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Passenger Liability, according to the Montreal Convention

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Summary

This thesis deals with the international rules regarding passenger liability on an international aircraft. The focus will be the carrier's liability toward passengers on an aircraft. The purpose is to give an account of the common international rules and to clarify the problems with interpretation of the passenger liability article. I will focus on the Montreal Convention of 1999, which is the newest convention. Article 17 deals with the carrier's liability towards passengers. The requirements in that article are that there must have been an accident which caused death or bodily injury while the passenger was onboard the aircraft or in the course of embarking or disembarking. There are terms in the article that have not been defined and it is instead a subject for courts to solve. In this thesis, I will examine the questions: what do the terms embarking and disembarking imply, what constitutes an article 17 accident and what damages are recoverable?

To be able to solve the problems introduced in this thesis I have read and interpreted cases from signatory states. I have chosen cases, which have been widely referred to in literature and in other cases. I have also, to a large extent, used relevant literature, article by recognized Air Law experts and official aviation web sites to collect information.

The purpose for creating the conventions on passenger liability has been to uniform the rules on international aviation. However, it has been an issue to uniform the rules due to the amount of actors involved. There are many opinions to consider and the result has become a compromise. There is also no consistent uniformity among the Supreme Courts in the signatories and therefore, it has been hard to find an exact definition to the terms.

By examining rulings and opinions of experts, I find it possible to determine that a passenger will be in the course of embarking or disembarking when he has reached the boarding area, after the boarding announcement, or when he is still on the apron. However, the passenger will not be found to be in the course of embarking or disembarking, before check in or even before security and after leaving the apron. However, certain circumstances can alter the decision, for example when the carrier or its agent escorts a minor in the terminal. Regarding what constitutes an article 17 accident it seems that a uniform interpretation is to determine if there is an unexpected or unusual event or happening external to the passenger. Consequently, the accident cannot be caused by the passenger's own internal reaction to the normal conditions on a flight. It can also be of importance to consider if the accident was caused due to aviation related risk inherent. A passenger can recover for death or bodily injury when harmed in an accident. Consequently, all physical injuries are recoverable and the problem is to determine if mental injury shall be recoverable as well. The courts have to interpret the term bodily injury to determine if it includes mental injury. The opinions differ between states. One conclusion to be drawn is that solely

mental injury is not recoverable. There is though no uniformity when mental injury is accompanied by a physical injury. Mental injury flowing from physical injury can be recoverable in some circumstances, but it is harder when dealing with a physical manifestation of mental injury.

Sammanfattning

Denna avhandling behandlar internationella konventioner gällande skadeståndsansvar gentemot passagerare på internationella flygplan. Fokus kommer att ligga på transportörens ansvar gentemot passagerare på ett flygplan. Syftet är att redogöra för de gemensamma internationella reglerna på området och att tydliggöra problem med tolkningen av artikeln gällande passageraransvar. Jag kommer att fokusera på Montrealkonventionen från 1999, vilken är den nyaste konvention. Artikel 17 reglerar transportörens ansvar gentemot resenärerna. Rekvisiten i denna artikel är att det måste ha inträffat en olycka som orsakat dödsfall eller kroppsskada medan passageraren var ombord på flygplanet eller vid ombordstigning eller avstigning. Vissa av begreppen har inte definierats och istället är de en fråga för domstolen att lösa. I denna avhandling kommer jag att försöka utreda innebörden av termerna i artikel 17 och därigenom besvara frågorna: Vad menas med begreppen ombordstigning och avstigning, vad utgör en artikel 17 olycka och vilka skador är ersättningsgilla?

För att kunna lösa problemen, vilka har presenterats i avhandlingen, har jag läst och tolkat fall från stater som undertecknat konventionerna. Jag har valt fall som har blivit frekvent refererade av författare och domare och således haft stor betydelse. Jag har i stor utsträckning också använt relevant litteratur, artiklar av erkända luftfarts experter och officiella luftfartswebbplatser.

Syftet när den första konventionen upprättades var att skapa enhetliga regler för den internationella luftfarten. Det har dock varit problem att skapa enhetliga regler på grund av mängden aktörer. Det är många åsikter att ta hänsyn till och resultatet har i slutändan blivit en kompromiss. Det föreligger inte heller någon enhetlighet bland avgöranden i medlemsländernas högsta domstolar. Det har därför varit svårt att utreda innebörden av artikeln.

Genom att granska domar och yttranden från experter, finner jag det möjligt att fastställa att en passagerare anses vara i akt med ombordstigning eller avstigning när han har kommit till gaten efter meddelande om att planet ska bordas eller då passageraren befinner sig på flygplansplattan. En passagerare anses dock inte befinna sig i ombordstigning eller avstigning, före incheckning eller rentav före säkerhetskontrollen, samma gäller då passageraren har lämnat flygplansplattan för att hämta sitt bagage. Dock kan vissa omständigheter ändra utgången, till exempel då en minderårig transporteras i sällskap av transportören eller dennes agent. När det gäller vad som utgör en artikel 17 olycka verkar den enhetliga tolkning vara att avgöra om det uppstått en oväntad eller ovanlig händelse vilken genom en yttre påverkan på passageraren orsakar skada. Olyckan får således inte vara orsakad av resenärens egen interna reaktion på en normal flygning. Det kan också vara viktigt att överväga om olyckan berodde på en av luftfarten

närstående risk. En passagerare kan, vid en olycka, få ersättning för dödsfall eller kroppsskada. Därmed är alla fysiska skador ersättningsgilla och problemet är således att avgöra om dessutom psykisk skada skall kunna ersättas. Domstolarna måste tolka begreppet kroppsskada för att avgöra om det även innebär psykisk skada. Åsikterna skiljer sig mellan stater. En slutsats är att enbart psykisk skada inte är ersättningsgill. Det finns dock ingen enhetlighet när psykisk skada åtföljs av en fysisk skada. Psykisk skada som följer av en fysisk skada kan ersättas under vissa omständigheter, men det är svårare när det handlar om en fysisk manifestation av psykisk skada. Domstolsavgöranden tyder på att det är en mer tolerant syn på psykiska skador i vissa länder.

Abbreviations

IATA	International Air Transportation Association
DVT	Deep Vein Thrombosis
ICAO	International Civil Aviation Organisation
IMF	International Monetary Fund
PTSD	Post Traumatic Stress Disorder
SDR	Special Drawing Rights

1 Introduction

1.1 Presentation of the Subject

The last century the man has started to use aircrafts both for private and commercial use. Every day there is a tremendous number of aircrafts transporting both passenger and cargo all over the world. The world's biggest airport, Hartsfield-Jackson in Atlanta, United States, handles up to 3125 flights daily¹. With the development on air traffic the world have become much smaller. Aviation has resulted in great benefits but not without downsides. Flying is a big asset to mankind but at the same time it is a dangerous activity and accidents can be devastating. Even if aircraft is a safe way to travel accidents occur and people and cargo get damaged. These accidents increased the need regulate on the area.

Aviation is an international business, which creates a need for international common rules. There have been quite many attempts to create an international convention on the area over the years. It was needful to create an adequate and uniform compensation system for the passengers but at the same time consider the aviation industry possibility to develop. The first Convention, the Warsaw Convention, was established in 1929 and it has later been amended due to the development on aviation.

In 1999 was another attempt made to replace and modernize the rules on aviation liability. The new Convention has been widely accepted but there are still flaws in the Convention that has to be solved by court around the world. Due to the large amount of parties to the discussion there is always hard to find the common will to constitute a Convention. The new Convention has improved or even solved several issues. However, the article concerning the liability of the carrier has not been modified and the major problems concerning liability are still a problem for the courts to solve.

1.2 Purpose

The purpose with this thesis is to examine passenger liability of the carrier on an international aircraft. The aim is to give an account of the common international rules on passenger carriage and also how the legal system has developed over the years. I will focus on rules according to the Montreal Convention of 1999, which is the newest Convention. The main intention is to clarify the problems with interpretation of the passenger liability article and there after give an account of the legal position today. Even though all improvements made in the new Montreal Convention there are still flaws,

¹ <http://atlanta.bizjournals.com/atlanta/stories/2009/08/10/daily79.html>

which were not solved. The liability article, which will be this thesis major concern, is still a subject of conflict. It contains several terms that are not defined in the Convention text, making it difficult to interpret. My purpose is to examine and establish the meaning of this article through international case law.

Article 17 reads as follows:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident, which caused the death or injury, took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The questions that I will examine more thoroughly in this thesis are:

1. What do the terms embarking and disembarking imply?
2. What constitutes an article 17 accident?
3. What damages are recoverable under article 17?

1.3 Method and Material

I have chosen to investigate international common Conventions regarding passenger liability on an aircraft. The materials I have used are Conventions texts and international cases. I have also, to a large extent, used relevant literature, article by recognized Air Law experts and official Aviation web sites. To be able to solve the problem introduced in this thesis I have read and interpreted cases.

To clarify the legal position today I will examine cases solved under the Montreal Convention and the Warsaw System. I have examined cases which occur frequently and are disputed in relevant literature. I have concentrated on cases that are known as seminal for passenger liability. The most seminal and followed cases are from the United States and the United Kingdom which can be seen in my thesis. I also had good help from Professor Paul Stephen Dempsey's lecture notes on passenger liability. He is a well-known law professor in Air and Space Law at the McGill University, in Canada. It is a possibility that other cases of importance exist which I have overlooked and not taken into consideration. The fact that I am not accustomed with cases from common law might also lead to some minor misinterpretations. The cases that I have chosen to clarify for more thorough are the most seminal cases which are widely referred to in case law and doctrine.

Case law from one state does not have prejudice effect in other states. However, the purpose of the international conventions on passenger liability is to reach uniformity. Therefore, cases solved within a state party are of major importance to all members to the convention and states tend to follow each other's decisions. Thus, the fact that I only use cases from a few states does not lower this thesis credibility or relevance. I have considered most cases in full text but some lower court decisions has been impossible to find

and therefore it have had to be sufficient to read those in air law literature instead.

The literature used in this thesis is relevant and the writers are well known among Air Law experts. Most of the literature used is also referred to, by judges, in the grounds of judgements. This legal area began to develop as early as 1929 and until today and the literature is of a widely spread age. I have though concentrated on the latest and most modern litterature. As to the articles used in this thesis they are all from a well recognized law journal, Air and Space Law.

The chapter concerning the development of the rules on aviation has been written from literature and not from the original articles in the conventions. I have chosen to do this because the changes are most relevant. I just wanted to describe the concerns and development over the years. To accomplish this it has been enough to study the summaries made by authors in recognised air law literature.

1.4 Delimitation and Structure

I will concentrate on the carriers' liability towards the passengers on an aircraft. I will limit this thesis to international flights and common applicable conventions. The term international flights mean a flight with departure and destination in different countries. I will disregard domestic flights due to that those damage claims are solved under domestic laws and not under International Conventions. My interest will be the common rules regarding passenger liability under the Warsaw System but I will concentrate on the Montreal Convention of 1999, which is the latest convention regarding passenger liability. I want to give a general view on what applies in the uniform rules but at the same time I intend to concentrate on the problems in article 17, which constitutes the liability article. Therefore, I will not elaborate other issues concerning exoneration, limitations and calculation of compensation for damage, which are not relevant for the purpose of this thesis.

There will be a description on how the rules have developed over the years and the thesis will introduce all the former conventions and their amendments. Article 17 in Montreal Convention of 1999 and article 17 in Warsaw Convention are generally the same and therefore the case law solved under the Warsaw Convention is still relevant. I will consequently, to a large extent, use cases solved under Warsaw Convention to interpret the legal situation of passenger liability today. Most of the cases that I will use are from courts in the United States and the United Kingdom.

2 The Warsaw System's Development

In this chapter, I will give the reader an introduction to the Warsaw System with the Warsaw Convention and its amendments and protocol. I will also introduce other important private agreements and regulations from the EU, concerning aviation liability. I will give an account of the major relevant changes in each of them and consequently how the aviation liability has developed over the years.

