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The Air Carrier's Liability for Passenger Damages

-Article 17 of the Warsaw System and the new Montreal
Convention

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Summary

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, the Warsaw Convention, was completed in 1929. The major purpose of the Convention was, as the Convention's title reveals, to unify the private law rules that regulate the aviation business, thereby avoiding major conflicts of law and conflicts of jurisdiction.

A second purpose of the Convention was to protect the infant and financially weak aviation industry from disastrous claims by injured passengers. The Warsaw Convention therefore established a fault based liability system with a reversed burden of proof, with a fixed monetary limitation on the imposed liability. The liability provisions constitute the core subject of the Convention but have, because of the limited possibilities of economic recovery, also extorted several legal instruments and unilateral private agreements to amend the Convention. The co-existence of these amendments and agreements has created confusion among the signatory states as to which rules that apply. In order to modernize the rules and to end the confusion caused by the multiplicity of instruments a new Convention was adopted in Montreal on 28 May 1999. The new Montreal Convention will come into force when thirty states have ratified it.

The conditions under which a carrier is liable for passenger damages are set out in Article 17 of the Warsaw Convention. The carrier is liable if the passenger has suffered damages due to:

1. death, wounding or other bodily injury;
2. while a passenger on an international transport;
3. in an accident;
4. while on board the aircraft or in the course of any of the operations of embarking or disembarking.

Most of these conditions seem clear, while the legal meaning of the terms "accident" and "bodily injury" are more difficult to ascertain.

The ordinary meaning of the word "accident" is often used to refer to the event of a person's injury, but is also used to describe the cause of an injury, or both the cause and the injury together. The term has no clearly defined legal meaning, which complicates the construction of the term. The U.S Supreme Court ruled in its *Saks*-decision that an Article 17 accident requires: an unexpected or unusual event that is external to the passenger, and that this definition should be flexibly applied after assessment of all circumstances. The Court further stated that it must be the cause of the injury rather than the injury itself that has to satisfy the definition, thereby ruling out situations where a passenger's injury is an internal reaction to the normal operation of the aircraft.

The Court failed, however, to answer whether the carrier is liable for all passenger damages caused by *any* unusual or unexpected event, as long as

they are external to the passenger i.e. passenger to passenger assaults and terrorist acts. The carrier shall, in my opinion, only be held liable in situations where there exists a causal connection between the cause of the damage and the operation of the aircraft. The operation of the aircraft should be read to encompass not only the mechanical and technical operation but also services provided by the carrier. The carrier can therefore become liable for passenger-to-passenger assaults caused by over-serving of alcohol.

The question whether the term "bodily injury" encompasses purely emotional distress and psychic injury unaccompanied by physical injury has, with different outcomes, been decided by two national Supreme Courts. In the *Teichner* decision, the Israeli Supreme Court decided that such compensation was allowed under the Convention and that it was a welcomed modernization of the old-fashioned Convention. The U.S. Supreme Court on the other hand held that the intent of the drafters was to exclude recovery for purely psychic injuries and that the purpose of uniformity would be upset if such compensation was allowed since many states did not recognize recovery for purely emotional distress in 1929. The purpose of limiting the carrier's liability would according to the Court also be upset since allowance for claims for emotional distress would broaden the scope of Article 17. The US Supreme Court also looked at the official French text of the Convention and found that the phrase "lesion corporelle" best is translated into bodily injury, a translation that clearly suggests that purely emotional distress is not encompassed by the Convention.

Article 24 of the Warsaw Convention states that a claim that satisfies the conditions of Article 17 only can be brought subject to the conditions and limits set out in the Convention. Article 24, however, does not state whether the Convention precludes a claimant whose action do not satisfy the conditions of Article 17 from suing a carrier under another source of law. The new Montreal Convention brought clarity to the question and states that any action for damages, *however funded*, only can be brought subject to the conditions and limits of liabilities set out in the Convention. The U.S. Supreme Court relied on this new wording of Article 24 and held that a passenger is precluded from maintaining an action against the carrier for personal injury damages under state law when her claim does not satisfy the conditions for liability under the Convention.

