard pressed to find that the emotional injuries constituted "bodily injury" under Article 17.

In Bloom v. Alaska Airlines,⁵⁴⁷ the Ninth Circuit reviewed a passenger's claim with facts very similar to those in Carey. The passenger brought a claim for emotional distress under Article 17 based on his confrontation with a flight attendant. The plaintiff did not allege bodily harm, but alleged that intentional infliction of emotional distress "is not preempted because the Convention does not govern the commission of intentional and malicious torts that cause non-bodily harm."⁵⁴⁸ The court analogized this case to Carey and held that the "Warsaw Convention creates 'no exception for an injury suffered as a result of intentional conduct.'"⁵⁴⁹ As the injuries were purely emotional, the passenger's claim was barred.

In re Air Crash at Little Rock Arkansas, on June 1, 1999⁵⁵⁰, by rejecting a \$6,500,000 jury award, the court found that

⁵⁴⁶ Tseng, 525 U.S. at 172.

⁵⁴⁷ Bloom v. Alaska Airlines, (9th Cir. May 30, 2002) (unpublished opinion).

⁵⁴⁸ Id.

⁵⁴⁹ Id. (citing Carey, 255 F.3d at 1051).

⁵⁵⁰ 291 F.3d 503, 59 Fed. R. Evid. Serv. 236, 196 A.L.R. Fed. 695 (8th Cir. 2002), cert. denied, 537 U.S. 974, 123 S. Ct. 435, 154 L. Ed. 2d 331 (2002).

physical manifestation of mental injuries such as weight loss, sleeplessness, or physical changes in the brain resulting from chronic posttraumatic stress disorder are not compensable under the Warsaw Convention. The court held that even had the former passenger submitted sufficient evidence at trial of brain changes resulting from posttraumatic stress disorder, these physical manifestations of the mental injury would not be compensable under the treaty.

In re Air Crash Off Point Mugu, California, on January 30, 2000,⁵⁵¹ the court noted in dictum that claims for physical injury purely descended from emotional distress are prohibited by the Warsaw Convention.

4-5. Emotional injury accompanied by but unrelated to physical injury

The majority of courts have not allowed plaintiffs to recover for emotional injury that is unrelated to physical harm.

In Alvarez v. American Airlines, Inc.⁵⁵², plaintiff sought compensation for physical and mental injuries related to an emergency evacuation. Plaintiff suffered physical injuries during

⁵⁵¹ 145 F. Supp. 2d 1156 (N.D. Cal. 2001).

⁵⁵² Alvarez v. Am. Airlines, Inc., (S.D.N.Y. 1999).

the evacuation, including bruises and pain. In addition, plaintiff began having anxiety attacks in situations that were similar to those occurring just before the evacuation. The plaintiff did not allege a casual connection between the physical injuries and the mental injuries. The court concluded that only plaintiff's physical injuries were compensable.

The Alvarez court adopted the majority view that in order to recover for psychological injuries, there must be a "causal link between the alleged physical injury and the alleged psychological injury." The court looked to the Second Circuit's decision in Shah v. Pan American World Services, Inc.⁵⁵³ and compared the language in Article 25, which required causation, with the liability provisions in Article 17, which did not. The court found that "under Article 17, a relatively intimate link is required between the liability-triggering event (the accident) and plaintiffs' damages because the liability-triggering event is not necessarily culpable." In other words, whereas a liability event is necessary to trigger liability under Article 25 (which is necessarily culpable), Article 17 imposes strict liability for "bodily injury," and the standard for imposing strict liability should be more stringent.

⁵⁵³ Shah v. Pan Am. World Servs., Inc., 148 F.3d 84 (2d Cir. 1998).

Contrasting a similar case, Longo v. Air France, Inc.⁵⁵⁴, where the plaintiffs alleged bodily injuries (bruises during evacuation) and related emotional injuries (fear of death), but failed to allege that their fear of death flowed from their bruises, the Alvarez court concluded that:

“The Convention's goal of 'reasonable and predicable' recoveries, would be undermined if similarly situated passengers were treated differently from one another on the basis of an arbitrary and insignificant difference in their experience. The happenstance of getting scratched on the way down the evacuation slide . . . [should] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash. In sum, in a case governed by Article 17, a plaintiff may recover compensation for psychological and emotional injuries only to the extent that these injuries are proximately caused by his or her physical injuries. Psychological and emotional injuries that are merely accompanied by physical injuries are not compensable.”

Not all courts have so hastily granted summary judgment in cases where psychic injury accompanies physical injury. In In re Aircrash Disaster Near Roselawn, Indiana⁵⁵⁵, actions were brought against airlines for pre-impact fear damages arising out of an air crash in which all passengers perished. In allowing damages for pre-impact fear, the court emphasized what Floyd did not address--the question of whether passengers could recover for mental injuries that were accompanied by physical injuries and the decision that "there could never be any recovery for purely psychic injuries."⁵⁵⁶ The court pointed out that nothing in Floyd "states that once [the bodily injury]

⁵⁵⁴ Longo v. Air France, Inc., (S.D.N.Y. 1996).

⁵⁵⁵ In re Aircrash Disaster Near Roselawn, Indiana, 954 F. Supp. 175 (N.D. Ill. 1997).

⁵⁵⁶ Id., at 178.

precondition is met, and physical injury or death is present, damages for mental distress are not available."⁵⁵⁷

The court distinguished other lower court decisions that have extended Floyd to "create a partial bar to recovering for emotional distress under the Warsaw Convention." In these cases, courts found that the "emotional distress claims flowing from the accident (as opposed to some physical injury sustained in the accident) are unrecoverable." The Alvarez court declined to adopt the reasoning in these cases, where "Article 17 itself expressly requires a causal link only between 'damage sustained' and the accident."⁵⁵⁸ In holding that plaintiffs could recover for their pre-impact pain and suffering, the court in *In re Roselawn* noted that its decision, "which permits those passengers who sustained physical injury in the accident to recover for any pre-impact terror they may have experienced, is no more unfair than the rule recognized in Floyd, which permits only passengers with physical injuries to recover at all."⁵⁵⁹

Similarly, in *In re Korean Air Lines Disaster of September 1, 1983*⁵⁶⁰, the court granted damages for emotional injury that was accompanied but not caused by simultaneous physical

⁵⁵⁷ Id.

⁵⁵⁸ Id. at 179.

⁵⁵⁹ Id.

⁵⁶⁰ *In re Korean Air Lines Disaster of Sept. 1, 1983*, 814 F. Supp. 592 (E.D. Mich. 1993).

injury. Survivors sought damages for pre-death pain and suffering by passengers on a Korean Air Lines flight that crashed after being shot down by a Soviet missile.⁵⁶¹ The court found that passengers were alive and conscious for about eleven minutes after the initial missile strike.⁵⁶² Acknowledging that, under Floyd,⁵⁶³ damages for mental anguish were not recoverable "absent physical injury,"⁵⁶⁴ the court awarded damages for the decedents' mental anguish because the evidence showed that they did sustain physical injury due to rapid air decompression. According to the court, the facts that the emotional injury was "accompanied by physical injury" and that the decedents' suffering was "likely considerable" made the case "vastly different" from Floyd.⁵⁶⁵

In Chendrimada v. Air India,⁵⁶⁶ plaintiffs brought an action for injuries that occurred on a trip to Bombay, India. Plaintiffs' first flight from New York was canceled due to a bomb scare, and plaintiffs were rescheduled on a flight the following day.⁵⁶⁷ The flight made a scheduled stop in Delhi, but due to weather conditions, the flight remained at Delhi for eleven and a half

⁵⁶¹ Id, at 594.

⁵⁶² Id, at 598.

⁵⁶³ Floyd, 499 U.S. at 530.

⁵⁶⁴ In re Korean Air Lines Disaster, 814 F. Supp. at 598.

⁵⁶⁵ Id.

⁵⁶⁶ Chendrimada v. Air India, 802 F. Supp. 1089 (S.D.N.Y. 1992).

⁵⁶⁷ Id, at 1090.

hours, during which plaintiffs were not allowed to deplane nor were they provided with any food. Plaintiffs alleged that they suffered "bodily injuries" by being confined without food for that period - including nausea, severe cramps, pain and anguish, malnutrition and mental injury.⁵⁶⁸ The court found that the plaintiffs' allegations of bodily injury satisfied the requirements of Floyd to survive summary judgment--namely that they alleged a "physical injury or manifestation of a physical injury."⁵⁶⁹ The court concluded that the manifestation of physical injury "need not result from a suddenly inflicted trauma, but may, as is alleged here, result from other causes for which the carrier is responsible." The court's conclusion, while consistent with the decision in Weaver, relaxes the requirement that the emotional injury be related to physical injury.

4-6. Mental injury flowing from physical injury

In cases following the Floyd decision, most courts have found that recovery for emotional injuries is permitted so long as the emotional injury "flows from" the bodily injury.

In In re Inflight Explosion on Trans World Airlines, Inc.

⁵⁶⁸ Id., at 1092.

⁵⁶⁹ Id. (emphasis added).

Aircraft Approaching Athens, Greece on April 2, 1986⁵⁷⁰, ("TWA"), survivors brought an action against an airline for physical and psychic injury arising out of a bomb explosion in which four people were killed and others were injured. One of the passengers alleged physical and psychic injuries. Mr. Ospina, a passenger, seated directly over the bomb, was blown out of the plane. Expert testimony established that Mr. Ospina's body had been nearly severed by the blast and that he probably lived for five to ten seconds after the blast and was aware of what was happening to him.

The court focused on the term "dommage survenue"⁵⁷¹ and began by acknowledging that while the term encompasses many forms of harm, it cannot include "purely mental injury unconnected to physical harm."⁵⁷² The TWA court found that the Floyd decision implied that "psychic damage accompanying physical injury is recoverable." The court distinguished Floyd based on the type of mental suffering experienced. In Floyd, the passengers were terrified, but no one was physically harmed from the event, while the airline's misconduct⁵⁷³ in TWA caused

⁵⁷⁰ In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625 (S.D.N.Y. 1991), rev'd on other grounds sub nom., Ospina v. Trans World Airlines, Inc., 975 F.2d 35 (2d Cir. 1992).

⁵⁷¹ Translated in English as "damage sustained." Id. at 640.

⁵⁷² Id. at 637.

⁵⁷³ TWA's failure to follow established security protocol was found to be willful misconduct by the jury. As such, the liability limits of Article 17 did not apply. See id. at 638.

plaintiffs to suffer "while in pain from his wounds, falling to certain death after the bomb tore through his body as he was ejected from the aircraft." Because Mr. Ospina suffered bodily injury that then caused him psychic harm, the court found the award of damages to be appropriate.