2.1 Background

Aviation has developed rapidly over the years and with the expanding business there have been a need for international rules. The first convention was the Warsaw Convention of 1929. To keep the international legislation up to date, Warsaw Convention has been amended a number of times. Below in the text I will introduce the Warsaw Conventions and its amendments and supplementary instruments and give an account of the most important provisions and changes. It is the modernizations made in conventions, protocols and inter-carrier agreements, which later lead to the Montreal Convention. I will concentrate on the Montreal Convention, which is supposed to replace the Warsaw Convention entirely.

The purpose in the 1920's to create a Convention concerning aviation was to solve and uniform the great discrepancy between different countries' legal regimes on international travellers to eliminate conflicts of laws. The aviation industry was in its infancy and a single disaster could ruin an airline. The drafter saw a need to protect the carriers and provide a more favourable environment for the industry to grow. In the final product, a compromise was made between the needs of the carriers and the passengers. The liability was fault based but with a reversed burden of proof as it was believed impossible for the passenger to prove negligence but the liability was at the same time limited to protect the carrier.²

The reader will see that over the years the rules on aviation liability have developed and changed in multiple ways but unfortunately many attempts did not succeed and never came into force and other had few ratifying states. With that, it has been difficult to fulfil the intention of creating uniformity within aviation liability and it could differ widely from carriers depending on the registration state. The most significant problems over the years have been what kind of liability to be used and how to limit the liability. It seems like the limits never were sufficient and this was one of the reasons why

² Dempsey P. S, Milde M, International Air Carrier Liability, 2005, p. 50

states decided not to ratify conventions or amendments. A prominent change over the years has therefore been constantly increasing limits on liability.

The reason for creating a totally new convention was to settle up the great disorder in the Warsaw System. The former rules were also inadequate and frequently questioned regarding limitations of liability for death and injury of passengers.

2.2 Conventions

2.2.1 Warsaw Convention of 1929

The Warsaw Convention was the first international aviation rules created. The organisation CITEJA began the initial work in 1925 but the definite text was first adopted at a conference in Warsaw in 1929 and it entered into force in 1933.³ With its 152⁴ member states, the Convention has been applied all around the world. By providing a set of uniform rules troublesome conflicts of law was eliminated. The convention resolved among other things jurisdiction, liability, limitations and uniform documentation.

The Warsaw Convention regulates the carrier's liability towards passengers and cargo owners. The Convention is applicable on an international flight. International flights include flights which has its point of departure and point of destination within two contracting parties, whether or not an interruption in the carriage occurs, or within one contracting party if there is an agreed stopping place within another state, regardless if the last state is a contracting state or not. The carrier is obligated to issue a ticket containing place and date of issue, departure and destination points, stop, name of carrier and a notice that Warsaw convention applies.⁵

Article 17 states that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury. The Convention applies fault-base liability but with a reversed burden of proof. The fault based liability is built on negligence, normally with the burden of proof on the plaintiff. As the Warsaw Convention uses reversed burden of proof instead, the fault will be assumed when damage is proved.⁶ Thus, the plaintiff only has to prove that an accident occurred and not that it was caused by the negligence of the carrier. To balance this lower burden of proof on behalf of the development on aviation the carrier's responsibility was reduced through limits of liability and the limit was set to 125 000 gold franc. The passenger had an opportunity to recover more if he proved wilful misconduct on the part of the carrier. The carrier also had the opportunity to

³ Videla Escalada, Fredrico N, *Aeronautical Law*, 1979, p. 545 (338)

⁴ <http://www.icao.int/icao/en/leb/wc-hp.pdf>, 2009-07-10,11:03

⁵ Diederiks-Verschoor, I.H.Ph, *An Introduction to Air Law*, 2006, p. 103ff

⁶ Shawcross and Beaumont, *Air Law*, 2004, p 105 (VII)

escape liability if he proved that he and his employees have taken all necessary measures to prevent the damage.⁷

The Convention states four available forums for litigation at the plaintiff's choice:⁸

- the carrier's domicile,
- the carrier's principle place of business,
- the place where the carrier maintains an establishment through which the contract has been made or
- the place of destination.

The official language of the Convention is French and that is the sole authentic version. Courts are obliged to give the treaty the meaning as expected by the contracting parties and consequently need to examine the French text to discern the meaning of the Convention. To determine the content courts have used French legal materials as legislation, judicial decision and scholarly writing.⁹

2.2.2 The Hague Protocol of 1955

As aviation expanded and developed rapidly from 1929, there was a need for a change in the former convention. In 1955 the Warsaw Convention was amended and improved by the Hague Protocol.

The most prominent change was that the limitations were change and increased twofold. The cap on the compensation according to Hague Protocol was increased to 250 000 francs. Another important adjustment was made in article 25, regarding when the carrier could not rely on the limitations. In the Warsaw Convention, the carriers were not protected by the limitations in the event of damage resulting from wilful misconduct or from such default on his part. This term, wilful misconduct, has caused a confusion of terminology and it had lead to a variation in interpretation in different countries over the years. To solve this problem the Hague Protocol replaced article 25 with a new article stating that the carriers were not protected by the limitations, if it was proved that the damage was caused by an act or omission with the intent to damage or recklessly and with the knowledge that damage would probably occur.¹⁰

2.2.3 Guadalajara Convention of 1961

When the Warsaw Convention was constructed, charter flights were still a small part of the airline business. In the Warsaw Convention, there was no

⁷Shawcross and Beaumont, *Air Law*, 2004, p 105 (VII)

⁸ Diederiks-Verschoor, I.H.Ph, *An Introduction to Air Law*, 2006, p. 148

⁹ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p. 48f

¹⁰ Diederiks-Verschoor, I.H.Ph, *An Introduction to Air Law*, 2006, p. 151ff

definition of the term carrier. In the 1950s, the number of charter flights increased considerably. With the increasing amount, it became urgent to develop new rules designed especially for charter flights. The Guadalajara Convention was created in 1961 to supplement the Warsaw Convention. The purpose of the new Convention was to clarify the liability situation of the air carrier on charter flights. It separated two different carriers, one that concluded the agreement and one that carried the flight. The Convention came into force on 1 May 1964.¹¹

The Guadalajara Convention, like the Warsaw Convention, did not contain a distinct definition of the term carrier but instead it distinguished between “contracting carrier” and “actual carrier”. “Contracting carrier” means a person who makes an agreement for carriage governed by the Warsaw Convention and “actual carrier” means a person other than the contacting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage.¹²

According to art III paragraph 2 the carrier who concludes the carriage is liable to a larger extent than the one that actually performs the carriage. The carrier that performs the flight can never be held liable above the limitation in the Warsaw Convention. On the other hand, the acts of the actual carrier or those of his employees can lead to an unlimited liability for the contracting carrier.¹³

2.2.4 Montreal Agreement of 1966

The Montreal Agreement was established because of the differences between countries’ point of view on the limits of liability. The United States and other developing countries found the limitations all too low. This was the reason why the United States did not ratify the Hague Protocol and later on, in 1965, even denounced the Warsaw Convention. The United States believed the limits to have outlived their time and it was thought not to be commensurate with domestic compensations and standard of living.¹⁴

The Agreement was concluded between airline companies and the Civil Aeronautics Board of the United States. It is thus a private agreement and not an attachment to the Warsaw Convention. When United States denounced the Warsaw Convention, great efforts were made to solve the problem. ICAO called for a meeting to discuss the limitations, which lead to a resolution to arrange a Diplomatic Conference. However, at that time, IATA carriers had already drafted the Montreal Agreement.¹⁵

¹¹ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 157f

¹² Article Ib-c, Guadalajara Convention of 1961

¹³ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 157

¹⁴ Videla Escalada, Fredrico N, Aeronautical Law, 1979, p. 547 (341)

¹⁵ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 162

The Agreement is applicable to all international flights, concerning passenger, with an agreed stopping point, point of departure or destination in the United States. The cap on liability is set on 75 000 USD, including legal fees. The agreement also changed the fault liability in the Warsaw Convention into a strict liability concerning death or injury of a passenger, the carrier was liable absent of negligence. The carrier could no longer exonerate himself by proving that he had taken all necessary steps to avoid the accident. Later on this development led to the adoption of the Guatemala Protocol and the four Montreal Protocols.¹⁶

2.2.5 Guatemala Protocol of 1971

Guatemala Protocol was created in 1971 to amend the Warsaw Convention as amended by Hague Protocol. Even though 21 states ratified it, including the United States, it has never come into force. The Protocol never met the requirements of 30 ratifying states and that five of those members had 40 per cent of the international scheduled air traffic of the ICAO member states. Despite the failure, the Protocol was of great importance to the development in Air Law, because it introduced new provisions that were later used in other instruments.¹⁷

If the Protocol had come into force, it had meant rather fundamental modification. Changes would only have affected passengers and their baggage and most important change would have concerned the liability. Just as in the Montreal Agreement, the fault liability was changed into a strict liability. Consequently, the carrier would be liable in all cases of death or injury even if he had not caused the accident by fault. There was though a cap on the liability, which was set to 1 500 000 francs Poincaré¹⁸. The amount was supposed, unlike previously, to be a maximum limit and was not to be exceeded. Even if, the carrier caused the damage through an act or omission with intent to cause damage or recklessly and with knowledge that the result would probably be damage it could not be exceeded.

Regardless of the strict liability, the carrier would be able to exonerate himself if he could prove that the damage was caused by the person claiming compensation or contributed to by negligence or other wrongful act or omission by that same person. The same applies, regarding exoneration, if death or injury resulted exclusively from the state of health of the passenger. There was also a new jurisdiction introduced and it became possible for the claimant to file a suit in the state where he has his domicile or permanent residence, if also the carrier has a place of business there.¹⁹

¹⁶ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 162f

¹⁷ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 164

¹⁸ Approximately 100 000 USD.

¹⁹ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 164f

2.2.6 The Four Montreal Protocols of 1975

Four Protocols were adopted in 1975 to amend the Warsaw Convention. All four Protocols dealt with recalculation of the former limits into SDRs. Earlier gold had been the basis of the monetary system and all currencies had been expressed thereafter. After a long period, problems arose with determining the value of the gold. The gold had, at this time, one value set in USD and another one on the free market, which made courts rely on different amounts. In 1944 the International Monetary Fund was established. To get control and eliminate irregularities of the gold value, IMF created the Special Drawing Rights. This is a fixed sum, which is based on the value of four currencies, US dollars, Yen, Sterling Pound and Euro. According to the Protocols, SDRs must to be transformed into national currencies according to the rules determined by IMF when used in judicial proceedings. Alternative limits have been founded for those countries, which are not members of the IMF or does not allow SRDs.

Protocol number one amended the Warsaw convention and conversed its currency into SDRs. Protocol number two changed the limits in the Hague Protocol while Protocol number three dealt with the limits in the Guatemala Protocol. Protocol number four changed the limits regarding goods and at the same time introduced SDRs. All but Protocol number three have come into force.²⁰

2.3 Private Agreements

2.3.1 The Japanese Initiative

In 1992, all Japanese airlines amended their respective rules on air carriage. The purpose was to modify the rules concerning the passenger liability limit. The Agreement abolished the limits of liability but kept most other provisions from the Warsaw Convention of 1929. Due to this change strict liability was applied, for the Japanese airlines, up to a limit of 100 000 SDRs and presumptive liable for claims of a greater amount.²¹ This Agreement gave the passengers of Japanese airlines a great advantage over passengers of other countries and the initiative later led to new common international rules.