Preface

I would like to extend my regards to Professor Lars Gorton at the Faculty of Law, University of Lund, Sweden for giving me valuable guidance during the course of writing this thesis.

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Abbreviations

CITEJA	Comité International Technique d'Experts Juridiques Aériens
ECJ	European Court of Justice
IATA	International Aviation Transit Association
ICAO	International Civil Aviation Organisation
IMF	International Monetary Fund
SDR	Special Drawing Right
SGMW	Special Group on the Modernization and Consolidation of the 'Warsaw System'

1 Introduction

1.1 Purpose

The purpose of this thesis is to describe and examine the air carrier's liability according to Article 17 of the Warsaw System. It is my intention to present the situations under which air carriers are liable for passenger damages and thereby bring clarity to an article that has been described as stark and nebulous. I also intend to describe the evolution of the Warsaw System and compare some of its provisions with the new Montreal Convention.

1.2 Method, Material and Delimitation

I have, in order to fulfill the purpose stated above, consulted traditional legal sources such as conventions, national legislation, case law, scholarly writings and articles. I have based my research on the text of Article 17 as it stands in the Warsaw Convention, and interpreted it in the light of relevant case law and doctrine.

This paper foremost presents an American view and application of the Warsaw Convention, which is a natural consequence of the fact that the majority of the Warsaw-cases decided have been decided by U.S. courts of law. I have as far as possible tried to include decisions that are not American, but these cases are rare and often repeat the conclusions of the American decisions.

One of the cases I have used is a decision from the Supreme Court of Israel, which I because of my limited knowledge in Hebrew and French have read in a translated summary. I must therefore make a reservation for the authenticity of the case since I have not used the primary source.

I have within the ambit of this paper chosen to disregard questions concerning transportation of goods and the carrier's liability for damages on the goods occurring during such transports. The reason for this is that Article 17 only regulates the air carrier's liability for passenger damages and that it would significantly expand the scope of this paper if I was to include other types of damages for which a carrier can become liable.

1.3 Outline

This paper is divided into three parts. The first part, Chapter 2 summarizes the evolution of the Warsaw System and gives the reader an overview of the basic provisions of the System. The chapter further discusses some of the unilateral actions that have amended the rules of the System and compares

some provisions of the new Montreal Convention with the provisions of the Warsaw System.

The second part examines in depth Article 17, the carrier's liability for passenger damages. Chapter 3 explains the basic structure of the Article while chapters 4 and 5 tries to bring clarity to the ambiguous terms "accident" and "bodily injury".

The final part of this paper, chapter 6, is concerned with the exclusivity of the Warsaw System and examines whether the Convention precludes a passenger from maintaining an action under another source of law.

2 Brief history of Air Law

When the Wright brothers carried out the first engine-powered flight in 1903, a discussion concerning the need for regulation of experimental aviation was heard. The discussion had so far only considered the use of balloons, and the few regulations in existence primarily dealt with public safety and the use of balloons in warfare.¹ The use of aircrafts for military purposes during the First World War showed that aviation had great potential in time of peace. This fact and the increasing number and use of aircrafts called for some kind of international regulation of aviation.² The regulatory efforts initially focused on public international air law but came, with the increasing number scheduled passenger transports, to focus on private international air law as well.

2.1 Public International Air Law

The below sections to follow will furnish a concise general overview of public international air law.