The court recognized that some courts⁵⁷⁴ have objected to permitting recovery for pain and suffering subsequent to physical injury because any de minimus physical injury, such as a scratch or bruise, could give rise to recovery for psychic trauma. The court reasoned that in this case, the psychic injuries arose directly from the bodily injury, and both types of injury were severe. As such, the court distinguished the case from ones where the passenger first experienced psychic injury followed by bodily injury or death, and ones where death occurred simultaneously with the psychic injury. In upholding the jury's award of damages for the conscious pain and suffering between the time of the explosions and Mr. Ospina's death, the court found:

"Survival damages for pain and suffering comports with the main policy goals of general tort law--full deterrence and compensation--without interfering with the goals of the Warsaw Convention. These goals are compatible--in fact, almost identical. Both are designed to provide full compensation for harm suffered and deterrence when the statutory limit of \$75,000 does not apply."⁵⁷⁵

⁵⁷⁴ See Alvarez, 1999 WL 691922, at *5.

⁵⁷⁵ TWA, 778 F. Supp. at 641.

In Jack v. Trans World Airlines, Inc.,⁵⁷⁶ plaintiffs aboard a flight from New York to San Francisco experienced an "aborted takeoff, crash and fire." All passengers survived, but many suffered minor physical injuries and were traumatized. Several passengers had international tickets, and their sole remedy was through the Warsaw Convention. Roughly half of the plaintiffs alleged only emotional injuries, while the other plaintiffs alleged emotional distress in addition to minor physical injuries.⁵⁷⁷ The court defined "physical manifestations" as "those bodily injuries or illnesses (such as skin rashes and heart attacks) that result from the distress one experiences during or after an accident," and emotional distress as "psychic trauma that one experiences either during or after the accident . . . (e.g., fear of flying or claustrophobia. . . or embarrassment about disfigurement or concern that an injury will develop complications)."⁵⁷⁸ The court found that the failure of the Warsaw Convention to use the term "caused by" in Article 17 may indicate that the recoverable damages "need not be caused by the bodily injury, and may instead be those caused by the accident."⁵⁷⁹ The court examined four possible approaches under Article 17 for recovery of

⁵⁷⁶ Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 (N.D. Cal. 1994).

⁵⁷⁷ *Id.*, at 663.

⁵⁷⁸ *Id.*, at 664.

⁵⁷⁹ *Id.*, at 665.

emotional distress. The first is to disallow recovery for emotional distress. The second approach is to allow recovery for all emotional distress, as long as a bodily injury occurs. The third possibility is to allow emotional distress as damages for bodily injury, including distress about the accident. Lastly, a court can allow recovery only for emotional distress flowing from a bodily injury.

1. Disallow recovery for emotional distress.

First, the court examined the approach that would allow no recovery for emotional distress, even if accompanied by bodily injury. Under this approach, an injured passenger could recover only pecuniary loss, such as medical expenses and lost income.

This approach is in accord with the Floyd Court's narrow reading of Article 17's reference to bodily injury. Denying emotional distress damages is also appropriate in light of the state of the law in many countries at the time of Warsaw Convention.⁵⁸⁰ And, because this approach is so restrictive on passengers' rights, it furthers the pro-airline industry goals of the Convention.⁵⁸¹

This approach is unacceptable, however, because it provides such minimal compensation for passengers who may

⁵⁸⁰ In Floyd, the Court noted that "such a remedy was unknown in many, if not most, jurisdictions in 1929." Floyd, 499 U.S. at 545.

⁵⁸¹ Jack, 854 F. Supp. at 665.

have suffered traumatic injuries, either physical or mental. The drafters of the Warsaw Convention attempted to strike a balance between passengers and airlines; this approach is too one sided. Further, even though many jurisdictions denied recovery for mental distress in 1929, the number of the countries which do not recognize recovery for mental distress nowadays is limited since most of the countries adopt the theory that mental distress, like physical injuries, is recoverable. Even at the time of 1929, France recognized such claims, as did other countries, when accompanied by physical impact or manifestation. Because of the numerous problems with this approach, American courts have not adopted it.

2. Allow recovery for all emotional distress, as long as a bodily injury occurs.

The second approach is to allow recovery for all emotional distress, as long as a bodily injury occurs, regardless of the connection between the distress and the bodily injury. Thus, a passenger with a scratched arm could recover for the trauma and fear due to the plane crash; the bodily injury opens the door to liability for emotional distress.

In Chendrimada v. Air-India⁵⁸², supra, the court adopted

⁵⁸² See supra note 541.

this approach. There, because the plaintiffs alleged physical injury, the court denied Air-India's motion for summary judgment.⁵⁸³ This approach is consistent with a broad reading of Article 17's imposition of liability for "damage sustained in the event of . . . bodily injury."⁵⁸⁴ Significantly, the drafters did not use the phrase "damage caused by . . . bodily injury," which would have served as a signal that any mental distress must be connected to the bodily injury. This approach is also supported by the fact that the Floyd Court did not mention a need for a causal connection between bodily injury and emotional distress. Further, this approach is in line with the approach to mental distress taken in early tort cases, where a physical impact or manifestation was a prerequisite to recovery.⁵⁸⁵

However, this approach is undesirable for two reasons. First of all, this approach treats mental distress as an

⁵⁸³ One paragraph of the court's opinion is of particular relevance:

"As discussed above, the Supreme Court held in the Floyd case that a passenger cannot recover for purely emotional or mental injuries absent physical injury or manifestation of physical injury. Therefore, to survive Floyd, plaintiffs must allege a physical injury or a manifestation of physical injury. The Court finds that plaintiff's allegations satisfy this requirement. It should be understood that the Court is not ruling that as a matter of law being held on an airplane for over eleven hours without food is a physical injury in and of itself. If a passenger in the same position as plaintiffs had not exhibited any physical manifestation of injury as a result of being held without food, but only alleged emotional injury, no action would lie. Of course, plaintiffs must still prove their alleged physical injuries at trial to recover, but plaintiffs have demonstrated that there is a genuine issue of material fact in dispute which cannot be resolved on a motion for summary judgment. In reaching this conclusion we of course have determined that the 'manifestation of physical injury' which is a prerequisite to an action under Floyd need not result from a suddenly inflicted trauma, but may, as is alleged here, result from other causes for which the carrier is responsible."

Id. at 1092 (emphasis added).

⁵⁸⁴ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 666 (N.D. Cal. 1994).

⁵⁸⁵ Under early tort law, the physical impact or manifestation was seen as proof that the emotional distress was not faked.

independent cause of action, which is inconsistent with precedent that dictates that the Warsaw Convention creates a cause of action, not just a limit on remedies.⁵⁸⁶ And, secondly, this approach treats mental distress as damages resulting from the accident, not the injury.⁵⁸⁷

3. *Allow emotional distress as damages for bodily injury, including distress about the accident.*

Emotional distress is considered an element of the damages for bodily injury under the third approach. Under this approach, the distress does not need to be about the injury to be compensable. This approach is different from the second approach in that the distress must occur at the same time or later than the bodily injury; one cannot, therefore, recover for the fear before the impact and bodily injury under this approach.

The courts in the cases concerning the downing of Korean Air Lines Flight KE 007 on September 1, 1983, *supra*, while the plane was in route from New York to Seoul, adopted this

⁵⁸⁶ The dispute did not arise until the 1970s because American courts did not originally view the Warsaw Convention as creating a cause of action. See Sheila Wallace Holmes, Casenote, 58 J. AIR L. & COM. 1205, 1207 (1993). Rather, courts first interpreted the Convention as simply limiting monetary damages on otherwise applicable law. *Id.* Courts thus viewed the treaty as creating only a presumption of liability, instead of an independent cause of action. *Id.* at 1209-10. It was not until the late 1970s that courts began to construe the Warsaw Convention as the "universal source of a right of action." *Id.* at 1210 (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)).

⁵⁸⁷ Jack, 854 F. Supp. at 666. This is problematic under the wording of Article 17 of the Convention and the reasoning of the Supreme Court in Air France v. Saks, 470 U.S. 392 (1985), where the Court noted that "'the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury.'" Jack, 854 F. Supp. at 666 (quoting Saks, 470 U.S. at 398).

approach.⁵⁸⁸ There, the plane strayed into Soviet airspace and was intercepted and destroyed by Soviet military aircraft over the Sea of Japan; all 269 passengers were killed.⁵⁸⁹

The numerous actions filed around the country for wrongful death of the deceased passengers were consolidated for common pre-trial proceedings and the trial of the common issue of liability.⁵⁹⁰ After a jury found that Korean Air Lines engaged in willful misconduct that proximately caused the deaths, the individual cases were returned to the various jurisdictions where they had been filed in order to determine compensatory damages for each plaintiff.⁵⁹¹

One court first noted that the 269 passengers aboard the plane were alive and conscious for ten or eleven minutes after the plane was hit by the missile and before it hit the sea, and possibly for a period thereafter.⁵⁹² The court then recognized that the passengers probably endured a considerable amount of emotional and physical (due to rapid decompression) pain during that period which ended in the death they were anticipating. Consequently, the court held, "This is pain and

⁵⁸⁸ *Zicherman v. Korean Air Lines Co.*, 814 F. Supp. 605, 606 (S.D.N.Y. 1993), modified, 43 F.3d 18 (2d Cir. 1994), cert. granted, 115 S. Ct. 1689 (1995).

⁵⁸⁹ *Zicherman*, 814 F. Supp. at 606.

⁵⁹⁰ See *In re Korean Air Lines Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

⁵⁹¹ *Zicherman*, 814 F. Supp. at 606. The jury also awarded punitive damages, but on appeal they were set aside as non-recoverable in a Warsaw Convention Case. *Id.* See *In re Korean Airlines Disaster*, 932 F.2d 1475, 1490 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991).

⁵⁹² *In re Korean Air Lines Disaster*, 814 F. Supp. 592, 598 (E.D. Mich. 1993).

suffering accompanied by physical injury, and logically must be permitted by Floyd."⁵⁹³

The logic behind the third approach is best illustrated by the comments of the court in *In re Air Crash Disaster Near Honolulu, Hawaii*⁵⁹⁴:

"The Convention itself does not specify the elements of damages which a plaintiff might recover under Article 17. Instead, 'commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention.'"⁵⁹⁵

Grafted onto the common law tradition, and recognizing the Warsaw Convention's adoption of "internal law" with respect to the measure of damages, Article 17 must be read to create a cause of action which encompasses the remedies traditionally provided by common law in personal injury actions, wrongful death actions, and survival actions.⁵⁹⁶

Although there is little federal common law on emotional distress, federal courts have indicated that emotional distress damages would be allowed for distress about the plane crash, not just the distress about the injury.⁵⁹⁷ This approach --

⁵⁹³ See also *In re Korean Air Lines Disaster*, 807 F. Supp. 1073 (S.D.N.Y. 1992).

⁵⁹⁴ 783 F. Supp. 1261 (N.D. Cal. 1992).