²⁰ Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 2006, p. 166ff

²¹ http://www.condonlaw.com/attachments/montreal_convention_1999_CRC.pdf, 2009-07-19, 18:51

2.3.2 IATA Inter-carrier Agreement of 1995 and Implementing Agreement of 1996

The Japanese Initiative influenced IATA to hold a major conference in Washington in June 1995 where the modernization of liability in international aviation was discussed. In October 1995 an Inter-carrier Agreement was produced. The principle provision was a commitment by the signatory air carriers to take action against the limitations of liability on compensation in Warsaw Convention. The liability was made unlimited and the recoverable damages were to be determined and awarded according to the law of the domicile of the passenger. In January 1996 IATA held another conference to discuss the implementation of the Inter-carrier Agreement. The meeting resulted in adopting an Implementation Agreement. The Agreements could not amend the Warsaw Convention because that had required Governmental action and approval. Instead, the air carriers used the mechanism of article 22 to raise or waive the liability limitations by amending their conditions on passenger carriage and tariffs.²²

2.4 European Union Regulations

2.4.1 European Union Regulation 2027/97

The European Union had also shown great dissatisfaction with the international rules regarding passenger liability. The purpose of the Warsaw Convention of 1929 was to establish an international uniform regulation absent any countervailing national laws. Unfortunately its last ratified amendment was made in 1961 (Guadalajara Convention of 1961) and the use of national laws had been required to complement the outdated rules. EU, like others, recognised the need to change the insufficient liability regime and to create a common liability policy throughout the Union.

The European Council adopted Regulation 2027/97 in October 1997. Carriers licensed by EU members were obliged to include the provisions in their conditions of carriage. Carriers from outside the Union could choose not to apply the rules but in such case that must clearly be notified to the passengers. The carriers' liability was unlimited and was not subject to any limits under law, conventions or contracts. There was a strict liability up to 100 000 SDRs but the carrier could exonerate himself if it was shown that the injured passenger caused or contributed to the damage. The regulation also expressed what assistance the carrier must render in case of an accident.²³

²² Shawcross, Beaumont, Air Law, volume 1, 2008, p 181ff (VII)

²³ Dempsey, P.S, European Aviation Law, 2004, p. 142f

2.4.2 Amending Regulation 889/2002

When the Montreal Convention was created, the European Parliament and Council decided to amend Regulation 2027/97. The intention was to align it with the provisions of the Montreal Convention to try to create a uniform system concerning liability in international aviation.

The amendment stated that it implements relevant provisions of the Montreal Convention and adds certain supplementary provisions. It also extends these provisions to apply to air carriage within a single member state. The liability provisions of the Montreal Convention replaced the liability provisions in the original regulation.²⁴

²⁴ Shawcross, Beaumont, Air Law, volume 1, 2008, p 223f (VII)

3 Montreal Convention of 1999

This chapter will introduce the new Convention on passenger liability, the Montreal Convention. I will give a short introduction and later give a description of the most interesting articles. I will concentrate on liability, article 17, which causes the problem that will be analyzed in this thesis. The chapter will end by summing up the major innovations in this Convention compared with the former.

3.1 General Information

The Warsaw system consisted of the Warsaw Convention and a numerous of amendments and protocols. The fact that some states had ratified the primary Convention but not the improvements made the situation complicated and confusing. Different rules applied in different states and the purpose of a uniform system was not functioning any longer. An ICAO study group was established, in 1996, to solve the problem. The effort finally made progress at a Montreal Conference in 1999, where the new Convention was adopted. The new Convention was created to modernize and consolidate the Warsaw System and it is essentially a composite of the former Conventions and amendments. The purpose was not to amend Warsaw Convention once again but to replace it totally. The Montreal Convention came into force in 2003, 60 days after 30 states ratified the Convention.²⁵ The United States was the thirtieth state to ratify. The EU countries ratified the Convention on 29 April 2004 and it came into force on the 28 of June.²⁶

The Preamble to a Convention does not have the force of law but it does reveal the purpose and design of the instrument, and, accordingly, will be of assistance in interpreting the instrument consistent with its purpose. The Preamble of the Montreal Convention states three fundamental principles, namely, the need to modernize and consolidate the Warsaw Convention, the need for a new basis for liability and the desirability for an orderly development of international air transport.²⁷

The Montreal Convention of 1999 is unlike the Warsaw Convention of 1929 written in six official languages. It is equally authentic in English, Arabic, Chinese, French, Russian and Spanish. Most of the drafting and preparatory work was however done in English and later translated into the other official languages.²⁸ This might cause problems to achieve a uniform interpretation, which is the purpose of the Convention. The importance of uniformity of

²⁵ Wahlen, Thomas J, The New Warsaw Convention: The Montreal Convention, 2000, p 12

²⁶ Shawcross, Beaumont, Air Law, volume 1, 2008, p 227 , (VII)

²⁷ Dempsey P. S, Milde M, International Air Carrier Liability, 2005, p. 57

²⁸ Dempsey P. S, Milde M, International Air Carrier Liability, 2005, p. 49

law might therefore require courts to refer to the English version as the sole authentic text when in doubt about the meaning or purpose.

3.2 Structure of the Montreal Convention

3.2.1 General Provisions

3.2.1.1 Applicability

The Montreal Convention is applicable to all international flights carrying passenger, baggage or cargo. The expression international flights means any carriage with the place of departure and the place of destination within two different State Parties, whether or not there is a break in the carriage, or within one State Party if there is a agreed stopping place within another state even if the last state is not a State Party.

A carriage, which is performed by several successive carriers, is to be seen as one undivided carriage if the parties regarded it as a single operation. It does not lose its international character even if one or several of the transports are to be performed entirely within one state.²⁹ Under these circumstances, action can only be brought against the carrier who performed the carriage at the time of the accident.³⁰

The Montreal Convention embraced the provision in the Guadalajara Convention with a separation between the contracting carrier and the actual carrier. The Convention still applies for both carriers and the liability shall be divided according to the Convention.³¹

3.2.1.2 Documentations

Regarding passenger flight there has to be an individual or collective document of carriage. This document must contain an indication of the place of departure and destination or an agreed stopping place. The passenger shall also be given written notice about that where this Convention is applicable it governs. Non-compliance with the rules shall not affect the contract of carriage and it shall however, be subject to the rules of the Montreal Convention of 1999.³²

3.2.2 Liability

3.2.2.1 Article 17- Death and Injury of Passengers

Passenger liability is regulated in article 17 and it reads as follows:

²⁹ Montreal Convention of 1999, article 1

³⁰ Montreal Convention of 1999, article 36

³¹ Montreal Convention of 1999, article 39-41

³² Montreal Convention of 1999, article 3

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The requirements of article 17 are:

1. There must have been an accident which caused
2. death or bodily injury,
3. while the passenger was onboard the air craft or in the course of embarking or disembarking

This article has been more or less unmodified over the years and the Montreal Convention made only inconsequential changes in the language. Thus, the same provision applies regardless of convention and therefore the past jurisprudence based on the Warsaw Convention and its amendments remains relevant. There has always been obscurity concerning the article when it comes to:

- what constitutes an accident,
- what types of injuries are contemplated by the term bodily injury and
- what is the meaning of embarking and disembarking?

To find a solution to each problem the courts have to interpret the terms. An interpretation of a treaty shall be made according to article 31 in the Vienna Convention. The interpretation shall be made by examining the ordinary meaning of the treaty in its context and in the light of the object and purpose.

Article 17 in the Montreal Convention is dealing with the carrier's responsibility stating that *the carrier is liable*. The liability is based on a two-tier liability, inspired by the Japanese Agreement. According to article 21 strict liability is applied for damage not exceeding 100 000 SDRs. Strict liability imply that the carrier is liable for damage irrespective of negligence. The carrier should not be able to exclude or to limit his liability. Consequently, it is enough for the claimant to prove that there has been an accident, which caused death or injury, regardless of fault. Concerning damages that exceed the 100 000 SDR limit the Convention applies presumed fault-based liability of the carrier. This implies that the carrier is responsible for his negligence but the plaintiff does not have to prove negligence. Instead, negligence is already presumed. The carrier is though entitled to exonerate himself if he can prove that: the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents, or that the damage was solely due to the negligence or other wrongful act or omission of a third party. This second tier, for damages exceeding 100 000, SDRs is unlimited.³³

³³ Montreal Convention of 1999, article 17, 21

The Convention includes an escalator clause concerning the limit liability. Every fifth year the limits shall be reviewed, by reference to an inflation factor, which corresponds to the accumulated rate of inflation since the last review. If the inflation factor exceeds 10% there shall be made a revision of the limits of liability. All states shall be notified and if the majority does not disapprove, it shall be affective six month after the notification.³⁴

The expression *damage sustained* indicates that it refers to compensatory damage and therefore excludes punitive or exemplary damages. The article refers to passengers, which mean a person who has entered into an agreement for international carriage with the carrier.

The provisions of the Montreal Convention are mandatory and the carrier cannot limit its liability by a contract, but after the accident has occurred the carrier has the possibility to negotiate a settlement with the claimant.³⁵

3.2.2.2 Exoneration

The carrier can be wholly or partly exonerated if he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation. If another person than the passenger claims compensation for death or injury of the passenger the carrier shall likewise be exonerated to the extent that it is proved that the passenger caused or contributed to the damage by negligence or other wrongful act or omission.³⁶ It is important to note that this provision apply even when it concerns the strict liability, within the first tier, of the carrier according to article 21. The burden of proof is on the carrier. There are only a few cases in which negligence has been recognised to partly or complete exonerate the carrier. Among those are cases when a passenger was walking around even though the fasten seat belt sign was on, when a passenger was killed by a propeller when using the wrong exit, and when a passenger fell from the boarding ramp when waving to a family member³⁷.

3.2.3 Other Provision

3.2.3.1 Exclusive Remedy

In carriage of passenger, all actions for damage, however founded, shall only be brought subject to the conditions and limits of liability under the Montreal Convention.³⁸ The effect of this provision has been a matter of some controversy and widely discussed and it raises two issues. If the carrier is liable under the Convention must such claim be based on the terms of the Convention or is it approved to take action under local law instead? The other issue is whether or not the rules in the Convention is exclusive

³⁴ Montreal Convention of 1999, article 24

³⁵ Montreal Convention of 1999, article 49

³⁶ Montreal Convention of 1999, article 20

³⁷ Dempsey P. S, Milde M, International Air Carrier Liability, 2005, p. 178 f

³⁸ Montreal Convention of 1999, article 29

concerning all carrier's liability in international carriage? Which would consequently not allow a claim under local law even if the damage sustained does not meet with the requirements to constitute an article 17 accident or injury? Cases have been solved by examining the provisions and the purpose of the Convention. Both the Supreme Court and the House of Lords have solved the issue.

In the American case, *El Al Israel Airline v. Tseng* the Supreme Court concluded that a passenger is precluded from maintaining an action for personal injury damage under local law when the claim does not satisfy the conditions for liability under the Convention. The effect is that if the injury occurred on board an aircraft or during embarking or disembarking, the passenger is without remedy against the carrier unless it can be established that an article 17 accident occurred and resulted in death or bodily injury. Prior to this case, it was quite common to argue that the Warsaw Convention did not apply to avoid the liability limitations. To make sure that passengers were not left without any remedy whatsoever many court expanded the circumstances what constitutes an accident and bodily injury.³⁹

The House of Lords has also solved a case, concerning exclusive remedy and the outcome was the same as in the Supreme Court. Lord Hope, who was writing for the House of Lords, found that if a passenger had a claim under article 17 the passenger may not take action under local law for loss not covered by article 17. Another conclusion was that if a passenger sustained damage in the course of an international flight but had no article 17 claim he would be without remedy because those in the Convention are supposed to be exclusive when it comes to the carrier's liability.⁴⁰

Thus, the only time the carrier is responsible for compensation of an injury caused to a passenger on an international flight is when it constitute an article 17 claim. Whether or not it is a claim under article 17, the claimant is not allowed to maintain an action under local law against the carrier.