2.1.1 The Paris Convention

Following the first scheduled air service between London and Paris in 1919 the need for an international legal instrument to regulate air traffic was considered greater than ever. Later in 1919 the Paris Convention was concluded and ratified by 32 nations.³ The Paris Convention had to make a choice between the principles of free airspace, analogous to the notion of freedom of the high seas in maritime law, or the principle of the underlying states sovereignty of the above airspace.⁴ Considering that the Convention was written after World War I the latter principle naturally prevailed, recognizing the complete and exclusive sovereignty of states over the airspace above their territory.⁵

2.1.2 The Chicago Convention

The increased use, size and range of aircrafts during the Second World War and the potential of their expanded use after the war called for a conference to discuss the future of the civil aviation and Public International Air Law. US President Roosevelt invited all allied nations on the 1st of November, as

¹ E.g.: Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, July 29, 1899, aerial warfare.

² McNair, Lord, *The Law of The Air*, London: Stevens & Sons, (1964), at 9.

³ Convention Portant Reglementation de la Navigation Aérienne, Paris, October 13, 1919.

⁴ Diederiks-Verschoor, I.H.Ph. *An Introduction to Air Law*, The Hague : Kluwer Law International, (1997), at 2-3.

⁵ McNair, Lord, at 5.

well as some of the neutral states, to discussions in Chicago.⁶ On December 7, 1944, 52 states signed the Chicago Convention as well as the four agreements annexed to it.⁷ The Chicago Convention came into force on April 4, 1947, and on the same day the ICAO came into being. The 96 original articles of the Convention are divided into two major parts. The first part establishes a multilateral legal basis on which international air transport may be developed further by additional agreements between member states.⁸ The second part is the constitutional instrument of the ICAO, an intergovernmental organization and a Specialised Agency of the United Nations. ICAO has been entrusted with far reaching legislative powers under the Chicago Convention and today it consists of more than 180 Member States.⁹ After nearly sixty years of only minor amendments to the Chicago Convention strong voices are now being heard that the Convention needs a major revision to adapt it to the modern demands of public international air law present and future.

2.2 Private International Air Law

The below sections to follow will briefly present the rules and development of the conventions that regulate private international air law.

2.2.1 The Warsaw System

The Warsaw Convention was drafted in 1929. It did not however remain static or unchanged, as several legal instruments amended it in order to adopt it to the increasing costs of living and the needs of modern aviation. The basic Convention and the amendments thereto can be said to form the “Warsaw System” which can be seen as constituting the following instruments:¹⁰

1. The Warsaw Convention 1929¹¹
2. The Hague Protocol 1955¹²
3. The Guadalajara Convention 1961¹³

⁶ Diederiks-Vershoor, I.H.Ph., at 9.

⁷ Convention on International Civil Aviation, Chicago, December 7, 1944.

⁸ Cheng, B., The Law of International Air Transport, London : Stevens & Sons, (1962).

⁹ Diederiks-Vershoor, I.H.Ph., at 9.

¹⁰ Since the Montreal Agreement 1966 is not an instrument of international law but rather a private IATA agreement between air carriers and the US authorities it can be argued that the Agreement is not a part of the Warsaw System. I have however chosen to include this de facto amendment of the Warsaw Convention since I believe it is necessary to have knowledge of the Agreement to fully understand the politics behind the Warsaw System.

¹¹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, October 12 1929.

¹² Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 12 1929, The Hague, September 28, 1955.

¹³ Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara, September 18, 1961.

4. The Montreal Agreement 1966¹⁴
5. The Guatemala City Protocol 1971¹⁵
6. Montreal Additional Protocols Nos. 1,2 and 3¹⁶
7. Montreal Protocol No. 4¹⁷

The rules of the Convention have apart from the amendments stated above also been altered by several unilateral private agreements concluded between air carriers. The co-existence of the multiplicity of conventions and protocols of the Warsaw System as well as the unilateral agreements de facto amending the Warsaw Convention have created a veritable legal labyrinth causing great confusion among the signatory states as to which rules that apply. In a situation where one signatory state has ratified the Hague Protocol while another state only is bound by the Warsaw Convention, the rules of the latter will prevail. The Convention's purpose to unify private international air law has thereby been lost on the way since not all states party to the Warsaw Convention have ratified all protocols.