⁵⁹⁵ *Id.* at 1264 (quoting *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1283 (2d Cir.), cert. denied, 502 U.S. 920 (1991)).

⁵⁹⁶ *Id.* at 1265.

⁵⁹⁷ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 667 (N.D. Cal. 1994). See, e.g., *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987) (allowing emotional distress damages for the trauma involved in a racially motivated arrest, not just for the minor injuries); *Lentz v. M/V Eastern Grace*, CIV. No. 85-1078-FR, (D. Or. Dec. 2, 1988) (awarding emotional distress damages for a seaman's discomfort around boats after an accident in which his boat was hit, although he suffered only bumps and bruises in the accident). *Jack*, 854 F. Supp. at 667.

analogizing to other areas of federal common law -- is unsatisfactory because of the uniqueness of the Warsaw Convention's exclusion of recovery for pure emotional distress.⁵⁹⁸

4. *Allow recovery only for emotional distress flowing from a bodily injury.*

Under the fourth approach, emotional distress flowing from the bodily injury is an element of damages allowed for the bodily injury. Thus, damages are allowed for emotional distress

⁵⁹⁸ See Dafna Yoran, Comment, Recovery of Emotional Damages Under Article 17 of the Warsaw Convention: The American Versus the Israeli Approach, 18 BROOK. J. INT'L L. 811, 814 (1992). The US Supreme Court in *Floyd* stated, "We granted certiorari to resolve a conflict between the Eleventh Circuit's decision in this case and the New York Court of Appeals' decision in *Rosman v. Trans World Airlines, Inc.*, which held that purely psychic trauma is not compensable under Article 17." *Floyd*, 499 U.S. at 534. The Court also noted, "The only reports of French cases we did find that used the term 'lésion corporelle' are relatively recent and involve physical injuries caused by automobile accidents and other incidents. These cases tend to support the conclusion that, in French legal usage, the term 'lésion corporelle' refers only to physical injuries." *Id.* (footnote omitted). Then, the Court dismissed the fact that in 1929 France, unlike many other countries, permitted recovery for mental distress. *Id.* at 539. The Court found that "this general proposition of French tort law does not demonstrate that the specific phrase chosen by the contracting parties-- 'lésion corporelle'--covers purely psychic injury." *Id.* To follow up on this, the court stated its task: "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 540 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

See also Dale M. Eaton, Note, Recovery for Purely Emotional Distress Under the Warsaw Convention: Narrow Construction of *Lésion Corporelle* in *Eastern Airlines, Inc. v. Floyd*, 1993 WIS. L. REV. 563, 569. The *Floyd* Court explained: In 1951, a committee composed of 20 Warsaw Convention signatories met in Madrid and adopted a proposal to substitute "affection corporelle" for "lésion corporelle" in Article 17. The French delegate to the committee proposed this substitution because, in his view, the word "lésion" was too narrow, in that it "presupposed a rupture in the tissue, or a dissolution in continuity" which might not cover an injury such as mental illness or lung congestion caused by the breakdown in the heating apparatus of the aircraft. The United States delegate opposed this change if it "implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury," but the committee adopted it nonetheless. Although the committee's proposed amendment was never subsequently implemented, its discussion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, "lésion corporelle" in Article 17 had a distinctively physical scope. *Floyd*, 499 U.S. at 546-47.

See also Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. AIR L. & COM. 587 (1994). Addressed the question of whether the Warsaw Convention provides the exclusive cause of action for injuries sustained during international flight.

only to the extent the emotional distress is caused by the bodily injury. A passenger may, therefore, recover for fear related to his broken leg, but not for fear related to the plane crash. Under this approach, emotional distress can also have a separate role as the causal link between the accident and the bodily injury; a passenger may, for example, recover for a heart attack caused by the distress of the plane crash.⁵⁹⁹

In Jack v. Trans World Airlines, Inc.⁶⁰⁰, the court adopted this approach. Jack involved the aborted takeoff and crash of TWA Flight 843 when departing New York's John F. Kennedy Airport for San Francisco.⁶⁰¹ All the passengers survived despite the fact that fire completely destroyed the plane. During the aborted takeoff and evacuation, many of the passengers suffered minor physical injuries; many were traumatized by the accident. The passengers filed suit, seeking damages for physical injuries and emotional distress, and TWA filed motions for summary judgment.

⁵⁹⁹ The comments of the court in Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848 (Ct. App. N.Y. 1974), help to illustrate the reasoning behind this position: The compensable injuries must be 'bodily' injuries but there may be an intermediate causal link which is 'mental' between the cause--the accident-- and the effect--the 'bodily injury'. And once that predicate of liability-- the 'bodily injury'--is established, then the damages sustained as a result of the 'bodily injury' are compensable including mental suffering However, only the damages flowing from the 'bodily injury', whatever the causal link, are compensable We hold, therefore, that defendant is liable for plaintiff's palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.

⁶⁰⁰ 854 F. Supp. at 654.

⁶⁰¹ The case fell under the Warsaw Convention because many of the passengers held tickets for international flights.

The court held that the plaintiffs with impact injuries could recover for their impact injuries, the emotional distress flowing from their impact injuries and any physical manifestations of their emotional distress. Further, the court decided that the plaintiffs with physical manifestations could recover for the manifestations and any distress flowing from the manifestations, but that they could not recover damages for the emotional distress that led to the manifestations. The court was careful to note that, in both instances, the emotional distress was limited to the distress about the physical impact or manifestation (the bodily injury) and that recovery was not allowed for the distress about the accident itself.⁶⁰²

Of the four approaches discussed above, this fourth one is the most desirable for a number of reasons. First, this approach prevents serious inequities among the passengers subject to the Warsaw Convention. Getting scratched on the way down an evacuation slide should not enable one passenger to obtain a much greater recovery than an unscratched fellow passenger who was equally terrified by the plane crash, and the fourth approach achieves this result. And, this approach is consistent

⁶⁰² TWA's motion for summary judgment was granted as to the 27 plaintiffs who complained of psychic trauma but did not complain of impact injuries or physical manifestations of emotional distress; TWA's motion for summary judgment was denied as to the 33 plaintiffs who claimed impact injuries and/or physical manifestation of their emotional distress. See Jack, 854 F. Supp. at 668.

with the intentions of the drafters of the Warsaw Convention by making passengers' recoveries more reasonable and predictable. This approach also allows for greater recovery with more severe injuries, presuming that more distress flows from more serious injuries. Further, this approach even permits recovery in wrongful death cases.⁶⁰³

The fourth approach does, however, have one drawback. The difficulty is that emotional damages might not be allowed in a case like that involving the Korean Air Lines plane that was shot down in Soviet airspace. For, if no impact injuries were suffered until the plane hit the water, no recovery would be allowed for the ten or eleven minutes of pre-crash terror.

The author believes that the numerous benefits of the fourth approach outweigh its one drawback. Courts should, therefore, adopt it and allow recovery only for emotional distress flowing from a bodily injury.

In a more recent case, In re Air Crash at Little Rock, Arkansas⁶⁰⁴, the Eighth Circuit reviewed a jury verdict in favor of passenger damages in the amount of \$6.5 million⁶⁰⁵ for a

⁶⁰³ Survivors may recover for physical manifestations of their grief at the loss of a loved one.

⁶⁰⁴ In re Air Crash at Little Rock, Arkansas, 291 F.3d 503 (8th Cir. 2002).

⁶⁰⁵ International Air Transport Association ("IATA") inter-carrier agreements entered into by America made the action a contract, rather than tort action. The agreements serve to waive the Warsaw Convention's liability limits. So, while the action was brought under Article 17, the liability limits of Article 17 were not applicable, hence the large jury verdict. *Id.* at 506-07 fn. 2.

claim arising under the Warsaw Convention. The passenger suffered physical injury (punctured leg, traumatic quadriceps tendinitis) during an air crash in Little Rock, Arkansas.⁶⁰⁶ Nearly a year later, she sought treatment from a psychiatrist for her psychic harm. She was diagnosed with PTSD and depression, and her psychiatrist testified that her leg injuries were a factor in her PTSD and depression, although later admitted that the passenger would likely have suffered from PTSD regardless of the physical injury. While testimony was offered that PTSD causes physical injury to the brain, no testimony was offered to show damage to the passenger's brain. Indeed, no diagnostic medical tests were performed. On appeal, the Eighth Circuit reversed the district court's ruling that any physical injury is sufficient to trigger recovery of emotional damages, regardless of their cause, and followed what it termed the more "mainstream" view that "damages for mental injury must proximately flow from physical injuries caused by the accident."⁶⁰⁷ The Fifth Circuit found that the approach was "consistent with *Floyd*, yet provides full compensation for the victim within the bounds established by the Warsaw

⁶⁰⁶ Although the passenger was on a domestic flight, she was returning home from a trip to Germany. *Id.* at 506.

⁶⁰⁷ *Id.* at 510.

Convention."⁶⁰⁸

In its holding, the court drew a line between the emotional injuries that were directly caused by the passenger's physical injuries to her legs and those that were directly caused by the accident--the damages were compensable in the first case, but not in the second.⁶⁰⁹ The Supreme Court denied certiorari in October of 2002.⁶¹⁰

4-7. International approaches

While the United States is the primary source of aviation law decisions under the Warsaw Convention, few other countries have addressed the issue of recovery for purely emotional damages (but not emotional damages accompanied with physical injuries, which issue leaved unanswered outside the US) under the Warsaw Convention. Those countries that have addressed the issue almost uniformly adopted the view that no such recovery is available.

For UK, in King v. Bristow Helicopters Ltd.,⁶¹¹ the House of Lords dealt with two cases where passengers suffered

⁶⁰⁸ Id.

⁶⁰⁹ Id. at 511-12.

⁶¹⁰ 537 U.S. 974 (2002).

⁶¹¹ King v. Bristow Helicopters, Ltd., 1 Lloyd's Rep. 745, (H.L. 2002).

psychiatric injury with no physical injury as a result of accidents on board aircraft. In the first case,⁶¹² plaintiff King was a passenger on a helicopter transporting workers off of a North Sea oil platform. Both of the helicopter's engines failed suddenly, causing the aircraft to plunge thirty-five feet back onto the oilrig's deck. King suffered post traumatic stress disorder with symptoms such as insomnia, nightmares, anxiety, and a fear of flying. He claimed the accident also caused or contributed to an existing peptic ulcer. In the second case,⁶¹³ the plaintiff was an underage girl, Morris, traveling unaccompanied from Kuala Lumpur to Amsterdam, who was sexually assaulted by a male passenger sitting next to her. She presented evidence at trial that she suffered from clinical depression consisting of a single episode of a major depressive illness. She claimed only mental anguish damages.⁶¹⁴ The House of Lords heard a consolidated appeal because the same legal issue was presented in both cases.⁶¹⁵

The House of Lords held that compensation could be awarded for physical manifestations of a mental injury so long as a casual link can be established by showing that the mental

⁶¹² Id. (citing King v. Bristow, 1 Lloyd's Rep. 95 (2001)).