3.2.3.2 Insurance

State Parties shall require their carriers to maintain an adequate insurance covering the liability under this Convention. The carrier can be asked to furnish evidence of the adequate insurance by the State Party into which it operates.⁴¹ This insurance requirement did not appear in the Warsaw Convention and this has obviously given the passenger a better protection than before. Due to the carrier's unlimited liability, it is essential to get an unlimited insurance as well, which the airline can afford. This might be a problem for the carriers.⁴²

³⁹ *El Al Israel v. Tseng* 525 US 155(1999)

⁴⁰ Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 371 (VII)

⁴¹ Montreal Convention of 1999, article 50

⁴² Wahlen, Thomas J, *The New Warsaw Convention: The Montreal Convention*, 2000, p 21

3.2.3.3 Jurisdiction

The Montreal convention has extended the available forums for litigation. It created a fifth forum for death or injury of a passenger.⁴³ This initiative was taken already in the Guatemala Protocol of 1971. An action for damage must be brought before court in the territory of one of the State Parties, either before the court of the domicile of the carrier or of its principle place of business, or where it has a place of business and where the contract also has been made or before the court at the place of destination. The new approved jurisdiction is that an action can be brought before a court in the territory of a State Party where the passenger has his permanent resident.⁴⁴ A claim shall be made within two years from the time when the aircraft arrived at the destination, or from the date when the aircraft ought to have arrived, or from the date on which the carriage stopped.⁴⁵

3.2.3.4 Relationship with other Warsaw Convention Instruments

The Montreal Convention of 1999 shall prevail of all other rules, which otherwise apply to international carriage by air. If a state has ratified the new Convention, the former instruments of the Warsaw System will no longer apply. There is though a requirement that both the place of departure and the place of destination are within State Parties to the Montreal Convention otherwise it is still the common ratified Convention that applies.⁴⁶

3.3 Innovations

As I earlier explained the Montreal convention has been created to modernize the rules on passenger liability and to replace the Warsaw Convention to try to once again create uniformity among states' rules. The most significant achievements of the Montreal Convention in comparison with the former convention and its amendments are the following:

- It embodies a two-tier liability system, without any maximum limit, for death or wounding of the passenger with strict liability up to 100 000 SDR and above the amount a presumptive liability.
- The Convention is a separate and new instrument, which consolidates the substance of the Warsaw system and comprising all of the former instruments into one uniform. The Montreal Convention will replace the patchwork of different conventions and protocols and prevail over it, which will exclude conflicts of law.

⁴³ Wahlen, Thomas J, *The New Warsaw Convention: The Montreal Convention*, 2000, p 24f

⁴⁴ Montreal Convention of 1999, article 33

⁴⁵ Montreal Convention of 1999, article 35

⁴⁶ Montreal Convention of 1999, article 55

- There are six official languages, so the Convention is authentic in French, Arabic, Chinese, English, Spanish and Russian.
- The Convention removes the formalities of documents and permit electronic data documents and there is no longer any relation between the form of the document and the liability regime.
- A fifth jurisdiction is introduced which allow claims in the jurisdiction where the passenger had his permanent residence and to or from which the carrier operates service for the carriage of passenger by air.⁴⁷
- There is a requirement for adequate insurance and that the air carrier shall be able to furnish evidence of such insurance.
- In case of an accident the carrier shall supply advance payment of compensation to the passenger or their surviving family to meet their immediate economical need.⁴⁸

When analysing the innovations and improvements in the Montreal Convention it seems clear that, the new Convention is more passenger friendly than former Warsaw Convention. I assume that the condition in aviation has changed over the years. When creating the Warsaw Convention the drafters found it important to protect the infant airline industry. Nowadays the airline industry is tremendously huge and there are plenty of big actors on the market. Even though the Montreal Convention has improved the uniform rules on aviation, the drafters were not able to solve the issues of how to interpret article 17. This issue on interpretation will be closely examined in the rest of the thesis. Due to the consistent text of article 17, the same conclusion will apply to both the Warsaw Convention and to the Montreal Convention.

⁴⁷ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p. 38

⁴⁸ Weber J Ludwig, *Recent developments in Air Law*, 2004, p 284

4 Embarking or Disembarking

This chapter will clarify where an accident has to occur to constitute an article 17 accident. I will examine the problem of defining the term “in the course of any of the operations of embarking or disembarking”. I will give an account of the methods used in judgments to determine the phrase and thereafter I will give examples of the results reached in cases in both civil and common law.

4.1 General Information

The Montreal Convention applies for all international air transport. However, to have a cause of action against the carrier in case of an injury the accident must take place on board the aircraft or in the course of embarking or disembarking. A passenger can have an international ticket but until he embarks the aircraft and after he disembarks, his claim will not be under the Montreal Convention but instead under other laws.

It is not a problem to determine if the accident took place on board the aircraft. As long as the passenger was located inside the aircraft when the accident occurred, it is enough. The issue is whether it took place in the course of embarking or disembarking. There is nothing in the Convention that defines the terms and it is a question to be solved by the court on the facts of each case.

Proposals were made in the draft to the Warsaw Convention to define the period of liability as broadly as the entry and exit of the door of the airport or as narrowly as the doors of the aircraft. Both these proposals were rejected in favour of drawing the line at the more reasonable but less precise activity of embarking or disembarking and leave the decision for the courts to determine.⁴⁹

It is most difficult to formulate a clear rule of what is embarking and disembarking in the modern condition of air travelling. Airports are of very varied size and even the procedures differs both over time and between airports.

4.2 Case Law

There have been several civil law cases⁵⁰ solved by determining the place of location. The case law seem to be consistent. It has been taken into consideration if the passengers were still in the zone exposed to the risk inherent in aviation operations. Other aspects has also been considered, as whether the passenger was under the charge or control of the carrier or his

⁴⁹ Dempsey P. S, Milde M, International Air Carrier Liability, 2005, p.157 ff

⁵⁰ Mache'e v. Cie Air France, Cie Air Inter v. Sage, Blumenfeld v. BEA

agent.⁵¹ After reviewing many of the civil law cases Godfroid recommended that, the primary test should be if the passenger was under the control of the carrier and a supplementary condition is that the activity should be related to activity of aviation.⁵² A passenger injured inside the terminal before the announcement of boarding was considered to be outside article 17 as well as a passenger that had reached the baggage claiming area. Whilst article 17 applied when a passenger injured himself on the steps of the terminal building on the way to board the aircraft and as well when a passenger was injured on the apron by a baggage transport.⁵³

Courts in the United Kingdom have, when solving cases concerning embarking or disembarking, found it important that the accident is related to a specific flight. They also considered the location of the passenger and if the passenger were actually entering or about to enter the aircraft it would constitute an article 17 accident. If the accident happened elsewhere in the terminal, the court considered if the passenger was obliged to be there by the carrier.⁵⁴ A passenger in a wheel chair was injured while an agent transported him up an escalator in the terminal. This was held to be in the process of embarking as the boarding had already begun. In another occurrence, a passenger was hurt on a walk band in the terminal after landing and this was held not to be in the course of disembarking. There are though circumstances that can broaden the interpretation, as if a minor travels alone and is escorted by the carrier.⁵⁵

The rich case law from the United States suggests that reliance on only one or two factors alone is unwise. A case, *Day v. Trans World Airlines*, solved by the United States Court of Appeal has been seminal on what constitutes embarking and disembarking and used by courts in other states as well.

In 1973 at an airport in Athens, Greece, two terrorists hurled three grenades and fired a small-arm into a line of passenger who were preparing to board a Trans World Airline to New York. Three persons were killed and many others were injured. Several of the injured claimed compensation from Trans World Airlines under the Warsaw Convention.

The court had to decide if Trans World Airlines should provide indemnification for the death and injuries. It was undisputed that the terrorist attack was considered an accident and the problem to be solved was if the injuries were sustained in the course of embarking or disembarking. The Court adopted a tripartite test to determine if the accident was caused in the course of embarking or disembarking. The Appeal Court later reformulated the test in to a quartet:

⁵¹ Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 688 (VII)

⁵² Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 689 (VII)

⁵³ Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 691 (VII)

Oberste Gerichtshof, *Blumenfeld v. BEA, Cie Air Inter v. Nicoli, Richardson v. KLM*

⁵⁴ Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 686f (VII)

⁵⁵ Shawcross, Beaumont, *Air Law*, volume 1, 2008, p 686f (VII),
Phillips v. Air New Zealand, Adiata v. Air Canada

1. What was the activity of the passenger at the time of the accident;
2. What control or restrictions did the carrier place on the passenger's movement;
3. What was the imminence of their actual boarding; and
4. What was the physical position of the passenger to the terminal gate?

In this case the passengers had gone through several of the required steps to board and they were in the area reserved exclusively for those about to depart on international flights. When the incident occurred, they were just about to board and were ordered to stand in line by a Trans World Airline agent to go through one last security search. The Court concluded that the passengers were in the course of embarking and they could claim compensation under article 17. The Court also noted that a broad construction of article 17 is in harmony with modern theories of accident cost allocation because the airline is in position to distribute among all passengers what otherwise would be devastating to those unfortunate victims. The airline is also in a better position to persuade, pressure or even compensate the airport to adopt more stringent security. The Court found the airline liable and they found it in accordance with the plain meaning and the purpose of the Warsaw Convention.⁵⁶

In another case, concerning a terrorist attack at Rome Airport, article 17 was not held to apply. This case differed from Day in that the passengers had only checked in but not gone through the security checkpoint but was still in the public areas of the airport. The court walked through the tests applied in Day.⁵⁷ Thus, the closer the passenger was physically to the aircraft and in time to departure or arrival and the more the passenger was acting under the direction of the carrier the more likely it is that the accident shall fall under the Convention.

In Shawcross and Beaumont it has been held that the case law of United States is consistent in terms of the location factor. Concerning embarking, numerous decisions held that article 17 does not apply before passing the security and other procedures to enter in to what is called the sterile area. However, entering into the sterile is not enough for applicability. Most of the time the passenger is free to wander about and therefore it is also necessary to examine to what extent the carrier is in control of the passenger. This relationship will normally not arise until the passenger is called for boarding. Concerning disembarking, liability will be applied if the accident occurred on the apron.⁵⁸

⁵⁶ Day v Trans World Airlines, Second circuit, 528 F.2d 31 (1975)

⁵⁷ Buonocore v. Trans World Airline, 900 F. 2d 8 (1990)

⁵⁸ Shawcross, Beaumont, Air Law, volume 1, 2008, p 693 (VII)

5 Accident

This chapter will give details about what constitutes an article 17 accident. The term “accident” will be examined in both general and in the Convention. Due to the lack of definition of the term accident in the Convention, the examination will build on case law.

5.1 Problem

According to article 17, in the Montreal Convention of 1999, the damage sustained by a passenger has to be caused by an *accident* for the carrier to be liable. There is no definition to the term *accident* and the Conventions give no further explanation when it comes to what would constitute an accident. The lack of an unequivocal term has been a problem for courts to solve and judgements regarding what constitutes an accidents differs widely.

5.2 In General

Most persons have a clear vision what constitutes an accident in real life. If you look up the word in a dictionary, you will find an explanation similar to “something which happens unexpectedly and unintentionally, and which often damages something or injures someone”⁵⁹.

In a case from United Kingdom, *Fenton v J. Thorley*, one of the judges, Lord Lindley, expressed his opinion on the meaning of the term accident. He said: “*the term accident is not a technical term with a clear defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or the hurt itself would certainly be called an accident. The word accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.*”⁶⁰

What Lord Lindley said was that an accident has to be something unintended or unexpected. The term can be a subject of two separate interpretations. The focus of attention can be either the loss or hurt, or the event which caused the loss or hurt, depending on different context. Consequently, accidents can be given a somewhat broad definition in general. Lord Lindsey observation has been referred to in many rulings regarding accidents.

⁵⁹ Cambridge Advanced Learner’s Dictionary

⁶⁰ *Fenton v. J. Thorley & Co Ltd*, AC 443 (1993)

5.3 In the Convention

One of the requirements to be able to recover for damage under the Montreal Convention is that it has to be an accident that caused the death or injury. The provision that an accident must have occurred for a passenger to be entitled to compensation has been unchanged since the rules on aviation first was created in the Warsaw Convention of 1929. The article and the term accident has been the subject of much controversy over the years.

Lord Lindley's definition of accident has been referred to in many cases dealing with the definition of accident in passenger liability. He found an accident to be either the loss or hurt, or the event that caused the loss or hurt. To determine the right interpretation, in different situations, it is important to examine the word in its context and the purpose more thorough.