2.2.2 The Warsaw Convention

The Warsaw Convention dates back to 1929 and is the product of two international conferences held 1925 in Paris and 1929 in Warsaw. Between the conferences, in May 1926, a group of experts known as CITEJA was formed to continue the work of the Paris Conference and to create a draft convention to be presented at the Warsaw Conference on the subject of private aeronautical law. The draft text that CITEJA presented was used as a backbone in the drafting of the Warsaw Convention.¹⁸

Before the Warsaw Convention there had been substantial differences amongst the world's aviation states regarding the rules that governed air transportation creating uncertainties for both passengers and carriers.¹⁹ Since air transport by nature is one of the most moveable enterprises possible it was considered to be one of the cardinal purposes of the Convention to unify the private law rules that regulate the aviation

¹⁴ Agreement Relating to Liability Limitations of the Warsaw Convention and and The Hague Protocol, Montreal, May 4, 1966.

¹⁵ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Guatemala City, March 8, 1971.

¹⁶ Additional Protocol No. 1, No. 2, No.3 to Amend the Convnetion for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12 1929, Montreal, September 25, 1975.

¹⁷ Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Montreal, September 25, 1975.

¹⁸ Barlow, P., "Punitive Damages Under the Warsaw Convention: Mixing Apples with Oranges", *Annals of Air and Space Law*, Vol. XVII, (1992), at 91.

¹⁹ Speiser & Krause, p. 635-636.

business.²⁰ By the creation of unified rules in this field it was possible to avoid major conflicts of law and conflicts of jurisdiction.

The second main purpose of the Convention was to protect the infant aviation industry from disastrous claims arising from potential accidents thereby securing a climate in which the industry could grow. In 1929, just two years after Charles Lindbergh crossed the Atlantic, carriage by air was still unusual as well as adventurous and most airlines were government owned and government operated.²¹ The aviation industry was in its infancy and was a growing yet financially weak industry; both governments and private bodies who operated the airlines were in great need of economic protection.²² The unification and limitation of the liability rules enabled the carriers to sign insurance in order to protect themselves from major claims following an accident and thereby historically created an early form of risk management in aviation.²³ Without the liability rules set out in the Warsaw Convention such an insurance would have been too costly for the air carriers and ultimately leading to flight tickets only affordable for a very small number of people.²⁴ The unified rules enabled passengers, in knowledge of the fact that carriers' liabilities were the same all over the world, to protect themselves against losses by signing private insurance agreements.

The Warsaw Convention unified the law in the following fields:

1. Documents of Carriage
Format, content and legal significance of documents of carriage such as passenger tickets, baggage checks and air waybills.²⁵
2. The Air Carrier's Liability
Liability for death, wounding or other bodily injury, destruction or loss of/or damage to any registered luggage or goods and damage to passengers, luggage or goods occasioned by any delay.²⁶ The legal basis of the liability of the carrier is fault based with a reversed burden of proof i.e. evidentiary burden rests with the defendant (the carrier). The reason to reverse the burden of proof was that it would be almost impossible for a claimant to secure evidence of the carrier's fault in case of a plane crash. The only defences available for the carrier are either contributory negligence on part of the injured passenger or proof that they (carrier) had taken all necessary measures to avoid the damage or that it was impossible for him to

²⁰ Ibid.

²¹ Milde, M. "Warsaw requiem or unfinished symphony? (from Warsaw to The Hague, Guatemala City, Montreal, Kuala Lumpur and to ...?)" The Aviation Quarterly 37 () at 37.

²² Ibid.

²³ Milde, M. "The Warsaw System of Liability in International Carriage by Air" Annals of Air and Space Law, Vol. XXIV, (1999), at 159.

²⁴ Weigand T.A. "Accident, Exclusivity and Passenger Disturbances Under the Warsaw Convention", Am. U. Int'l L. Rev. 16:890, (2001), at 900.

²⁵ Warsaw Convention, Art. 3-16.