⁶¹³ Id. (citing Morris v. KLM Royal Dutch Airlines, Q.B. 100 (C.A. 2002)).

⁶¹⁴ Id. at 746.

⁶¹⁵ Id. at 747.

injury causing the physical symptoms itself was caused by the accident. However, no recovery is available for mental injury absent physical symptoms. In this consolidated appeal, the holding meant that plaintiff King could recover only for his ulcer, and plaintiff Morris was entirely denied recovery.

In their analysis, their Lordships turned to the leading authorities from the United States. In particular, they followed Eastern Airlines, Inc. v. Floyd⁶¹⁶ and El Al Israel Airlines, Ltd. v. Tseng⁶¹⁷, but paid close attention Weaver v. Delta Airlines, Inc.⁶¹⁸ Lord Steyn noted that, in addition to any legal rationale for not following Weaver, the policy reason for not following Weaver was that "the extension of the Warsaw system to include mental injury and illnesses is too controversial to command sufficient international support."⁶¹⁹ This rationale for rejecting Weaver is important in that their Lordships expressed a strong preference in establishing international uniformity in Warsaw Convention interpretation.⁶²⁰ Lord Hobhouse disagreed and thought Weaver was correctly decided and naturally followed from Floyd.⁶²¹ Lord Hope took a third position. He suggested

⁶¹⁶ E. Airlines, Inc. v. Floyd, 499 U.S. 530, 533 (1991).

⁶¹⁷ Tseng, 525 U.S. at 155.

⁶¹⁸ Weaver, 56 F. Supp. 2d at 1190.

⁶¹⁹ King, 1 Lloyd's Rep. at 755.

⁶²⁰ Id. at 748.

⁶²¹ Id. at 783-84.

that bodily injury is that which is capable of being demonstrated by a physical examination using the most sophisticated means available.⁶²² He then stated that he did not think such an examination happened in *Weaver* and, in fact, that no evidence of a physical injury had been presented at all in that case. Based on these differing viewpoints, the United Kingdom's position regarding *Weaver* is unclear.

The House of Lords had been previously confronted with the issue of damages for purely mental injuries in *Sidhu v. British Airways*⁶²³. That case involved a consolidated appeal arising from passengers being taken hostage in Kuwait by invading Iraqis during the first Gulf War. The plaintiffs claimed to have suffered psychological and bodily injury including weight loss, eczema and excessive menstrual bleeding.⁶²⁴ In the trial, however, plaintiffs submitted that their claims likely did not fall into the category of "bodily injury" as their claims were for psychological injury. Before the House of Lords, plaintiffs suggested that psychological injury should provide for recovery.⁶²⁵ Their Lordships regarded the issue as not germane to their decision and avoided discussion of the issue.⁶²⁶

⁶²² Id. at 771.

⁶²³ *Sidhu v. British Airways*, 2 Lloyd's Rep. 76 (1997).

⁶²⁴ Id. at 77. The other consolidated plaintiff alleged only psychological injury.

⁶²⁵ Id. at 80.

⁶²⁶ The issue was whether damage suffered in the course of international carriage by air is

Interestingly, it appears that the type of physical injury claimed in Sidhu would have allowed for recovery under the standard set forth by the House of Lords in King.

Australia has also had the opportunity to decide whether recovery should be allowed for purely mental damages. In Kotsambasis v. Singapore Airlines, Ltd.⁶²⁷, the Court of Appeal of New South Wales dealt with a plaintiff who claimed mental anguish arising from an in-flight turn-back after an engine fire.⁶²⁸ Following Floyd, the court held that the term "bodily injury" did not include purely psychological injury, but noted that the decision in Floyd "left open the possibility that recovery be available where psychological injury is accompanied by physical injury."⁶²⁹

The only case supporting recovery for mental anguish without physical symptoms was handed down by the Israel Supreme Court.⁶³⁰ In Daddon, the Israel Supreme Court was confronted with claims by passengers alleging mental anguish damages suffered while being held captive by hijackers.⁶³¹ The court reached the conclusion that mental anguish absent any

governed exclusively by the Warsaw Convention. The House of Lords held that it was and dismissed the case on limitations grounds. See Sidhu, 2 Lloyd's Rep. at 87.

⁶²⁷ Kotsambasis v. Singapore Airlines, Ltd., 140 F.L.R. 318 (1997).

⁶²⁸ Id. at 319.

⁶²⁹ Id. at 323.

⁶³⁰ 1 Lloyd's Rep. at 770 (citing Daddon v. Air France, 1 S.&B. Av. R. 141 (1984)).

⁶³¹ Id. at 769.

physical injury should be considered "bodily injury" under the Warsaw Convention because at the time of drafting, unlike today, mental anguish either was not actionable or the possibility of mental anguish without physical harm had simply not been contemplated. This approach has been criticized as impermissibly seeking to develop the meaning of the phrase "bodily injury" by judicial policy in light of subsequent legal and medical advances instead of interpreting the Convention as written.⁶³² To date, no other jurisdictions have followed Daddon.

4-8. Conclusion

While there is very little disagreement about the literal translation of "lésion corporelle," its meaning and application in the context of a variety of mental or psychic injuries is less clear. There is widespread disagreement about whether - and to what extent - the term encompasses emotional injury. Court decisions since Floyd allow recovery for a range of claims involving emotional injury under Article 17; in some cases there is no recovery, while in others there is full recovery, depending on the

⁶³² Id. at 770.

allegations and the nexus between the alleged injury and any related or accompanying physical injury. Courts are in agreement that pure emotional injury is not compensable under the Convention.⁶³³ Most courts agree that emotional injury is not compensable in those cases where it has resulted only in physical manifestations such as weight loss or sleeplessness. At the same time, most courts generally agree that emotional injury is compensable if it proximately flows from a physical injury.

The troubling cases are those involving emotional injury accompanied by unrelated physical injury, i.e., where the physical injury has not been shown to have caused the emotional injury. These cases are typically resolved on a case-by-case basis. There is no consistent rule to guide the parties, although the trend in the decisions seems to disfavor recovery for emotional injury with unrelated physical harm. Thus, the case law suggests that a plaintiff is more likely to prevail if he or she can allege and prove a link between the physical and mental injuries.

In the future, certain advances in medicine may blur, or perhaps even clarify, the distinction between purely "physic" and physical injury. Currently, the majority of courts have not

⁶³³ See *Floyd*, 499 U.S. at 530; *Rosman*, 214 N.E.2d at 848; *Fishman*, 132 F.3d at 140; *Croucher*, 111 F. Supp. 2d at 501.

accepted that PTSD alone can be characterized as a physical injury. Defendants should expect, however, even under the new Montreal Convention of 1999, that plaintiffs will continue to push the envelope with the backing of experts and application of advances in science and medicine for more rulings to the effect that PTSD is itself a physical injury or *lésion corporelle*. On the other hand, although science may change or advance, the analysis of facts in cases involving a claim of emotional injury is unlikely to change significantly with the introduction of the Montreal Convention. Accordingly, parties involved in future cases with claims of mental injuries must be well-versed in the body of case law cited in this chapter. As discussed herein, the application of the "*lésion corporelle*" concept in context of allegations of emotional harm is not entirely resolved and is an important area for development of the law in international air carrier litigation.

CHAPTER FIVE

The Warsaw – Montreal System and China

5-1. Introductory note

CAAC⁶³⁴ was established in the year of 1950 as the central administrative body of civil aviation in China. It has developed rapidly since the Chinese Reformation in 1980.⁶³⁵ Today, China has more than one hundred international flight lines covering almost the entire world.

Compared to the high speed development of the Chinese civil aviation industry, Chinese legislation has not kept up with the pace. China only has "Civil Aviation Law of China (1995)", promulgated on October 30 1995 and effective as of March 1, 1996, which is out of date. Importantly, ^{it} does not deal with the issue of international airlines' liability to passengers. Only in one article of the "Civil Aviation Law of China", Article 184 provides:

"Where the provisions of international treaty concluded or acceded to by the People's Republic of China... the provisions of that international treaty shall apply..."

However, this provides no means to interpret an international convention. This situation creates uncertainty for Chinese courts, airlines, lawyers. No one is clear what exactly the law is, or how to apply international conventions when deal

⁶³⁴ Civil Aviation Administration of China, now known as General Administration of Civil Aviation of China.

⁶³⁵ Before Chinese Reformation, CAAC was state-owned property, even under the military organization system.

with international issues. Fortunately, this is not a dead end, for the Civil Aviation Law of China, Article 184 paragraph 2 provides:

“In respect of cases which are not provided by the law of the P.R. China or by the international treaties concluded or acceded to by the P.R. China, international practices may apply.”

This constitutes the foundation of the present dissertation. Examining the cases around the world in this area will solve or at least provide references to legal problems in China.

The problems have been clearly pointed out in recent air disasters at Pusan Airport in South Korea on April 5, 2002 and over the sea near Dalian, China on May 7, 2002 have raised questions about how compensation claims are handled in China. Though China is a contracting party to relevant international conventions⁶³⁶ and has enacted domestic laws and regulations governing compensation for passengers killed or injured in air accidents, defects in the country's legislation have been revealed. How to apply the articles of the international conventions and domestic laws to the air calamities that have occurred in different jurisdictions, and how to determine the damages are serious challenges faced by China's judges when claims for compensation are brought to trial.

⁶³⁶ China made the accession to the Warsaw Convention 1929 on 20/07/58, so the convention came into force in China on 18/10/58.

China made the accession to the Hague Protocol 1955 on 20/08/75, so the protocol came into force in China on 18/11/75.

Since China is a contracting party to both the Warsaw Convention, signed October 1929, and the 1955 Hague Protocol that amended the Warsaw Convention. In accordance with article 1 of the conventions, these conventions apply to international carriages, which is defined as:

“any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territory of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another state, even if that state is not a High Contracting party.”⁶³⁷

So, in case of an aircraft that departed from within China and suffered air crash in a state of destination which is a state or party signatory country of either the Warsaw Convention or the Hague Protocol, the relevant convention shall apply to the compensation arising from the air accident.

The Chinese Aviation Law expressly introduces the concept of ‘international carriage’ as it is used in the conventions, and thus the Chinese law also distinguishes between international and non-international carriage. For international flights to or from China, the conventions will prevail, and the local rules will deal with non-international flights.

⁶³⁷ See Warsaw Convention 1929, Article 1.