In one seminal case, it was established that the term accident, in the Convention, is used with reference to cause rather than to the occurrence of an injury. The text in the article states, *an accident which caused*. The plaintiff needs to be able to prove that an accident had happened and that it caused the injury. Thus, it had to be an accident that caused the injury of a passenger and not an accident that is the injury. The Court also found the difference of language used concerning passenger and baggage of great importance. In the article concerning baggage the term occurrence was used instead of accident. The conclusion was that the drafters of the Convention understood the term accident to mean something different from the term occurrence. The court was of the opinion that the drafters of the Convention tried to distinguish between the effect and the cause. Thus, the text of the Convention implies, however accident is defined, that it is the cause of the injury that must satisfy the definition rather than the occurrence of an injury alone.⁶¹ When determining that an accident refers to the cause of damage, it is still a struggle to define the term accident.

There has been a tremendous issue concerning if an accident has to be an action. There has been controversy in courts on whether an omission can constitute an accident. It has been said, that an accident can be a series of acts and omissions and then it will be difficult to distinguish between them. However, inaction itself can never constitute an accident.⁶² Voices in the High Court of Australia have also held that a bare omission, i.e. an absence of an accident, is not fitting the term accident due to that the element of accident requires a happening. Nevertheless, when it was failed to carry out a duty, practice or expectation, an omission can constitute an event or happening.⁶³ Notwithstanding, the Supreme Court in the United States rejected that only affirmative acts are events or happenings. They held that it

⁶¹ Air France v. Saks, 470 U.S 392 (1985), p 398

⁶² Deep Vein Thrombosis and Air Travel Group Litigation (Court of Appeal)

⁶³ Povey v. Qantas Airways, HCA 33, (2005)

is only necessary to distinguish between action and inaction when the claim is based on tort of negligence.⁶⁴

The term accident in the Montreal Convention gives fault no relevance. It does not matter who was to blame for the accident. Regardless, the carrier is liable in all circumstances. The only way for the carrier to exonerate himself is, in accordance with article 20, if he is able to prove that the damage was caused or contributed to by negligence or other wrongful act or omission of the person claiming compensation.

5.4 The Ruling of Air France v. Saks

The term accident has been a major problem and been widely discussed by courts. The interpretation has shifted over the years. Saks, the leading case on the subject, solved by the US Supreme Court in 1985, has given some clarity as to what is required to constitute an article 17 accident.

Before the ruling of Saks there had been two similar cases where the court had struggled to define the term accident. Those ruling later lead to Saks. In *Warsaw v. Trans World* the injured was denied compensation on the ground that the injury was caused during normal operations of a properly functioning aircraft on an uneventful and ordinary flight. In the other case, *Desmarines v. KLM*, the court stated that an accident was an unusual or unexpected event or happening that took place not according to the usual course of things.⁶⁵

In *Air France v. Saks* it was a female passenger flying from Paris to Los Angeles. The flight went smoothly in all respects, but during landing the female passenger felt severe pressure and pain in her left ear. Shortly after the flight, when the pain remained, she contacted a doctor who concluded that she had become permanent deaf in her left ear. She filed a suit against the airline company, under article 17 Warsaw Convention and the Montreal Agreement, alleging that her hearing loss was caused by negligent maintenance and operation of the pressurization system. The claimant had to prove that the injury was caused by an accident within the meaning of article 17. Evidence indicated that the pressurization system had functioned properly.

The Court had to interpret the Convention and in order to do so they began analysing the treaty text and the context in which the words were used. The Court found two significant features of the provisions that stand out in the text. Firstly, liability toward passengers is imposed if injury is caused by an *accident* while liability concerning luggage is imposed if destruction or loss of baggage is caused by an *occurrence*. The drafters of the convention obviously meant to distinguish between accident and occurrence. Secondly,

⁶⁴ *Olympic Airways v. Husain*, 540 U.S 644 (2004)

⁶⁵ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.135

the Court reviewed the phrase: *accident which caused the passenger's injury* and thereafter referred to Lord Lindley's observation to distinguish between an accident that caused the passenger's injury and an accident that is the passenger's injury. Their reasoning continued to imply that, however accident is defined, it is the cause of the injury that must satisfy the definition to constitute an article 17 accident, rather than the occurrence of injury alone.

Despite the two clues given in the Convention the Court was not able to define the term accident. To do so they continued to discuss the legal meaning of "accident" in French, the Warsaw Convention's original language. Thus, consistence with the shared intentions of the contracting parties. By research, the Court found that when the word accident is used as to describe a *cause* of injury it is often described as a fortuitous, unexpected, unusual or unintended event.

The US Supreme court concluded that liability arises under article 17 if the injury is caused by an unexpected or unusual event or happening that is external to the passenger. The definition of accident should though be flexible applied after evaluating all circumstances but when the injury is a result of the passenger's internal reaction to the usual, normal and expected operation of the aircraft it does not constitute an accident. An accident can be a product of a chain of causes but the claimant is only required to prove that some link in the chain of causes was an unusual or unexpected event external to the passenger. The court concluded that no accident had occurred in this case because the female's injury had resulted from her on internal reaction to normal operation.⁶⁶

The conclusion made by the Court in Saks can be summarized as: an accident constitute an unusual or unexpected event or happening, external to the passenger and, where the injury does not results from the passengers own internal reaction to the usual, normal, and expected operation of the aircraft.

5.5 External to the Passenger

Saks has given good help to determine what constitutes an accident, as it has to be an unusual or unexpected event external to the passenger. If there are no unusual features to the flight the injury will not constitute an accident, according to Saks.

The fact that an accident in some way has to be external to the passengers excludes death or injury caused by premedical conditions. A heart attack on a normal flight will not constitute an accident. Even if the medical condition was aggravated by normal flight conditions, it cannot be held to be an accident under article 17.⁶⁷

⁶⁶ Air France v. Saks, 470 U.S 392 (1985)

⁶⁷ Shawcross, Beaumont, Air Law, volume 1, 2008, p 655 (VII)

However, courts have had it more difficult when it can be established that the premedical condition is responding to some action or omission by the crew. There is one seminal case, *Olympic Airways V. Husain*, solved in the Supreme Court of the United States. The passenger had premedical conditions, which were worsened by an action or in fact by an inaction by the flight attendant.

A passenger flying with Olympic Airways had requested for a seat away from the smoking area because the passenger suffered from asthma and was sensitive to second hand smoke. The seat he got was only three rows away from the smoking section. When the smoking increased during the flight the passenger requested a flight attendant to be moved, but he was denied. The passenger died on the aircraft and his wife filed a suit.

The court had to determine if the flight attendant's failure to move the passenger, which was inaction, could be equalized with an accident in article 17. Furthermore, they had to determine if the passenger's death resulted only from his own internal reaction to the normal operation of an aircraft and consequently not be regarded as an accident.

The court used the definition of accident, set out in *Air France V Saks* that it must be an unusual or unexpected event or happening external to the passenger. Their conclusion was that the death of the passenger was caused by different factual events. The exposure to smoke by sitting next to the smoking section and the flight attendant's refusal to move the passenger all contributed to his death. Like in *Saks* it is enough that one of these links in the chain was an unusual or unexpected event to constitute an accident. The flight attendants failure to move the male passenger was one factual event found to be a link in the chain that led to death of the passenger. The Court found that the failure was unexpected or unusual in the light of the relevant industry standards or the company policy and the defendant never questioned this. The fact that it was inaction was not of any importance, according to the Court. It is of relevance solely where negligence regime applies and consequently not in the Convention. The relevant inquiry under *Saks* is whether there is an unusual or unexpected event or happening. The rejection of an explicit request for assistance is enough to meet with the requirement of an event of happening, under the ordinary definition of those terms as something that happens or takes place, thus it is enough to constitute an accident under *Saks*.⁶⁸

Appeal courts in England and Australia, dealing with damages caused by DVT due to inaction of flight attendants had earlier come to the opposite result than in *Husain*, that an inaction cannot constitute an accident. The majority in *Husain* dismissed the judgements from the appeal courts as intermediate court decisions. A dissenting judge in *Husain* found it unclear if inaction was enough to constitute an accident defined in *Saks*. The judge

⁶⁸ *Olympic Airways v. Husain*, 540 U.S 644 (2004)

emphasized the importance of a uniform interpretation of the Convention and decided to follow the ruling of the other signatories. Later on, the Supreme Courts in Australia and United Kingdom both agreed with their lower courts but at the same time explained that DVT cases are different from the Husain case.

Another source of accident that has not fared well in courts are cases concerning Deep Vein Thrombosis⁶⁹. It has been well settled that the development of DVT does not constitute an article 17 accident by itself. It is caused by the passenger's own internal reaction to the prolonged sitting activity due to long flights.⁷⁰ There are though DVT cases, similar to the Husain, where the claimant has alleged that the failure of the flight crew to give information and warn about the condition would be an action or inaction enough to constitute an accident. A case solved in a lower court in the United States, *Blansett v. Continental Airlines*, was denied. Even though the Court acknowledge the holding in Husain, that a refusal to a requested assistance might constitute an accident, they concluded that the failure of the crew to inform and warn about DVT was not an accident due to the fact that it was not an unusual or unexpected event, even if there was an industry practice to warn.⁷¹

There are two cases solved by Supreme Courts where the claimant alleged that the condition of DVT was developed due to the flight crew's failure to warn about DVT and to inform of how the passenger could avoid the consequences.

The High Court of Australia solved the first one, *Povey v. Qantas Airways*. A passenger who had travelled from Sydney to London suffered Deep Vein Thrombosis from that occasion, which later lead to bodily injury. The injuries included the development of pulmonary embolism, resulting in stroke with consequential impaired mobility and breathing difficulties. The plaintiff alleged that he had suffered his injuries due to the flight conditions. It was the refined and restricted physical environment and the encouragement from flight attendants to remain seated which made the passenger immobilised for a long period of time, which in turn caused the DVT. The passengers on the flight were also never informed or warned about the risk of or how to avoid DVT.

⁶⁹ Deep Vein Thrombosis is a serious medical condition that occurs when a blood clot forms in one of the large veins which lead to partially or completely blocked circulation. The result of this condition can be severe health complications damaging organs and can even lead to death if not treated effectively. A clot can break off and travel in the blood and if it reaches the lung or blocks the blood flow it can be deadly. DVT can be caused due to immobilization which makes long distance flights a risk factor.

(http://www.nhlbi.nih.gov/health/dci/Diseases/Dvt/DVT_All.html, 2009- 09-12, 17:57)

⁷⁰Dempsey P. S, *Accidents and Injuries in Air Law: The clash of the Titans*, 2008, p 13
Camán v. Continental Airlines 455 F 3rd 1087 (2006), *Blotteaux v. Qantas Airways* 171 Fed. Appx. 566 (2006)

⁷¹ *Blansett v. Continental Airlines*, 379 F 3rd 177 (2004)

The Court of Appeal held that a failure to do something could not be characterized as an event or happening. In addition, the High Court of Australia dismissed the case. The Court interpreted the term accident in article 17. The Court concluded that the term accident was used to refer to an event rather than the cause of injury. An accident should also be something unusual, unexpected and external to the passenger and thus DVT could not constitute an accident. DVT may have been unexpected and unusual as far as the passenger was concerned but this is not enough to turn those circumstances into an event or happening required in the definition of an accident in Saks. Even if the airline knew about the risks of DVT and failed to inform the passengers, the failure did not constitute an event or happening and even less an unexpected or unusual. There were no standard flight conditions, which required the airline to inform or warn about DVT. Moreover, there was nothing else unexpected or unusual with the circumstances on the flight. The conclusion of the Court was that the injury was not caused by an accident within the meaning of article 17. The court found the conclusion consistent with other decisions reached in DVT cases that failure to warn was a non-event which could not describe an accident.⁷²

Another case dealing with DVT, Deep Vein Thrombosis and Air Travel Group Litigation, was solved in England. It was a group action involving 55 claims against 27 air carriers. This litigation also raised the question whether or not inaction of the flight attendant to warn about DVT could constitute an accident.