²⁶ Warsaw Convention Art. 17-19.

take such measures.²⁷ Whether the carrier has taken all necessary measures to avoid the damage is left to the discretion of the judge, and some courts have decided that the concept should not be interpreted to literally.²⁸

3. Limitation of liability

Because of the Warsaw Convention's severe liability rules the carriers were compensated with a fixed monetary limitation on the imposed liability. If the carrier was found liable he could according to the Convention limit his liability for each claim to 125 000 francs Poincaré (approximately US \$8.300 at that time) for injuries and 250 francs Poincaré (approximately US \$17 at that time) per kilogram for checked baggage and goods.²⁹ The obvious reasons to express the monetary limits in a gold clause was due to the severe inflation following World War I and the consequent need to make limits more stable for the future.

The carrier's liability would however be unlimited:

- if the claimant showed that the carrier caused the damage by wilful misconduct or such default on its part as is considered to be equivalent to wilful misconduct;³⁰ or
- if the ticket was not delivered or if the ticket was delivered in a default state.³¹

The reason for breaking the limit if the ticket, the contract of transportation, was not delivered or was delivered in a faulty state is that the passenger had not been properly informed of the limitation rules and therefore could not by insurance protect himself against possible losses.³²

4. Jurisdiction

The Warsaw Convention limited the potentially high number of jurisdictions to four forums where, at the option of the plaintiff, action for damages may be brought:³³

- the ordinary residence of the carrier, or
- the carrier's principal place of business, or
- where the carrier has an establishment by which the contract has been made, or
- the place of destination.

²⁷ Warsaw Convention Art. 20 (1).

²⁸ E.g.: *Manufacturers Hannover Trust Company v. Alitalia Airlines*, (1977)14 Avi. 17.710 (A.D. N.Y. 1977).

²⁹ Warsaw Convention art 22.4 states that the mentioned francs shall consist of 65 ½ milligrams gold of millesimal fineness 900.

³⁰ Warsaw Convention Art. 25.

³¹ Warsaw Convention Art. 3.

³² *Mertens v. Flying Tiger*, (1965) 341 F.2d851(2d Cir. 1965).

³³ Warsaw Convention Art. 28.

Continental jurists in the French language drafted the Warsaw Convention, which is a natural consequence of the facts that the first steps towards the Warsaw Convention was taken at the Paris Conference in 1925, and that French was the foremost diplomatic language of that time. The text has been translated into many different languages, which can be problematic when trying to construe some of its provisions. It is however, as will be showed below, the French language that shall guide an interpretation of the text.

The Convention was initially signed by twenty-three countries but has grown to be recognized by more than 140 nations. The United States did not participate in the original drafting, but ratified the Convention in 1934. Sweden ratified the Convention in 1937, and has since then also ratified the Hague Protocol, The Guadalajara Convention and all four Montreal Protocols. These instruments have been incorporated into the 9th chapter of the Swedish Transport by Air Act, "Luftfartslagen".³⁴

2.2.3 The Hague Protocol

After World War II the general consensus was that the Warsaw Convention was in need of an amendment in order to correct minor legal problems, but most of all to improve the monetary limit of the air carrier's liability. The monetary limit had become eroded by inflation and did no longer reflect the cost of living in developed countries and the aviation industry had expanded rapidly and was no longer in need of protection to the same extent. The limitation of liability had also led to a large number of lawsuits, mainly in the US, trying to circumvent the limitation provisions by proving wilful misconduct on part of the carrier or that the ticket was delivered in a faulty state. By increasing the monetary limit of liability the ICAO hoped to satisfy the claimants and thereby limit the number of lawsuits.

The Hague Protocol doubled the limit payable for death or injury of passengers, limiting the air carrier's liability to 250 francs Poincaré.³⁵ The Protocol further allowed court costs and other related expenses to the plaintiff based on the *lex fori*.³⁶ The Protocol also simplified the requirements for passenger tickets and baggage checks.³⁷

Almost every state party to the Warsaw Convention has ratified the Protocol, thereby making its rules applicable to most international air transports. Even though the limitation of liability was raised by the Protocol it was considered insufficient to fit the American standards of living. The US therefore never ratified or adhered to the Protocol. The USA may, however, unknowingly have ratified the Protocol by ratifying the Montreal Protocol No. 4, which will be further discussed below.