For domestic carriage, Article 128 of the Chinese Aviation Law stipulates: '*The limits of carrier's liability in domestic air transport shall be formulated by the competent civil aviation authority under the State Council and put in force after being approved by the State Council.*' This is a delegated legislation clause. However, the Civil Aviation Authority (CAAC) did not formulate a new regulation as per the law on this matter but let the pre-existing '*The Provisional Regulations on Compensation to Passenger Killed or Injured in Domestic Air Transport*' (that entered into force January 1, 1994) continues to apply. Under these regulations, air carrier's liability for passengers is limited to Rmb70,000 (about US\$8,400). For checked baggage, according to the revised '*Domestic Transport of Passengers and Baggage by China Civil Aviation Rules*' formulated by CAAC on June 28, 1996, the limitation is Rmb50 (US\$6) per kilo, and for carry-on baggage is at Rmb2,000 (US\$240).

The air carrier's liability to passengers under Warsaw Convention is 125,000 French francs and Hague Protocol doubled this to 250,000 francs. The Chinese Aviation Law introduces the Special Drawing Right (SDR) contained in Montreal Additional Protocol No.2, 1975, rather than the French francs. Article 129 of the Chinese Aviation Law places an air

carrier's limits on passenger liability for international flights at 16,600 SDR, on checked baggage at 17 SDR per kilo and carry-on baggage at 332 SDR for each passenger.

Over the past three decades, civil aviation industry around the world have seen higher limits in air carriers' liability. Since the IATA Intercarrier Agreement (IIA) of 1995, supplemented by the measures to implement the IATA Intercarrier Agreement (MIA), many airlines in developed countries have incorporated new limits into their Conditions of Carriage and increase the ceiling to 100,000 SDR. In 1998, EC regulation on air carrier liability entered into force. Airlines from Japan, meanwhile, lifted the limits voluntarily. The Montreal Convention came into being in 1999.⁶³⁸

All of these efforts aim to modernize the Warsaw system with higher limits, and ultimately aim to abolish the limits. When looking at China's liability limitation regulations, we find that the limit for domestic carriage (Rmb70,000) is much lower than the international limit of 100,000 SDR, and even lower than the original Warsaw system. China's calculation was based on the economic situation in 1993, but with fast GDP growth

⁶³⁸ China has ratified the Montreal Convention 1999 on 01/06/05, so the convention came into force in China on 31/07/05.

over the past decade and taking inflation into account the amount needs to be raised. A positive sign that things are changing is China Northern Airline's increase of the limited amount for families of the Dalian (May 7, 2002) crash victims killed to Rmb133,000 (US\$16,000) per passenger; with additional compensation (for checked and carry-on baggage), the amount in total will be about Rmb194,000 (US\$23,458). This roughly equals the level of Hague Protocol and the amount for international flights under the Chinese aviation law. It is believed this compensation policy has been approved by the CAAC.

Therefore, under the framework of China's aviation legislation, there exist five regimes that govern carrier's limits for passenger liability: the Warsaw convention 1929, the Hague Protocol 1955, the Montreal Convention 1999, the Chinese Aviation Law for international carriage and the CAAC rules for domestic carriage.

5-2. How to interpret "Accident" in China?

Beside the problem of "how much" an international air

carrier should be liable to its passengers, how to interpret the international conventions is another major problem, especially the pre-conditions of a carrier's liability in the crucial Article 17 of the Warsaw Convention 1929 and the Montreal Convention 1999.

Article 17 of the conventions requires there is an "accident" to trigger the airline's liability, however, no definition of "accident" has been given in the conventions.

The theory that the goal in the interpretation of any convention is to effectuate the intent of the parties is also accepted in China. According to the Vienna Convention,⁶³⁹ 'a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'⁶⁴⁰ The basic rules include the need to uphold the purposes of the treaty and give meaningful effect to the signature or intent behind the treaty. Notions of liberality and good faith⁶⁴¹ are also commonly invoked.

Notably, the draft convention initially presented to the Warsaw delegation by CITEJA made air carriers liable 'in the

⁶³⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁶⁴⁰ Vienna Convention, *supra* note 639, art. 32.

⁶⁴¹ *Id.*

case of death, wounding or any other bodily injury suffered by a traveler,' 'in the case of loss, damage or destruction of goods or baggage,' or 'the case of delay suffered by a traveler, goods, or baggage.' The liability scheme did not textually include any requirement of causation and made no mention or reference to 'accident.' Liability was likewise the same for personal injuries and damage to goods or baggage.⁶⁴²

The minutes to the Convention establish that the term 'accident' itself was never discussed, but simply appeared in final form as revised by the drafting committee at the Convention.⁶⁴³ While there is no information as to why or when this occurred, the wording remains exactly the same today as it was then.

Surely Warsaw Convention Article 17 is 'stark and undefined.' The plain or ordinary meaning of 'accident' or, 'l'accident', is certainly similar under both English and French usage, and references an unexpected, fortuitous, or untoward event or happening. What it includes within its ambit, however, remains in question.

⁶⁴² See International Conference on Air Law Affecting Air Questions, Second International Conference on Private Aeronautical Law, Minutes, Oct. 4- 12, Warsaw 1929, at 264-265 (R. Horner ed. & D. Legrez transl., 1975) [[hereinafter 1929 Warsaw Minutes], (listing liability of the carrier as adopted by CITEJA in May 1928).

⁶⁴³ See 1929 Warsaw Minutes, supra note 642, at 267 (using the term 'accident' in discussing the liability of third party carriers).

Fortunately, followed the basic principles, there is one universal accepted definition of “accident” generally, which given by the US Supreme Court in Air France v Saks,⁶⁴⁴ where Ms. Saks was a passenger on an international flight between France and Los Angeles, California.⁶⁴⁵ As the aircraft descended, Ms. Saks felt extreme pressure and pain in her left ear⁶⁴⁶ and suffered permanent deafness as a result.⁶⁴⁷ Ms. Saks claimed that the normal pressurization changes during descent caused her deafness and constituted an accident under Article 17.⁶⁴⁸ She argued that “accident” should be defined as a “hazard of air travel,” and that her injury had indeed been caused by such a hazard. The US Supreme Court rejected her claim and in this landmark case, defined “accident” as an “unexpected or unusual event or happening external to passenger”.

This definition has been accepted by UK, in the case of Chaudhari v British Airways plc,⁶⁴⁹ the UK Court of Appeal determined that a passenger, who was already suffering from a left-sided paralysis and who was injured when he fell as he tried to leave his seat, did not suffer an “accident” that fell within

⁶⁴⁴ 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985).

⁶⁴⁵ See Saks, 470 U.S. at 394.

⁶⁴⁶ See id.

⁶⁴⁷ Id.

⁶⁴⁸ See id, at 395.

⁶⁴⁹ [1997] Times 7 May 1997 (Apr. 16, 1997).

Article 17 of the Convention. Leggatt LJ emphasized that the word “accident” focused attention on the cause, rather than the effect of the accident, and should be contrasted with Article 18 of the Convention (covering loss and damage to baggage) which refers to the “occurrence” which caused the damage. The word “accident” was not to be construed by reference to the passenger’s peculiar condition, but was properly to be defined as something external to the passenger.

This definition has also been accepted by Australia, in the case of Povey v Qantas Airways Ltd⁶⁵⁰, the High Court of Australia held that “accident” is a concept which invites two questions: first, what happened on board (or during embarking or disembarking) that caused the injury of which complaint is made, and secondly, was what happened unusual or unexpected.

Same as Canada, in the case of Quinn v. Canadian Airlines Int'l Ltd.⁶⁵¹, Canadian court relying on Saks' holding that turbulence was not considered an accident under the Warsaw Convention.

China has not encountered a trail case concerned with the definition of “accident” in Article 17 of Warsaw Convention.

⁶⁵⁰ 2005 WL 1460709 (HCA 2005), affirming QANTAS Ltd v. Povey, 2003 WL 23000692 (VCA 2003), Special leave to appeal granted by, 2004 WL 3222486 (HCA 2004) and Affirmed by, 2005 WL 1460709 (HCA 2005).

⁶⁵¹ [1994] 18 O.R.3d 326.

The reason is due to the extremely unwillingness of prosecution, Chinese people rarely sue in courts, the quantity of cases (at least in this area) is so limited, this is particularly true when compare with the US legal practice. However, there is no reason to reject the worldwide accepted definition in Saks, the only doubt as to this worldwide standard interpretation of "accident" in the Warsaw Convention is the "external" requirement. Will China accept the "external" requirement? The most likely answer will be affirmative.

Prior to the decision of the US Supreme Court in Saks, a number of courts expressed the view that an "accident," as that term is used in Article 17, must be an unexpected or unusual happening without requiring the event to be external to the passenger.⁶⁵² And the Australia Povey case expressed this concern as well. Some experts argue that the US Supreme Court insisted that the "accident" must be external, however, there is not a lot of textual support in the Warsaw Convention for this conclusion. On the contrary, the text of Article 17 uses the word "accident" as the necessary cause of the "damage so sustained." Thus, arguably, if such "damage" were sustained by an internal "accident" (should that be possible) so long as it happened "on

⁶⁵² See Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400 (E.D. Pa. 1977); see also Rullman v. Pan American World Airways, Inc., 122 Misc. 2d 445, 471 N.Y.S.2d 478 (Sup 1983).

board the aircraft" or "in the course of" the specified "operations," that would be enough. Under this view, the happening or event in such special and temporal circumstances would be sufficient to attract the liability of the carrier.

By aware that even in the Saks, why an event must be "external" to qualify as an "accident" has not been clearly reasoned. There are some positive aspects under this approach, this "external" prerequisite of Article 17 accident arises from the court's desire to reduce the trouble of proof, which Chinese courts usually welcome, since under the modern science, it is extremely difficult to prove "internal accident" which connects to the air travel, such as the DVT cases.

The next issue is should China interpret "accident" broadly or narrowly? The most likely answer is broadly. Given the significant exclusivity of the Warsaw and the Montreal conventions, the world, include China, certainly under the pressure of interpret the word "accident" broadly since recovery for personal injury in the scope of international air carriage if not allowed under Article 17 of the Conventions, is not available at all. This is more so that in light of the traditions of Chinese laws, regulations, and policies always encourage comfort the people. The question usually will be "how much is

appropriate?” rather than “will that be an accident?”.

Based on the issues discussed so far, the following will be a detailed examination of what will constitute “accident” under Article 17 of the Warsaw Convention and the Montreal Convention in China, or will not.

1. Can intentional misconduct constitute an “accident” within the meaning of Article in China? The answer is affirmative. There is nothing in the Warsaw Convention and the Montreal Convention exclude intentional misconduct to be an “accident”, instead, according to the inter-relationship of the Article 17 and Article 25⁶⁵³, intentional misconduct will definitely fall in the scope of Article 17’s “accident”.

2. Whether inaction may constitute an “accident” within the meaning of Article in China? The Chinese approach would be pure inaction will not be an “accident” but an event lead by an inaction could be an “accident”.