The Court of Appeal held that to constitute an accident it had to be an unexpected or unusual event external to the passenger and that inaction was a non-event which could not rank as an accident. The House of Lords affirmed the decision of the Court of Appeal and dismissed the claim. The starting point to determine the term accident was as in Saks to examine the text in English and in French and the history and purpose of the convention. They followed the definition in Saks and respected the two requirements set out, namely, that an event or happening which is no more than the normal operation of the aircraft in normal conditions cannot constitute an article 17 accident and that the event or happening that has caused the damage of which complaint is made must be something external to the passenger. Their conclusion was that DVT did not fall under the term accident in article 17. Due to the absence of any industry standard requiring the airline to warn about DVT there can be no duty or consequently no failure to do so. They emphasized that this ruling concerned cases where there was no established practice of airlines generally or particularly to issue warnings about DVT.⁷³

In this case solved in the United Kingdom, House of Lords criticized the ruling in Olympic Airways v. Husain on the ground that the Supreme Court only interpreted the definition of the term accident in accordance to Saks and not the original text in the Convention to determine if the occurrence in Husain constituted an accident. A judge in the House of Lords rejected an

⁷² Povey v. Qantas, HCA 33, 2005

⁷³ Deep Vein Thrombosis and Air Travel Group Litigation, UKHL 72, (2005)

“approach to interpretation of the Convention that interprets not the language of the Convention but instead the language of the leading judgment interpreting the Convention”.⁷⁴

5.6 Aviation Related Risk

An important discussion when it comes to the term accident is whether it is enough that it was an unusual or unexpected event or happening external to the passenger to constitute an accident or if the notion of aviation-related risk has to be considered as well. After the Saks ruling courts have still been struggling with the definition of an accident. There are different opinions how to interpret the judgement. One camp holds that an accident under article 17 must arise from such risk that is characteristic of air travel and the other camp reasons that the definition of an accident in Saks is not limited to those injuries resulting from risks inherent in aviation.⁷⁵

There is reluctance by many courts to classify violent or abusive behaviour by another passenger as an accident when it has nothing to do with the carrier’s operation of the aircraft. It can be thought unfair against the airline if they should be held liable for incidents unrelated to the aviation business. This opinion found support in the preparatory work of the Convention.⁷⁶ There are several cases where the courts have embraced that the accident must bear some relation to the carrier’s operation of the aircraft and where the carrier has not been found liable due to the lack of this relationship.⁷⁷ Attorney Weigand argues, in a review of the Warsaw Convention, that courts have interpreted the term accident too broadly and contrary to the intention of the drafters. He insisted that an accident must be unequivocally tied to the aircraft operation, air crashes and aviation mishaps as these are the events focused on during establishing the Warsaw Convention. He held that the very purpose and heart of the conference was the concern over aircraft accidents and the associated risks with aircraft operation and travel.⁷⁸

There are though different opinions on the subject. Lawrence Goldhirsch is very critical against courts that began, as he said, mis-interpreting the Supreme Court ruling when they required the accident in some way to connected with the airline. Courts held either that the Convention only covered inherent risks of air travel or that the damage had to arise from the operation of the aircraft. Goldhirsch alleged that the Saks ruling never required such connections with the aircraft. The only requirement to constitute an accident is that it was an unusual or unexpected event or

⁷⁴ Deep Vein Thrombosis and Air Travel Group Litigation, UKHL 72, 2005, para 22

⁷⁵ Brandi Wallace v. Korean Air Lines, 214 F. 3d 293 (2nd Cir. 2000), p 7f

⁷⁶ Shawcross, Beaumont, Air Law, volume 1, 2008, (VII), p 651

⁷⁷ Shawcross, Beaumont, Air Law, volume 1, 2008, (VII), p 651, Prince v. British Airways 23 Avi 18, 465 (1992), Stone v. Continental Airlines Inc, 905 F Supp823 (1995)

⁷⁸ Weigand, Tory, Accident, Exclusivity, and Passengers Disturbance under the Warsaw Convention, 2001, p 914

happening external to the passenger. He found that requiring a causal connection in the chain leading to an injury was to use a negligence cause of action. The purpose of the Convention was to avoid negligence and allow compensation on proving only that an accident occurred.⁷⁹

If established that there have to be a causal connection it is important to decide what is calculated as a risk inherent in air travelling or what has connection with the operation of carriage.

5.6.1 Passenger to Passenger

A source of accident when the connection to the aircraft can be discussed is the behaviour by fellow passenger. The ruling of Tseng in which the United States Supreme Court held that the Convention was an exclusive remedy has resulted in a broader interpretation of the term accident. The term accident has been flexibly applied, even constituting an injury caused to a passenger by another passenger an accident under article 17.

Two seminal cases have been solved, by the Supreme Courts, where a passenger assault has been determined to constitute an accident and the question of aviation related risk has been discussed.

In *Brandi Wallace v. Korean Air* a female passenger was sexually assaulted by another passenger during a flight with Korean Airlines. The female was seated in a window seat with two male passengers beside her. She had fallen asleep during the flight and woke up because the male passenger next to her had unbuckled her pants, unzipped and unbuttoned her shorts and placed his hand inside her underpants and fondled her. She complained about the assault to a flight attendant and was reassigned another seat. Later the female brought action against Korean Airlines alleging that they were liable under the Warsaw convention.

The District Court dismissed the claim relying on *Saks*. They interpreted the *Saks* judgement in the way that there is a prerequisite for the accident to be caused because of a risk characteristic of air travel. The female passenger appealed. The Appeal Court discussed the interpretation of the term accident according to *Saks* and the relevance of the relationship between the event and the operation of the aircraft. They found the interpretation in *Saks* to be satisfactory, thus that an accident should be an unexpected or unusual event or happening external to the passenger. The Court held that whether an accident must arise due to risk inherent in aviation, to be regarded an accident under article 17, was of no matter, as this case would satisfy even the narrower characteristic risk of air travel approach. The court turned to the fact of the case and concluded that by cramping the female into a seat beside two men she did not know in a dark aircraft, it is plain that the

⁷⁹ Goldhirsch, Lawrence, Definition of Accident: Revisiting *Air France v. Saks*, 2001, p 87f

characteristic of air travel increased the female's vulnerability to the assault. In summary, the assault satisfies the provisions set out in Saks that it should be an unexpected or unusual event or happening, external to the passenger. Therefore, it constitutes an accident under article 17 of the Warsaw Convention.⁸⁰

The House of Lords solved *Morris v KLM*, another similar case, concerning assault between passengers and followed the ruling in *Wallace*. I have clarified for the case more thorough below, under recoverable damages, but in short, it was a young girl flying alone when a male passenger fondled her. She claimed compensation for mental distress.

The Court of Appeal found it to be an accident under article 17 and House of Lords confirmed. The Appeal Court held that the event causing the accident not necessarily had to have any relationship with the operation of the aircraft and that the incident in which the passenger was involved exemplified a special risk inherent in air travel. AS long as the event occurred during the time when the passenger was in the charge of the carrier, the passenger was entitled to compensation.

Unfortunately, the Court never answered if an accident has to arise out of a risk characteristic of air travel but instead they just embraced the flexible meaning of accident established in Saks and found that the case would satisfy irrespective of what interpretation concerning risk inherent used. The similar approach has been used in the Supreme Court of United states and the United Kingdom. The interpretation of an accident is extremely generous and it may cause concern for the carriers to calculate what they can be held liable for.

5.6.2 Terrorist Attacks

Terrorist attacks are other sources of accidents which the carrier can be held liable for. Terrorism and hijacking were not likely contemplated when the Warsaw Convention was created. Terrorist attacks are a problem that has occurred and increased in recent years. It is not only the passengers that can be affected by a terrorist attack. The carrier is though only liable for damage sustained in case of an accident that took place onboard the aircraft or in the course of embarking or disembarking. Consequently the carrier's liability is only toward damages that were caused to the passengers and not damages caused on the ground to third a person. There is another Convention⁸¹ applicable for damages on the surface.

It is clear that acts of terrorism and hijacking are events which are unusual and unexpected and external to the passenger, consequently these events will meet with the requirements in Saks. As the Convention is created to

⁸⁰ *Brandi Wallace v. Korean Air Lines*, 214 F. 3d 293 (2nd Cir. 2000)

⁸¹ Rome Convention of 1952

cover at least all hazards of air travelling I allege that these damages will constitute accidents under article 17. It is a characteristic of air travelling and should be compensated by the carrier. There are several cases concerning damages which has been caused due to a terrorist attack or hijacking which has been held to be an accident under article 17.⁸² The courts have used arguments of cost allocation to justify their conclusions that an accident is constituted and that the carrier is liable in the event of terrorist attacks and hijackings. It has been held that the airline is the party most qualified to develop defense mechanisms to avoid incidents and they are likewise the party most capable of assessing insurance against the risks associated with air transport.

⁸² Day v Trans World Airlines, 528 F.2d 31(1975), Husserl v Swiss Air 351 F Supp 702(1972)

6 Recoverable Damage

This chapter will deal with the problem concerning what damages are recoverable and especially concentrated on emotional damages. The term bodily injury will be examined thoroughly according to relevant case law to find an answer to what are recoverable damages.

6.1 The term Bodily Injury

Article 17 as we have seen states that the “*carrier is liable for damage sustained in case of death or bodily injury of a passenger*”. This differs slightly from the original text in the Warsaw Convention, which stated that “*the carrier is liable for the damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger*”. There is no problem when it is a case of death but instead the main problem is to determine what type of injuries are contemplated by the term *bodily injury*. This term has stayed the same through the development on passenger liability. There is nothing in the Convention to clarify the term.

An accident can cause both physical and emotional injury and the question that many courts have struggled with is whether emotional damages are recoverable, according to article 17. There are different situation as to how the damage can appear. Firstly, solely physical injury or solely emotional injury can be caused. Secondly physical injury can be caused leading to emotional injury and thirdly emotional injury can be caused leading to physical injury, in another word physical manifestation of emotional injury. In general, case law supports that solely emotional injury cannot be recovered but also physical injury is required. Even though emotional injury was one of the main issues discussed during the conference to create the Montreal Convention it was never resolved. If the damage sustained to a passenger falls under the term bodily injury, they can recover for all compensatory damages.

In the ICAO International Conference in 1999, which was held to create the Montreal Convention, liability for emotional injury was discussed. The focus of the discussion was if, and to what extent, mental injury should be compensated as a separate head of damage. This was a proposal by made by Sweden and Norway to include *or mental injury* in the article. Countries in favors of the suggestion were Canada, most European countries, all Latin American countries, Lebanon and Korea. During the Conference the arguments against accepting mental injury in the article were among others the problem that mental injury can be simulated and lead to false claims and the problem of proof of mental injury. In spite of all positive response mental injury was not included in the final compromise of article 17 and it is still the concern of courts. This has been criticized because this type of

damage is gaining grounds in many countries around the world.⁸³ The proposal to include mental injury was based on several arguments. It was insisted that the term “bodily injury” fragments rather than unifies the international rules and that other international transport agreements include recovery for emotional injury and aviation should give the same protection. It was also emphasized the impossibility of distinguish mental injury from physical injury.⁸⁴

As the term bodily injury was never changed or clarified in the new Montreal Convention the jurisprudence concerning the Warsaw Convention is still valid to determine the recoverable damages. In case law courts have felt the need to interpret the French term “*lésion corporelle*”, as it was the authentic version of the Warsaw Convention. They have also taken consideration to the purpose of the Convention, which was to limit the liability of air carriers in the infant aviation industry.

6.2 Case Law

6.2.1 US Case Law

The United States Supreme Court provides one seminal interpretation in the case *Eastern Airlines v. Floyd*. The conclusion in this case was that solely mental injury could not be recoverable if the accident did not also cause death, physical injury or physical manifestation of injury for the passenger. Before this ruling, there had been much controversy in lower courts. A number of courts found emotional damage to fall within article 17. Some of them required the emotional injury to be accompanied with physical injury while other allowed recovery irrespective of physical injury.