³⁴ Lag 1957:297, kapitel 9.

³⁵ The Hague Protocol, Art. XI p.1.

³⁶ The Hague Protocol, Art. XI p.4.

³⁷ The Hague Protocol, Art. III-IX.

2.2.4 The Guadalajara Convention

The Guadalajara Convention is a supplementary convention to the Warsaw Convention and deals with chartering, a way of travelling that did not exist at the time the Warsaw Convention was drafted. The Warsaw Convention therefore does not contain any explicit definition of the term “carrier”, a term that becomes ambiguous in situations where two or more carriers are involved.³⁸ It was held in Anglo-American law that the operator actually performing the carriage would be held liable as Warsaw carrier, while in European Continental Law the airline contracting the carriage would be the Warsaw carrier.³⁹

The Guadalajara Convention was drafted to resolve this dispute but does not define the term “carrier” as such. Instead it introduced the terms “contracting carrier” and “actual carrier” to the Warsaw System and defined the liabilities connected to these.⁴⁰ A contracting carrier means “a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor”.⁴¹ An actual carrier means “a person other than the contracting, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b”.⁴²

The actual carrier is only liable for the part of the carriage that he performs, while the contracting carrier is liable for the whole of the carriage.⁴³ The actual carrier can only be held liable up to the monetary limitation while the contracting carrier can be held liable, even unlimited, for the acts of the actual carrier.⁴⁴

2.2.5 The Montreal Agreement

The Montreal Agreement is not an instrument of international law but rather a private agreement concluded between most major air carriers and the Civil Aeronautics Board of the United States. Even though the Agreement is not an international convention it is nevertheless considered to be a de facto amendment of the Warsaw Convention.

The US did, as mentioned above, not ratify the Hague protocol because of the low limitation of liability, and a major crisis ensued when the USA

³⁸ Sunberg, J.W.F., “The Guadalajara Convention live from Cyprus”, 2 Air Law, (1976) at 83.

³⁹ Ibid.

⁴⁰ Grönfors, K., Successiva Transporter, Stockholm : P.A. Nordstedt & Söners Förlag, (1968), at 95.

⁴¹ The Guadalajara Convention Art. I b.

⁴² The Guadalajara Convention Art. I c.

⁴³ The Guadalajara Convention Art. II.

⁴⁴ The Guadalajara Convention Art. III.

denounced the Warsaw Convention in 1965. The reason of the denunciation was that the 125 000 francs Poincaré limit was held not to be commensurate to the sums paid in cases of American domestic aviation accidents where the Warsaw Convention do not apply. The Warsaw Convention of course stood to lose much of its importance if the world's leading aviation state was no longer a party to it. Great efforts were made to solve the dilemma and in the end it was IATA, a non-governmental organisation consisting of most of the worlds airlines, which solved the problem by drafting the Montreal Agreement. The United States accepted the terms of the Agreement and requested, only 11 days before the denunciation would have become effective, a cancellation of the denunciation.

The Montreal Agreement was concluded between most major air carriers and the Civil Aeronautics Board of the United States. The Agreement is applicable to all international flights, which, according to the contract of carriage, includes a point in the USA as a point of origin, point of destination or agreed stopping place. The Agreement increases the Warsaw Convention liability limit to \$75 000 US per passenger and provides also that a carrier is strictly liable for a passenger's bodily injury or death even if the carrier can prove that he was not negligent in causing the accident.⁴⁵ The new liability heralded the beginning of a revolutionary movement aimed at changing the fault liability of the carrier into a risk liability.⁴⁶