In the case of *Olympic Airways v Husain*⁶⁵⁴, the US Supreme Court held that the term accident is not limited to

⁶⁵³ Warsaw Convention 1929, Article 25 provides:

“(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct;

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.”

⁶⁵⁴ 540 U.S. 644, 124 S. Ct. 1221, 157 L. Ed. 2d 1146, 4 A.L.R. Fed. 2d 709 (2004).

affirmative acts. Under the circumstances of the instant case, the court rejected the defendant airline's argument that a flight attendant's failure to act, by refusing to assist a passenger sensitive to second-hand cigarette smoke in moving farther from the smoking section, could not constitute an "accident" because it was not an affirmative act. The court declared that the relevant "accident" inquiry was whether there was an unexpected or unusual event or happening and the rejection of an explicit request for assistance would be an event or happening under the ordinary and usual meaning of those terms. Moreover, the court thought that Article 25, providing that Article 22's liability cap does not apply in the event of willful misconduct or such default [emphasis added by the court] on the carrier's part that may be the equivalent of willful misconduct, suggested that an airline's inaction could be the basis of liability.

Chinese courts will hardly accept this case. It is true that rejection of a request can be considered an event, but inaction itself would not be. Inaction itself is nothing, not even an event, how could it be an accident? The US Supreme Court conclusion that an airline's pure inaction could be the basis of liability would most likely not be acceptable in China.

3. Should service of food or beverages could be an

“accident” in China? Normally, the answer will be yes. In one complaint to Eastern Airline, a passenger flew from Hong Kong to Shanghai, one hour after disembarkation, he felt very uncomfortable and was diagnosed with food poisoning. The airline agreed that if the food poisoning was caused by the food during the flight, it is an accident for which the airline should be liable. However, in this complaint, the passenger failed to prove that his food poisoning was caused by the in flight meal.

4. Can detention or search of a passenger be an “accident” in China? Probably yes, the reasonable expectation is that courts will interpret detention or search of passenger as a Warsaw Convention Article 17’s “accident” as long as the detention or search is unexpected or unusual. If the detention or search is a normal or routine one according to the airport or airline security procedures, then there will be no accident.

5. Can removal of passenger from aircraft be an accident in China? There is no clear answer, a court has to look into every case’s facts. Normally, a court will focus on whether the removal is justified, if yes, it is the passenger’s responsibility to follow the removal order, if the passenger refuses to be removed and caused injury to himself during the force removal, the airline should not be liable. On the contrary, if the removal is not

justified, it is an unexpected and unusual event, then airline should liable to the injury to the passenger.

6. Can a passenger's pre-existing medical condition be an accident in China? Probably not, because if the passenger is aware of his medical condition, such as heart disease, he should know that may cause damage during international flight, there will be no unexpected or unusual event external to the passenger, then there will be no accident. Even if the passenger is not aware of his medical condition, the problem is already there, this could not trigger the airline's liability. Since there is no case in China concentrate on this issue, the following US case may provide reference.

In *Rajcooar v. Air India Ltd.*⁶⁵⁵, the US court held that the death of a passenger, who suffered a heart attack during layover in an airport transit lounge utilized by several carriers and restricted to passengers who cleared customs and security checks, was not the result of an "accident" under Article 17 because a heart attack, under the definition of that term by the Supreme Court in *Saks*, was not an event external to the passenger.

⁶⁵⁵ 89 F. Supp. 2d 324 (E.D. N.Y. 2000).

7. Can a carrier's personnel response to passenger's medical emergency be an accident in China? The answer is yes.

In an unreported complaint to Air China, one passenger felt uncomfortable during an international flight, the air stewardess offered him airsickness medicine, after the flight arrived at its destination, the passenger suffered medicine hypersusceptibility. The airline agreed that this is an accident under the Warsaw Convention Article 17 and paid the passenger compensation.

Similarly, in one US case, *Fishman by Fishman v Delta Airlines, Inc.*⁶⁵⁶, the US court adopted the same approach. The court of appeals held that the scalding of a child by a stewardess attempting to alleviate the passenger's earache was caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. On the defendant carrier's international flight from Tel Aviv, Israel to New York City, the child, who had a cold, suffered from the change of air pressure. The stewardess suggested that a cup containing a warm cloth be placed over the ear and, when the poultice was applied to the child's ear, scalding water in the cup dripped on the child's neck and shoulder, causing burns.

⁶⁵⁶ 132 F.3d 138 (2d Cir. 1998).

In an effort to take their claim outside the Warsaw Convention and avoid the result of the district court's ruling, dismissal of the claims because the two-year limitations period for bringing suit under Article 29 of the Warsaw Convention had expired, the plaintiffs attempted to cast their claims chiefly in terms of the tortious refusal of medical care that happened afterward and argued that the claims did not arise out of the normal operation of aircraft, and in any event were not accidental in nature. The appellate court approved the district court's reasoning that the underpinning of the claims was the scalding of the child by the flight attendant, an unexpected event that was external to both plaintiffs. Although the plaintiffs contended that the child suffered serial colds and ear infections and had narrow eustachian tubes, all of which predisposed her to earaches caused by a change of pressure on the aircraft, the appellate court agreed with the district court's reasoning that the injury in the instant case was not the child's earache, but rather the application of scalding water to treat it. The appellate court thus found that, although the earache was caused by a change in air pressure, which was part of the normal operation of the aircraft and not an accident, all the harm alleged by the plaintiffs flowed from the scalding, which was easily seen as accidental.

5-3. How should the phrase "From Embarking to Disembarking" be interpreted in China?

After analyzing how to interpret "accident" in China, the next issue is how to interpret "from embarking to disembarking" in China. This is the second pre-condition to trigger an air carrier's liability under the Warsaw-Montreal system.

It makes no difference that the negligence occurred or that the carriage contract was formed prior to embarkation, for the Warsaw Convention and the Montreal Convention Article 17 refer to the place where the accident causing injury must *happened* *accident's* *commence* occurred in order for that article to cover the case and establish the presumption of liability for the injury. The actual, ultimate cause of the accident is irrelevant for purposes of Article 17. As long as, and only if, the accident which caused the injury 'took place on board the aircraft or in the course of any of the operations of embarking or disembarking,' the action is covered by Article 17.⁶⁵⁷

The general understanding of the scope of "from embarking to disembarking" is narrower than from the moment

⁶⁵⁷ See Husserl v. Swiss Air Transport Co., Ltd., 388 F. Supp. 1238, 13 CCH Avi 17603 (S.D. N.Y. 1975).

the passenger entered the airport of departure until the passenger left the terminal at his destination; but broader than from when the passenger entered the aircraft until exiting the aircraft.

At the 1929 Warsaw Conference, the delegates were faced with two general proposals concerning the extent of carrier liability. One point of view was that liability attached from the moment the passenger entered the air terminal and extended until the passenger left the terminal at his destination. A more restrictive view was advanced which would have extended liability from the time the passenger boarded the aircraft until the time of deplaning. The broader plan of liability was rejected in favor of the language presently contained in Article 17.⁶⁵⁸ Perhaps the restrictive one too.⁶⁵⁹ The equivalent phrase of Article 17 in the French text reads: "*Au cours de toutes operations d'embarquement et de débarquement*". It is thus plain that the draftsman contemplated that the process of disembarking, as well as that of embarking, may in some circumstances be capable of including at least some activities beyond the mere actual ascent or descent of the steps of an

⁶⁵⁸ For useful background discussion of the views expressed at the 1929 Conference, see *Martinez Hernandez v Air France* (1976, CA1 Puerto Rico) 545 F2d 279, cert den 430 US 950, 51 L Ed 800, 97 S Ct 1592. *Infra*.

See also Note: Warsaw Convention--Air Carrier Liability for Passenger Injuries Sustained Within a Terminal. 45 *Fordham L Rev* 369.

⁶⁵⁹ See *Day v Trans World Airlines, Inc.* (1975, CA2 NY) 528 F2d 31, 36 ALR Fed 477, cert den 429 US 890, 50 L Ed 172, 97 S Ct 246, reh den 429 US 1124, 51 L Ed 574, 97 S Ct 1162. *Infra*.

aircraft or use of an equivalent device. Problems, however, may arise in determining what other location should be treated as the point where the process of embarkation begins or the process of disembarking ends.

Since the Guatemala Conference, in 1971, the use of the words "embarking" and "disembarking" were re-examined in the light of the absolute liability regime which had been established by the Montreal Interim Agreement, but it was apparently the consensus of opinion of the delegates that the wording needed no change.⁶⁶⁰ Even in the new Montreal Convention 1999, the words are still the same.

There are three major approaches about this issue around the world today, namely the location test, the aviation risk test, and the tripartite test.

1. The location test. In UK, the determine factor is the location. In *Adatia v Air Canada*⁶⁶¹, the English Court of Appeal expressed the opinion that location is the crucial factor, if not the only factor to determine the extent of from embarking to disembarking.

The plaintiff arrived at Heathrow Airport from Toronto and

⁶⁶⁰ As to discussion of "embarking" and "disembarking" by the delegates of the Guatemala Conference, see Minutes of the International Conference on Air Law, Guatemala City (1971), ICAO Document 9040--LC/167-1, pp 31 et seq.

⁶⁶¹ *Adatia v Air Canada*, May 21, 1992. Lloyds Aviation Law, vol. 11, No. 13, July 1, 1992.

suffered injury on the moving walkway while proceeding from the aircraft to the immigration and customs hall. The English Court of Appeal affirmed the judgment of the County Court that the plaintiff had not suffered the injury in the course of disembarkation.

As the judge said, the point to be resolved was whether the plaintiff's injuries, which sustained on the travelator, were caused "in the course of any of the operations of . . . disembarking". There was no English authority which specifically deals with the meaning of those words. In the absence of such authority, the judge concluded: "One has to construe them in their ordinary English meaning and disembarking, either from a ship or aircraft, in my judgment means leaving the ship or aircraft and actually stepping on to dry land or that part of the non-movable part of the airfield or aerodrome or terminal." The judge derived support for this conclusion from an American authority, MacDonald v Air Canada.⁶⁶²

As is pointed out in Shawcross⁶⁶³ modern conditions governing embarkation and disembarkation at different international airports may well differ widely. The courts should

⁶⁶² MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1970).

⁶⁶³ This case law is helpfully analysed in paragraphs 155, 155.1 and 1552. of Shawcross & Beaumont on Air Law (4th Edition).

be cautious before placing a gloss on the words of Article 17 and that in any case the ultimate question is whether, on the wording of that Article, the passenger's movements through airport procedures (including his physical location) indicates that he was at the relevant time engaged upon the operation of embarking upon or disembarking from the particular flight in question.