The cases *Burnett v. Trans World Airlines* and *Rosman v. Trans World Airlines* represented the first camp. Both cases involved the same hijacking of a Trans World Airline aircraft by the Popular Front for the Liberation of Palestine. The aircraft was on the way from Athens to New York when it was hijacked and taken to the dessert of Amman, Jordan. The passengers were held hostages for six days in a cramped quarter where they also were exposed to extreme temperature and without regular food and drinks.

In *Burnett*, the Court examined the authentic text of the Warsaw Convention and its purpose. Their conclusion was to allow recovery for emotional injury resulting from bodily injury but not for emotional injury alone.

In *Rosman* the Court held that bodily injury in article 17 connotes a palpable, conspicuous physical injury and exclude mental injury with no observable bodily manifestation. Thus, the Court in *Rosman* required bodily injury for recovery but there also had to be some causal connection with the

⁸³ Mauritz, Jeroen, Reports of the Conference, 1999, p 154

⁸⁴ Cunningham, McKay, The Montreal Convention: Can Passenger Finally Recover for Mental Injuries?, 2008, p 31f

accident. However, they determined that it could be sufficient if the hijacking had caused a physical manifestation of emotional harm to recover for the injury. In other words, it was possible to recover for the physical injury, which was caused by the primary emotional harm, but not for emotional harm that did not lead to any physical injury. A damage flowing from the observable bodily injury was also recoverable.⁸⁵

Other courts allowed recovery even if there was no physical injury causing or resulting from the emotional injury. *Husserl v. Swiss Air Transport* also involved a hijacked aircraft taken to the desert of Amman in Jordan. The court found that article 17 comprehends mental and psychosomatic injuries.⁸⁶

A case, *Eastern Airlines v. Floyd*, solved by the Supreme Court of the United States, was seminal on determining recovery for damage. In 1983 an aircraft from Eastern Airlines departed from Miami bound for Bahamas. Shortly after the takeoff, one of the engines lost oil pressure and was shut down by the staff. The pilot turned the aircraft around to go back to the Miami Airport. Soon thereafter, the other two engines failed due to loss of oil pressure. The aircraft rapidly began to lose altitude and the passengers were informed that they had to make a forced landing in the Atlantic Ocean. Fortunately, the crew managed to start one of the engine and they were able to land safely on the Miami airport. A group of passengers filed a lawsuit against the Eastern Airlines each claiming damages solely for mental distress. The airline conceded that the event constituted an accident but that there was a lack of physical injury, which was also a condition for liability.

The court analysed the French legal text, as was the only authentic text of the Warsaw Convention. The text states that the damages are compensational if the passenger suffers *mort, blessure or toute autre lésion corporelle* translated into the English version as *death or wounding or any other bodily injury*. The court turned to bilingual dictionary, French legislation and the purpose of the Warsaw Convention to find the right interpretation of *lésion corporelle*. Their conclusion was that the air carrier could not be held liable if the passenger solely suffered emotional injury. The conclusion was based on the interpretation of *lésion corporelle* as only bodily injury, excluding purely mental injury. The Court found nothing in the Warsaw Convention that demonstrated another interpretation of the term *lésion corporelle* and it was also consistent with the history and the purpose of the Warsaw Convention, with its limited liability to protect air carriers and to foster the infant airline industry. The accident had to have caused death, physical injury or physical manifestation of injury for the passenger to be able to recover. The result in *Floyd* has been referred to and widely followed in judgements, also in other states. However, the Court never expressed their

⁸⁵Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.126

⁸⁶Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.127

view as to whether passengers can recover for mental injury that is accompanied by physical injuries.⁸⁷

This question was unsolved in *Floyd* and this led to obscurity concerning what damages are recoverable. For example, is it possible to recover if the emotional injury resulted from physical harm and may the physical harm result from the emotional injury? What if the emotional injury causes physical injury may the passenger then recover for emotional harm that precedes its physical manifestation or only the ones flowing from the bodily injury? A federal court in the States solved the issue and identified four alternatives for recovery for emotional harm:

- No recovery allowed for emotional distress
- Recovery allowed for all emotional distress, as long as bodily injury occurs
- Emotional distress allowed as damages for bodily injury, but distress may include distress about the accident; and
- Only emotional distress flowing from the bodily injury is recoverable.⁸⁸

The Court embraced the fourth alternative that it is possible to recover for mental distress flowing from physical injury. The mental injury has to be caused by the physical injury, thus, it is not enough that a physical injury occurred. This has been widely followed and it appears to be the mainstream view in the international aviation jurisprudence of United States.⁸⁹ In dicta the court also concluded that it is possible to recover for the physical manifestation of emotional harm caused by the accident but not for the mental distress for the accident itself.⁹⁰

After *Floyd* other lower courts have tried to interpret the judgment to determine what the requirements are to recover for an accident under article 17. As *Floyd* never gave any answers whether passengers can recover for mental injury that is accompanied by physical injuries the results has not been uniform, even though the mainstream view in United States is the one in *Jack v Trans World Airlines*.

There are cases in the United States Courts of Appeals where courts have held that physical manifestation of emotional harm is not recoverable under article 17 and they only approved compensation for emotional injury flowing from physical injury.⁹¹ While there are other judicial decisions that allow mental damage that arise prior to or simultaneously with physical injury. *Floyd* has been interpreted in a way where physical injury is just a prerequisite and when met, it should be possible to recover for mental injury

⁸⁷ *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)

⁸⁸ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D.Cal. 1994)

⁸⁹ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.131

⁹⁰ Dempsey P. S, *Accidents and Injuries in Air Law: The clash of the Titans*, 2008, p 20

⁹¹ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.132f, *Lloyd v American Airlines*, *Terrafranca v. Virgin Atlantic Airways*,

as well, as long as there is a causal link between the accident and the injury. It should consequently be enough that the mental injury is accompanied by physical injury instead of caused by.⁹²

Another problem when it comes to compensation is concerning third parties. The article states that carrier is liable for damage sustained in case of death or bodily injury of a passenger. Is it though possible for a third person to recover for injuries flowing from another person's physical injury? It is impossible for a injured passenger to recover if he only suffered emotional harm, but is it enough for compensation that the physical injury was caused to another person? This has been the subject issue in different lower courts in the United States. The outcome has varied and therefore the legal position is still unclear.⁹³

6.2.2 PTSD

PTSD is a medical condition which is caused when a person experience something bad like an aircraft accident. It makes the person feel afraid or stress even after the danger is over and this affects the life of the injured person and even the people around.⁹⁴

Above in the text the reader can understand that solely mental injury is not enough to recover according to the Convention. Post traumatic stress disorder has been seen as solely a mental injury which would make it impossible to recover but new scientific studies have been presented which alleged PTSD to be both a physical as well as psychological injury. This has led to judgments which accepted PTSD as a physical injury instead of a mental injury consequently allowing compensation under the term bodily injury.

In another case, *Weaver v Delta Airlines*, a passenger who had suffered chronic post-traumatic stress disorder, due to an emergency landing, recovered for her damage. The passenger relied on recent scientific research and alleged that she had suffered a physical injury to her brain and neurological system and not a mental injury. The court found that extreme stress could cause actual physical brain damage and consequently constitute a bodily injury. Consequently the fright alone is not recoverable but the brain injury from fright is.⁹⁵

In *re Air Crash at Little Rock* concerned a passenger who suffered chronic PTSD and depression when she was subject to an aircraft crash. The

⁹² Cunningham, McKay, *The Montreal Convention: Can Passenger Finally Recover for Mental Injuries?*, 2008, p 18f

In *re Aircrash Disaster Near Roselawn*, 954 F. Supp. 175 (N.D. Ill. 1997), In *re Korean Air Lines Disaster*, 814 F. Supp. 592 (E.D. Mich. 1993)

⁹³ Dempsey P. S, Milde M, *International Air Carrier Liability*, 2005, p.133, Lugo v American Airlines, *Kruger v United Airlines*, *Fishman v Delta Air Lines*,

⁹⁴ <http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-easy-to-read/index.shtml>, 2009-09-12, 18:36

⁹⁵ *Weaver v Delta Airlines*, 56 F Supp 2d 1190 (1999)

claimant's doctor said in his testimony that PTSD have in some cases led to brain dysfunction. This abnormality would not show in all cases and therefore PTSD must constitute both a physical and psychological injury.⁹⁶

6.2.3 UK Case Law

The House of Lords have gone against rulings in the United States when concluding that physical manifestation of emotional harm is recoverable. They solved two cases at the same ruling both concerning compensation for mental injury. None of the claimants alleged that their mental injuries were caused by physical injuries. There was though an important difference between the two cases. In one, the mental injury led to physical injury and in the other only mental injury occurred, this circumstances lead to different outcomes.

In *Morris v. KLM* a young girl of 15 year travelled with KLM from Kuala Lumpur to Amsterdam. She was travelling on her own and was seated beside two men. She fell asleep on and woke up to discover the hand of the man next to her caressing her left thigh. She rapidly got up and told one of the flight attendants, thereafter she was moved to another seat. Back in England a doctor found that she was suffering from clinical depression. She did not allege suffering any physical illness.

In the other case, *King v. Bristow Helicopters Ltd*, a helicopter owned and operated by Bristow Helicopters took off from a platform in the North Sea, in poor weather. When ascending the two engines failed and the helicopter descended and landed back on the helicopter deck. Smoke engulfed the helicopter and prevented the passenger from seeing out, panic occurred among the passengers who feared that it would crash into the sea. The doors were opened and the passengers could disembark. One of the passenger filed a suit against the carrier claiming that he had suffered PTSD due to the accident. Because of the stress, he suffered an onset of peptic ulcer disease.

The two cases were both appealed to the House of Lords and they were considered together by the Court.

The House of Lords examined the meaning of the term bodily injury both in English and in French. They also considered jurisprudence from other countries mostly leading cases in the United States.

It was determined that an accident leading to injury was recoverable if it was a physical injury to the passenger body. A person suffering no physical injury but solely mental injury the court said had no claim under article 17. The Court held that mental injury was relevant in two respects. To satisfy the requirements in the Convention it is enough if the mental injury was caused by physical injury and secondly if an accident cause mental injury which in turn causes physical injury. However, it was observed that the

⁹⁶ In re Air Crash at Little Rock, Arkansas 118 F Supp 21d 916 (2000)

brain is also a part of a body and can be subject to injury. If the brain has suffered an injury is a question of medical evidence. Such damages may be recoverable when the science has advanced to the level that it can point to an injury in the brain causing clinical depression. The Court found it important to acknowledge the developments in medical science since 1929 to interpret the term bodily injury. Bodily injury simply and unambiguously mean a change in some part or parts of the body which was sufficiently serious to be described as an injury, this including provable damage to the brain. Another conclusion, as I already clarified for, was that it was possible to recover for the physical manifestation of a mental injury. However, it had to be a causal link between the accident and the injury but it was enough to show that the injury was caused by a mental injury which itself was caused by the accident.⁹⁷

The appeal in Morris was dismissed while the appeal in King was allowed due to the physical manifestation of mental injury, more exactly the ulcer.

In comparison with the United State case Weaver, clarified for above, the Morris case differs in the way that the mental injury never was proved to be a physical injury to the brain.

⁹⁷ <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020228/king-1.htm>
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7 Analyses and Conclusions

7.1 General Conclusion

As we have seen, there is a major problem with determining the undefined terms in article 17. There is no consistent uniformity among the Supreme Courts in the signatories. Therefore, it has been hard to find an exact definition to the terms. These terms were not defined in the new Montreal Convention and consequently the issues are still a subject for the courts to solve, with the uniformity at risk. There is always a problem with creating a durable and uniform system of rules when there are a large number of members and opinions and it can be said to be a product of compromises. The rules regarding passenger liability will not be satisfactory as long as there is no uniformity.

7.2 Embarking and Disembarking

What do the terms embarking and disembarking imply?

To determine if the uniform rules on passenger liability apply it has to be established that the accident took place onboard the aircraft or during the course of any of the operations of embarking and disembarking. The problem concerning this phrase has been to determine whether it took place during embarking or disembarking.