2. Aviation risk test. The civil law jurisdictions' courts when deal with the issue of the scope of "from embarking to disembarking" frequently pay some regard to the question whether the relevant accident related to the activity of aviation, in another word, whether there is any aviation risk. They also attach considerable importance to the question whether at the relevant time the passenger was under the control of the carrier.

In *Mache v Cie Air France*⁶⁶⁴, the French court held that the physical injuries received as a result of the passenger falling into a manhole when crossing the apron to customs did not take place in the course of disembarkation since there is no aviation risk.

In *Air-Inter v. Sage et al.*⁶⁶⁵, where a passenger slipped and fell in an airport entrance hall, while he was in front of the

⁶⁶⁴ 17 RFDA 353, 20 RFDA 228, (1966); 21 RFDA 343, (1967); 24 RFDA 311, (1970) Cour de Cassation.

⁶⁶⁵ Cour d'Appel de Lyon (France), February 10, 1976; RFDA 266.

check-in counter before proceeding to the departure lounge. The fall was caused by the passenger slipping over a pool of whisky split on the ground by a previous traveler. The French court held that the fall could not be blamed on the carrier, since the airport entrance hall is a public place and not subject to the carrier's control and management. Consequently, the preparatory stage of air transport could not be considered as having commenced.

In *Consorts Zaoui v. Aeroport de Paris*⁶⁶⁶, the French Court of Appeal has, for good reason, rejected the request for compensation from an airline for injuries sustained by passengers who used the escalator situated in the airport entrance hall; it noted that the people applying for compensation were, at the time when the accident occurred, in airport buildings used by different airline companies and where the carrier's agents had not yet taken over responsibility for those persons.

In *Blumenfeld v BEA*⁶⁶⁷, unlike the French approach illustrated above, the German court adopted a rather extensive interpretation as to the Warsaw Convention Article 17. In this case, an aircraft of the defendant airline had been unable to take off on schedule due to thick fog, so the passengers had to wait

⁶⁶⁶ Cour de Cassation (1re Ch. Civ.), May 18, 1976; [1976] RFDA 394.

⁶⁶⁷ (Federal Republic of Germany), March 11, 1961; [1962] ZLW 78.

for some time. When the flight was finally called the plaintiff, who alone with other passengers hurried down the steps of the air terminal building in order to board the aircraft, slipped and fell; she boarded the aircraft with bruises on her leg and ankle. The plaintiff then claimed and received compensation for the accident, because the court ruled that when the airline company calls its passengers to board the aircraft it takes full charge of the passengers.

In Adler v Austrian Airlines⁶⁶⁸, the Brussels Court of Appeal held that where the passenger who slipped on ice disembarking from a bus in order to embark on the aircraft was in the course of embarking.

3. The tripartite test. Taking the position that the physical location of a passenger was not a sufficient sole criterion on which to determine whether a passenger was in the course of "embarking" or "disembarking" within the meaning of Article 17 of the Warsaw Convention, the US courts will look at the following factors: the location, the activity of the passenger, and the control over the passenger by the carrier.

In Day v Trans World Airlines, Inc.⁶⁶⁹, where injured passengers and the executrix of a passenger who died in a

⁶⁶⁸ [1986] 1 S & B A v R VII/191 (Brussels CA).

⁶⁶⁹ Day v Trans World Airlines, Inc. (1975, CA2 NY) 528 F2d 31, 36 ALR Fed 477, cert den 429 US 890, 50 L Ed 172, 97 S Ct 246, reh den 429 US 1124, 51 L Ed 574, 97 S Ct 1162.

terrorist attack, filed an action against airline company in which they claimed that the TWA was liable for the injuries and the death under the Warsaw Convention. The TWA contended that the application of Article 17 should be determined by reference only to the area where the accident occurred. Liability under the Convention should not attach while the passenger is inside the terminal building. The very earliest time at which liability can commence is when the passenger steps through the terminal gate.

The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. The US Supreme Court held that whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, driven to the conclusion

that the plaintiffs were 'in the course of embarking.'

The US Supreme Court believes a relatively broad construction of Article 17, affording protection to the plaintiffs under the Warsaw liability umbrella, is in harmony with modern theories of accident cost allocation. The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims.⁶⁷⁰ Equally important, this interpretation fosters the goal of accident prevention.⁶⁷¹ The airlines, in marked contrast to individual passengers, are in a better posture to persuade, pressure or, if need be, compensate airport managers to adopt more stringent security measures against terrorist attacks.

The US Supreme Court believes that the Warsaw drafters wished to create a system of liability rules that would cover all the hazards of air travel.⁶⁷² The rigid location-based rule suggested by TWA would ill serve that goal. Under TWA's test, many claims relating to liability for the hazards of flying would be excluded from the Warsaw system and would be governed by local law. Rather than serving the drafters' intent of creating an

⁶⁷⁰ See G. Calabresi, *The Costs of Accidents* at 39--45 (1970).

⁶⁷¹ See *Union Oil Co. v. Oppen*, 501 F.2d 558, 569--70 (9th Cir. 1974).

⁶⁷² See Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air. L. 1, 20 (1936); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air. L. 217 (1959).

inclusive system, TWA's proposal would frustrate it.

Moreover, the US Supreme Court also believes that the result it has reached furthers the intent of the Warsaw drafters in a broader sense. The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes.

Having analyzed the three major approaches about the scope of "from embarking to disembarking", then which one should China adopt, I believe is the tripartite approach. While there appears to be no relevant Chinese authority, the problem has given rise to extensive case law in other jurisdictions. The object of the Warsaw Convention and the Montreal Convention as thereby described is "the unification of certain rules relating to international carriage by air". So far as possible, therefore, in interpreting and applying Article 17, should have due regard to the case law in other jurisdictions. This view also supported by Chinese Aviation Law Article 184.⁶⁷³

Beside the advantages of the tripartite approach which discussed above, let us analyzing the other two approaches in

⁶⁷³ The Civil Aviation Law of China Article 184 provides: "In respect of cases which are not provided by the law of the P.R. China or by the international treaty concluded or acceded to by the P.R. China, international practices may apply."

the view of why they are not the best. The location approach is too hidebound which could not catch up with the modern change of embarking or disembarking a flight. Such as the situations in the Day case, it is really hard to disagree that the passenger were embarking, I could not even answer a simple question, if they were not embarking, what were they doing? The aviation risk approach has its disadvantages too. Aviation risk is relative, but not decisive. As one passenger walking on the steps of a life shaft which connect with the aircraft, the real risk is people walking on steps may fall down, rather than any risk of fly in the air, will a passenger who fall down on a life shaft which connect with the aircraft not embarking? The answer is no.

5-4. How to interpret “Bodily Injury” in China?

The final issue is how to interpret “bodily injury” in China, which is the third pre-condition to trigger an air carrier’s liability under the Warsaw-Montreal system. In [another word; ^{must} will] mental distress included in the word [of] “bodily injury”/in ^{occure} China?

Whether ‘bodily injury’ encompasses emotional distress under the Warsaw - Montreal liability regime is one of the

heaviest debated topics within the field. Courts have attempted for years to interpret and solidify the meaning of ambiguous phrasing and terminology, and the debate has yet to be resolved.

A number of decisions around the world except one decision in Israel have held that there can be no recovery for purely mental injuries. For example, in Eastern Airlines, Inc. v. Floyd⁶⁷⁴, the US Supreme Court not only rejected the view that there can be any recovery for purely mental injuries under the limited liability provisions of the Warsaw Convention,⁶⁷⁵ but also concluded that unless a passenger was made to "suffer death, physical injury, or physical manifestation of injury," an air carrier could not be held liable.⁶⁷⁶ The case was brought by passengers of an Eastern Airlines flight from Miami to the Bahamas. Shortly after takeoff, one of the engines lost oil pressure and, as part of the normal emergency protocol,⁶⁷⁵ the flight crew shut down the engine and returned to Miami. The two remaining engines then failed, and the flight crew informed the passengers that the plane would be "ditched" in the Atlantic Ocean. As the plane was descending, the crew was able to

⁶⁷⁴ Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

⁶⁷⁵ See Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108, 112 (3d Cir. 1998)

(characterizing the plaintiff's injuries as "purely psychic injuries that do not qualify as bodily injuries under the Warsaw Convention"); Turturro v. Continental Airlines, 128 F. Supp. 2d 170, 178 (S.D.N.Y. 2001) (absent any "physical wounds, impacts, or deprivations, or any alteration in the structure of an internal organ, then any subsequent shortness of breath, sleeplessness, or inability to concentrate may safely be characterized as psychosomatic and is not compensable").

⁶⁷⁶ Floyd, 499 U.S. at 552.

restart one of the engines and the plane landed safely at Miami International Airport.⁶⁷⁷ The passengers brought suit to recover damages solely for their mental distress. The district court concluded that pure psychic injury was not compensable under the Warsaw Convention.⁶⁷⁸ The Eleventh Circuit reversed, holding that the phrase "lésion corporelle" encompassed "purely emotional distress."⁶⁷⁹ By applying long-accepted methods of treaty interpretation, considering the text of the treaty, its context, as well as the "history of the treaty, the negotiations, and the practical construction adopted by the parties." The US Supreme Court reversed the Eleventh Circuit, ultimately holding that recovery for pure psychic injury was not permitted under the Warsaw Convention.

In King v. Bristow Helicopters Ltd.,⁶⁸⁰ the UK House of Lords dealt with two cases where passengers suffered psychiatric injury with no physical injury as a result of accidents on board aircraft. In the first case,⁶⁸¹ plaintiff King was a passenger on a helicopter transporting workers off of a North Sea oil platform. Both of the helicopter's engines failed suddenly,

⁶⁷⁷ Id.

⁶⁷⁸ *In re E. Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F. Supp. 307 (S.D. Fla. 1986).

⁶⁷⁹ Floyd, 872 F.2d at 1480.

⁶⁸⁰ King v. Bristow Helicopters, Ltd., 1 Lloyd's Rep. 745, (H.L. 2002).

⁶⁸¹ Id. (citing King v. Bristow, 1 Lloyd's Rep. 95 (2001)).

causing the aircraft to plunge thirty-five feet back onto the oilrig's deck. King suffered post traumatic stress disorder with symptoms such as insomnia, nightmares, anxiety, and a fear of flying. He claimed the accident also caused or contributed to an existing peptic ulcer. In the second case,⁶⁸² the plaintiff was an underage girl, Morris, traveling unaccompanied from Kuala Lumpur to Amsterdam, who was sexually assaulted by a male passenger sitting next to her. She presented evidence at trial that she suffered from clinical depression consisting of a single episode of a major depressive illness. She claimed only mental anguish damages.⁶⁸³ The House of Lords held that compensation could be awarded for physical manifestations of a mental injury so long as a casual link can be established by showing that the mental injury causing the physical symptoms itself was caused by the accident. However, no recovery is available for mental injury absent physical symptoms.

Australia has also had the opportunity to decide whether recovery should be allowed for purely mental damages. In Kotsambasis v. Singapore Airlines, Ltd.⁶⁸⁴, the Court of Appeal of New South Wales dealt with a plaintiff who claimed mental anguish arising from an in-flight turn-back after an engine

⁶⁸² Id. (citing Morris v. KLM Royal Dutch Airlines, Q.B. 100 (C.A. 2002)).

⁶⁸³ Id. at 746.

⁶⁸⁴ Kotsambasis v. Singapore Airlines, Ltd., 140 F.L.R. 318 (1997).

fire.⁶⁸⁵ Following Floyd, the court held that the term "bodily injury" did not include purely psychological injury, but noted that the decision in Floyd "left open the possibility that recovery be available where psychological injury is accompanied by physical injury."⁶⁸⁶

The only case supporting recovery for mental anguish without physical symptoms was handed down by the Israel Supreme Court.⁶⁸⁷ In Daddon, the Israel Supreme Court was confronted with claims by passengers alleging mental anguish damages suffered while being held captive by hijackers.⁶⁸⁸ The court reached the conclusion that mental anguish absent any physical injury should be considered "bodily injury" under the Warsaw Convention because at the time of drafting, unlike today, mental anguish either was not actionable or the possibility of mental anguish without physical harm had simply not been contemplated. This approach has been criticized as impermissibly seeking to develop the meaning of the phrase "bodily injury" by judicial policy in light of subsequent legal and medical advances instead of interpreting the Convention as written.⁶⁸⁹ To date, no other jurisdictions have followed

⁶⁸⁵ Id. at 319.

⁶⁸⁶ Id. at 323.

⁶⁸⁷ 1 Lloyd's Rep. at 770 (citing Daddon v. Air France, 1 S.&B. Av. R. 141 (1984)).

⁶⁸⁸ Id. at 769.

⁶⁸⁹ Id. at 770.

Daddon.

China certainly will not allow recovery for purely mental injuries under the Warsaw-Montreal liability regime, because if the contracting parties of the Conventions wish to do so, they will expressly incorporate the word “mental injury” in the Article 17, instead, the words “bodily injury” have remained the same since 1929. For my own opinion, contrary to Israel Supreme Court’s reasoning, *supra*, if the Conventions would allow recovery for pure mental injury, a lot of countries will not sign it. The following example will be clear reference.

Early drafts of the Montreal Convention 1999 Article 17 would have expressly included liability for mental injury.⁶⁹⁰ Later drafts even introduced the element of personal injury designed to encompass both physical and mental injuries.⁶⁹¹ For example, the provision (then Article 16) of the first draft of the Montreal Convention corresponding to Article 17 of the Warsaw Convention read:

“The carrier is liable for damage sustained in case of death or bodily injury or mental injury of a passenger upon condition only that the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.”⁶⁹²

⁶⁹⁰ Blanca I. Rodriguez, Recent Developments in Aviation Liability Law, 66 J. Air L. & Com. 21, 36 (2000).

⁶⁹¹ Ruwantissa I.R. Abeyratne, Mental Distress in Aviation Claims-- Emergent Trends, 65 J. Air L. & Com. 225, 225 (2000).

⁶⁹² *Id.* at 226-27 (quoting Report of the Rapporteur on the Modernization and Consolidation of the Warsaw System, Aviation Q., July 1997, at 286, 313) (emphasis added).

Other drafts of the convention even included the term "personal injury"; however, after further deliberations, the ICAO removed both "mental injury" and "personal injury" from the provision, choosing, instead, to leave the language virtually unchanged.

Having solved the problem of pure mental distress, the next question is whether mental distress accompanied by bodily injury is recoverable. There are four approaches:

1. Disallow recovery for emotional distress accompanied by bodily injury. Under this approach, an injured passenger could recover only pecuniary loss, such as medical expenses and lost income. Denying emotional distress damages is appropriate in light of the state of the law in many countries at the time of Warsaw Convention.⁶⁹³ And, because this approach is so restrictive on passengers' rights, it furthers the pro-airline industry goals of the Convention.⁶⁹⁴ However, this approach is unacceptable because it provides such minimal compensation for passengers who may have suffered traumatic injuries, either physical or mental. The drafters of the Warsaw Convention attempted to strike a balance between passengers and airlines; this approach is too one sided. Further, even though many

⁶⁹³ In *Floyd*, the Court noted that "such a remedy was unknown in many, if not most, jurisdictions in 1929." *Floyd*, 499 U.S. at 545.

⁶⁹⁴ *Jack*, 854 F. Supp. at 665.

jurisdictions denied recovery for mental distress in 1929, the number of the countries which do not recognize recovery for mental distress nowadays is limited since most of the countries adopt the theory that mental distress, like physical injuries, is recoverable.

2. Allow recovery for all emotional distress, as long as a bodily injury occurs. This approach is to allow recovery for all emotional distress, as long as a bodily injury occurs, regardless of the connection between the distress and the bodily injury. Thus, a passenger with a scratched arm could recover for the trauma and fear due to the plane crash; the bodily injury opens the door to liability for emotional distress.

This approach is consistent with a broad reading of Article 17's imposition of liability for "damage sustained in the event of . . . bodily injury."⁶⁹⁵ Significantly, the drafters did not use the phrase "damage caused by . . . bodily injury," which would have served as a signal that any mental distress must be connected to the bodily injury.

However, this approach is undesirable for three reasons. First of all, this approach treats mental distress as an independent cause of action, which is inconsistent with

⁶⁹⁵ Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 666 (N.D. Cal. 1994).

precedent that dictates that the Warsaw Convention creates a cause of action, not just a limit on remedies.⁶⁹⁶ Secondly, this approach treats mental distress as damages resulting from the accident, not the injury.⁶⁹⁷ And, thirdly, this approach create significant unfair. One passenger luckily scratched his finger would obtain a much greater recovery than an unscratched fellow passenger who was equally terrified by the plane crash.

3. Allow emotional distress as damages for bodily injury, including distress about the accident. Emotional distress is considered an element of the damages for bodily injury under the third approach. Under this approach, the distress does not need to be about the injury to be compensable. This approach is different from the second approach in that the distress must occur at the same time or later than the bodily injury; one cannot, therefore, recover for the fear before the impact and bodily injury under the second approach, but one can recover it under the third one. Only some US courts adopted this approach, and

⁶⁹⁶ The dispute did not arise until the 1970s because courts did not originally view the Warsaw Convention as creating a cause of action. See Sheila Wallace Holmes, Casenote, 58 J. AIR L. & COM. 1205, 1207 (1993). Rather, courts first interpreted the Convention as simply limiting monetary damages on otherwise applicable law. *Id.* Courts thus viewed the treaty as creating only a presumption of liability, instead of an independent cause of action. *Id.* at 1209-10. It was not until the late 1970s that courts began to construe the Warsaw Convention as the "universal source of a right of action." *Id.* at 1210 (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)).

⁶⁹⁷ Jack, 854 F. Supp. at 666. This is problematic under the wording of Article 17 of the Convention and the reasoning of the Supreme Court in Air France v. Saks, 470 U.S. 392 (1985), where the Court noted that "'the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury.'" Jack, 854 F. Supp. at 666 (quoting Saks, 470 U.S. at 398).

these courts went too far. In my opinion, this approach is very close to allow pure mental injuries which definitely against the contracting states' intention of the Warsaw Convention and the Montreal Convention.

4. Allow recovery only for emotional distress flowing from a bodily injury. Under this approach, emotional distress flowing from the bodily injury is an element of damages allowed for the bodily injury. Thus, damages are allowed for emotional distress only to the extent the emotional distress is caused by the bodily injury. A passenger may, therefore, recover for fear related to his broken leg, but not for fear related to the plane crash. Under this approach, emotional distress can also have a separate role as the causal link between the accident and the bodily injury; a passenger may, for example, recover for a heart attack caused by the distress of the plane crash.⁶⁹⁸

Of the four approaches discussed, China should adopt the fourth one for a number of reasons. First, this approach prevents serious inequities among the passengers subject to the Warsaw

⁶⁹⁸ The comments of the court in *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (Ct. App. N.Y. 1974), help to illustrate the reasoning behind this position: The compensable injuries must be 'bodily' injuries but there may be an intermediate causal link which is 'mental' between the cause--the accident-- and the effect--the 'bodily injury'. And once that predicate of liability-- the 'bodily injury'--is established, then the damages sustained as a result of the 'bodily injury' are compensable including mental suffering However, only the damages flowing from the 'bodily injury', whatever the causal link, are compensable We hold, therefore, that defendant is liable for plaintiff's palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.

Convention. Such as getting scratched on the way down an evacuation slide should not enable one passenger to obtain a much greater recovery than an unscratched fellow passenger who was equally terrified by the plane crash. And, this approach is consistent with the intentions of the drafters of the Warsaw Convention by making passengers' recoveries more reasonable and predictable. This approach also allows for greater recovery with more severe injuries, presuming that more distress flows from more serious injuries. Further, this approach even permits recovery in wrongful death cases.⁶⁹⁹

Further more, let us analyze this issue in a simple way which is usually overlooked by some experts. Disallow recovery for emotional distress accompanied by bodily injury is against the modern understanding of a bodily injury is not fully recovered if the mental distress of that injury has not been compensated. Allow recovery for all emotional distress as long as a bodily injury occurs would create significant unfair. Allow emotional distress as damages for bodily injury, including distress about the accident is went too far against the contracting states' intention. Then what is left and the reasonable approach is allow recovery only for emotional distress flowing from a

⁶⁹⁹ Survivors may recover for physical manifestations of their grief at the loss of a loved one.

bodily injury.

5-5. Conclusion note

As a successful international convention regulating air carrier's liability around the world, the Warsaw Convention and the Montreal Convention will play a very important role in air transport. Chinese aviation law regulations need to be modernized to correspond with global developments in the industry. As a first target, the low limitation of air damage recovery needs change, and more detailed implementing regulations are needed to determine the extent and quantum of damages caused by air accident. China needs to unify limits on liability regarding international carriage with those existing in other countries. This will certainly benefit both the aviation and insurance industries.

Apart from the problem of low limitation, another important task is to clarify the interpretation of Article 17 of the Warsaw Convention 1929 and the Montreal Convention 1999, which is crucial to international air carrier's liability to passengers. This is the main purpose of the present dissertation.

By suggesting that (1) China should interpret "accident"

broadly to provide more, but reasonable protections to passengers; (2) China should adopt tripartite approach to interpret "from embarking to disembarking" to catch up with modern changes of civil aviation, and (3) China should not allow recovery for pure mental injuries but only to allow recovery of mental distress which flowing from a bodily injury to best serve the purpose of the Conventions. The author wishes to clarify some uncertainties of legal practice in the area of international air carrier's liability to passengers in China.

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