Some guidance can be given from the debates on this matter during the conferences to create the Warsaw Convention. The delegates rejected proposals to draw the line at the aircraft doors or at the airport doors.

When examining case law it can be found that signatories apply different test to examine where the limit will be drawn. However, the results seem to be quite unanimous among states. Certain facts seem to be of importance irrespective of what state that solved the case. These factors are the physical place of the passenger, the activity of the passenger and if the passenger was under the charge of the carrier or his agents. When examining the location of the passenger it seems essential if the accident occurred in the zone of aviation risk and if the activity was related to the activity of aviation. Obviously, the closer in time and in location to embarking or disembarking even more likely it is that the liability will apply under article 17.

By examining rulings and the opinions of experts, I find it possible to determine that the passenger will be in the course of embarking or disembarking when he has reached the boarding area after the boarding announcement or when he is still on the apron. The passenger will not be found to be in the course of embarking or disembarking, before check in or

even before security and after leaving the apron to reach the baggage claiming area. However, certain circumstance can alter the decision as a minor walking about in the terminal accompanied by the carrier or an agent. If the accident was not taken place on board the aircraft or in the course of embarking or disembarking there is no claim against the carrier as the Convention seems to be an exclusive remedy. Nevertheless, the passenger can claim compensation from another actor as perhaps the airport. The difference is that the passenger has to prove negligence but on the other hand there is limitations on liability.

7.3 Accident

What constitutes an article 17 accident?

The carrier is liable according to the Montreal Convention in case of damages sustained due to an accident. The first thing to establish when solving a claim under article 17 is thus if the event that occurred would constitute an accident. This has been a great concern of many states' courts.

The ordinary meaning of the term accident has been a good start in determining what constitute an accident in the Convention. The term accident can either refer to the event that caused the injury or the injury itself. To determine what constitute an accident in the Convention the term has to be examined in its context and in the light of the Convention's purpose and history. It has been determined and agreed on that a separation of the cause and the effect must be made and that it is the cause of the injury that must satisfy the definition to constitutes an article 17 accident, rather than the occurrence of injury alone.

A development concerning the term accident was made in Saks. The definition of an accident has been widely referred to and approved of both in cases in the United States and in cases of other signatory states as well. The conclusion can be that an accident must be:

- An event or happening that is
- unexpected or unusual and
- external to the passenger and not the passenger's own internal reaction to the normal condition on a flight.

It is also important to remember that the definition of an accident shall be flexibly applied considering all the circumstances and there can be a chain of causes leading to the injury but it is enough if one link is an unusual or unexpected event or happening external to the passenger.

The Saks case has been followed in most decisions concerning the term accident, which implies that it is a right and uniform interpretation of the term accident in the Convention. However, even if most courts have reached the same definition as in Saks, there has been criticism to those courts solely interpreting the ruling of Saks and consequently disregarding the original text. The scenario has been seen in Husain when deciding that an omission

or inaction would constitute an accident. It has been criticised that the court only asked if the inaction of the flight attendant was an unusual or unexpected event external to the passenger when they instead should have asked if the inaction could constitute an accident. As established in the Vienna convention it is the text and its context that shall provide an interpretation. What other courts have established shall only be used as guidance. I assume it can be concluded that an accident can be said to be an unusual or unexpected event or happening external to the passenger but during all circumstances, it has to be asked if it is an accident.

It was concluded in Saks that the event has to be external to the passenger. This makes all damages caused by premedical conditions excluded from compensation. This seems to me to be a rational and intelligent solution. I cannot see how it could be in any other way, it cannot be reasonable that the carrier shall be held liable for something that he is not aware of or cannot do anything about. The cause shall satisfy the term accident. It would be indefensible if the carrier should be liable for a cause they could not control. The carrier would act as the passengers insurance.

The ruling of Husain has altered the legal position in the way that it was established that an inaction of a flight attendant, which aggravated a premedical condition of a passenger, was enough to constitute an accident. The flight attendants refusal to assist a passenger was held to be an unusual or unexpected event external to the passenger. The asthma was not an unusual or unexpected event external to the passenger however, it was enough that the flight attendant failure was, as it was one link in the chain. I agree on the terms that the flight attendants' failure was unusual or unexpected event external to the passenger, when they were well aware of his condition and she acted against the flight company standards. About the inaction constituting an accident, I can conclude that it is a clash between courts of how broad the term accident shall be interpreted.

As I have established previously, this case has been criticised by courts when dealing with DVT on the subject that it relied too much on the ruling in Saks. It was said that the court had taken the interpretation of Saks too far by using it as a substitute to the language of the Convention. Even if criticised it cannot be ignored that at the same time the Supreme Courts of Australia and United Kingdom emphasised that their cases were different from Saks, which I assume meant that they did not want to rule out omission, which was not in accordance with industry standard or company policy.

My conclusion is that an accident must be external to the passenger and therefore damages due to premedical conditions are ruled out. However, if an accident on an aircraft aggravates the premedical condition it will be enough to constitute an article 17 accident. There is though still a clash between the courts whether or not an omission or inaction can be said to be that accident. My conclusion is that if the carrier is aware of the premedical

condition and has industry standard of how to act even an omission might constitute an accident.

DVT is not regarded as an accident under article 17. Neither has the failure from flight attendants to inform and warn of DVT been enough to constitute an accident. However, in the cases solve by Supreme Courts in Australia and United Kingdom there was no industry standards or company polices or practice which required the flight attendant to warn or inform. The Courts declined to consider such circumstances. I assume that the decision would otherwise be different and might instead resemble Husain. I would though like to allege that nowadays all airlines, at least in industrial countries, have warnings and information how to avoid DVT on their long distance flight, which will reduce the risk of claims.

The Court in Saks never considered if the event had to have a causal relation to the operation of the aircraft or be a characteristic of aviation related risk. The question if an accident has to arise from the risk inherent in aviation has been the subject of controversy in lower court. Unfortunately, the Supreme Courts in neither the United States nor in the United Kingdom resolved that question when they had the opportunity. The conclusion in Morris respectively in Wallace, where the matter has been discussed, was that the circumstances in both cases satisfied the characteristics of risk inherent in air travelling. It seems unfair that the carrier shall be liable for all events that took place on the aircraft that are unexpected and unusual and external to the passenger, regardless of relation to the operation of the aircraft and consequently beyond the carriers control. I would prefer an interpretation of accident that excludes accidents that are unrelated to the risks of aviation. I find the reasoning of Weigand appropriate, as the issues discussed during the establishment of the Warsaw Convention was aircraft accidents and associated risks. Thus, I disagree with the opinion of Goldhirsch. Saks never discussed the importance of aviation related risk, but they never had to. I cannot understand how a requirement that an accident shall be in the risk inherent of air travel or related to the operation of the aircraft is to impose a negligence cause of action. The term accident shall be defined as something related to the air travelling or risk inherent irrespective of negligence. This would also be consistent with the purpose of the Warsaw Convention as it was created to protect the infant industry.

With this established there is still a concern with determining what constitute a characteristic of air travel. Both assault by fellow passengers and terrorist attack has been held to be within the risk of aviation The Court in Wallace found that by cramping the female into a seat beside two men she did not know in a dark aircraft, was a characteristic of air travelling. In Morris, the Court took it even further and said that it is enough if the passenger is in the charge of the carrier for the incident to be recoverable. Over all the view of what is a characteristic of air travelling has been very generous and I assume that most circumstances would be accepted as risk characteristics of aviation. It seem that court have a tendency to interpret the term too widely after Tseng due to that they do not want to leave the injured

without compensation. It is though important to remember that the carrier has a possibility to exonerate himself according to article 20 or at least limit the liability to 100 000 SDRs according to article 21.

7.4 Recoverable Damages

What damages are recoverable under article 17?

The Montreal Convention states that the carrier is liable for damage sustained in case of death or bodily injury. Consequently, it has to occur a death or bodily injury to a passenger to get compensation according to article 17. In addition, the original text in the Warsaw Convention also required more or less the same provisions, that the carrier is liable in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. To determine what constitute a recoverable damage it is necessary to examine the term bodily injury. There is nothing given in the Convention to clarify the term more closely to be able to determine if it shall include both physical and emotional injuries. Courts have turned to the authentic text and the purpose of the Convention to find an answer.

The issue what is recoverable damages under article 17 has developed differently in jurisprudence from United Kingdom and United States. Even though states seem to regard international cases when judging there is a clash between the courts and their decisions.

Without controversy, it can be established that death and a direct injury to one's body is recoverable under article 17. The term bodily injury in the article has been said to connote palpable and conspicuous injuries. All injuries to a passenger's body will fulfil the requirements set out in the article. Consequently, as long as a physical injury occurs, which is medical provable and caused by the accident, the claimant can recover compensation for those.

Rulings concerning other damages than solely physical ones are very varied. However, court seems to have agreed on that solely mental injury is not recoverable if it is not accompanied by a physical injury. This was first concluded by the Supreme Court in the seminal case *Floyd*, which has been widely followed and referred to both of court in the United States and in other states. *Floyd* was as just mentioned the First Supreme Court case to resolve the issue of solely mental injury. Before *Floyd* it had been much controversy in lower courts of the United States. Unfortunately *Floyd* did not resolved the issue if mental injury is recoverable if accompanied by physical injury. It was only concluded that a mental injury without death, physical injury or physical manifestation of injury would not be recoverable.

There can be both mental injury flowing from physical injury and physical manifestation of mental injury. Concerning mental injury flowing from physical injury there seems to be uniformity between United Kingdom and

United States. Courts in both countries have approved recovery for those type of injuries. If the mental injury is caused by a physical injury, which in turn was caused by the accident, it is recoverable. The mainstream view, at least in the United States, is that only mental injury flowing from physical injury is recoverable but there is controversy both between the courts in the United States and with courts in the United Kingdom.

The Supreme Court in the United States has not yet had the opportunity to resolve this issue of physical manifestation or mental injury. Until now, it has only been settled in lower courts and there have been some controversy about what to apply. The courts have come up with diverse results leading to unclarity, as far as United States legal position is concerned. Whilst according to cases solved in the United Kingdom it is possible to establish that physical manifestation of mental injury is recoverable. The House of Lords has determined, in *King v. Bristow Helicopters* and *Morris v. KLM*, that these damages are recoverable as long as there is a causal link between the accident and the injury and it is enough that the causal link is a mental injury which in turn was caused by the accident. In cases where physical manifestation of emotional harm is found to be recoverable it is likely that the passenger also can recover for the pain and suffering resulting from the manifestation. The reasoning in the case that an injury to the brain is a bodily injury is consist with the reasoning in the PTSD cases from the states. It seems like the case law has developed into more passenger friendly. This can be said to harmonize with the suggestion in the conference to include the term mental injury. It can be ascertained that the deciding made in United Kingdom apply a broader interpretation of bodily injury.

Solely mental injury does not fulfil the requirements in the term bodily injury according to the judicial decision but large developments have been made. In some cases, the courts have developed mental injuries as PTSD into physical injuries. In the judgement *Morris v KLM* it was established that the brain is a part of the body and an injury to a passenger's brain is recoverable. However, it is a fact of medical evidence to be able to prove a brain damage causing mental injuries. Other cases also showing great progress concerning PTSD was *Weaver v Delta Airlines* and *In re Air Crash at Little Rock*. The courts in these cases also concluded that physical injury to the brain was recoverable. They found it proved by new progress in scientific studies concerning PTSD that it could constitute a physical injury to the brain. The case law has definitely developed and these cases may have ultimately changed the term bodily injury when determined that PTSD can constitute physical injury.

The proposal to include the term mental injury in the new Convention indicates a development on the issue to allow recovery for mental injury as well. As many countries around the world allow claims for mental injury and the fact that it is also allowed in other international transport agreements suggest more passenger friendly judgments in the future. I find the arguments against including mental injuries weak. The argument that mental

injuries can be simulated can be dismissed on the fact that the injury has to be medically provable.

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