2.2.6 The Guatemala City Protocol

The Guatemala City Protocol was thought to become the modernisation of the Warsaw Convention, as amended by the Hague Protocol, the Warsaw System so well needed. The protocol continued the endeavours of the Montreal Agreement and changed the regime of liability from a fault liability to a strict liability. In order to silence calls for a higher limit of liability, the sum was raised to 150 000 francs Poincaré (approximately 100 000 US \$ at that time). The limit, which is subject to periodical reviews, was however formulated to be an absolute limit that could not, unlike previously, be exceeded because of faulty ticketing, inadequate notice to passengers or wilful misconduct. One reason for the unbreakable limit was a series of judgements in the USA using any potential loophole in the Warsaw System to exceed the limits of liability.⁴⁷

The Guatemala City Protocol only amends the rules of transportation of passengers and their baggage and not the rules of transportation of goods.

Further additions included that the carrier could be exonerated in case of contributory negligence on part of the damaged passenger, and the introduction of the 5th jurisdiction, the passenger's domicile if the carrier has an establishment there. The protocol also modernized the documents of

⁴⁵ The Montreal Agreement, Explanatory Statement.

⁴⁶ Diederiks-Verschoor, I.H.P.H., at 97.

⁴⁷ Milde, M., "Warsaw requiem or unfinished symphony", at 38.

carriage and made it possible to replace tickets by an electronic record and replaced the concept of “bodily injury” by “personal injury” thus allowing compensation for mental trauma.

The Guatemala Protocol never came into force. The Protocol was signed by 21 states, including the USA, but only eleven states, considerably less than the 30 states required, have so far ratified it. The American senate, supported by the trial lawyer lobby group, effectively blocked the decisions to ratify the protocol, which is an ironic outcome since the Guatemala City Protocol was regarded as a compromise between the US and the rest of the world.⁴⁸

Even though the Guatemala City Protocol never came into force it is considered an important instrument since it introduced several new provisions that have been used in some of the newer instruments, especially the Montreal protocol No. 4 and the new Montreal Convention.

2.2.7 Montreal Additional Protocols Nos. 1,2 and 3

After the creation of IMF in 1944 gold no longer remained the standard value in which all currencies were expressed, which led to a discrepancy between the official gold price in US dollars and the free market price for gold. Courts therefore had problems when deciding if they should use the gold value as prescribed in the Warsaw Convention or if they should adopt the free market price.⁴⁹ To overcome the problems with the fluctuating gold prices the gold clause was replaced in each of the Protocols by the SDR, a unit of account valued on the basis of a basket of key national currencies created by the IMF in 1969.⁵⁰ The Montreal Protocol nos.1, 2, 3 replaced the gold clause with the SDR’s for the Warsaw Convention, The Warsaw Convention as amended by the Hague Protocol and the Warsaw Convention as amended by the Guatemala City Protocol.

2.2.8 Montreal Protocol No. 4

The fourth Montreal Protocol amends the rules of liability relating to goods, something that had not been done since the adoption of the Hague Protocol. As mentioned above, many of the innovative provisions of the Guatemala City Protocol were used when the fourth Montreal Protocol was drafted. The Protocol simplified the formalities of the air waybill, introduced the regime of strict liability regardless of fault and introduced the SDR to express the limit of liability in goods transportation. The Montreal Protocol No.4 became effective in the US in March 1999 and thereby indirectly, since the Protocol amends the Montreal Convention *as amended by the Hague Protocol*, makes the Hague Protocol effective in the US.

⁴⁸ Milde, M., “Warsaw requiem or unfinished symphony”, at 39.

⁴⁹ Diederiks-Verschoor, I.H.Ph., at 101.

⁵⁰ <http://www.imf.org/external/np/exr/facts/sdr.htm>, visited on November 26, 2002.

2.3 Private Agreements and Unilateral Actions

Even though the Montreal Agreement was only meant to be an interim agreement it has been valid since it came into force and continuous to be so. The limited liability has of course since 1966 been dramatically eroded by inflation and is by today's standard of living held to be unacceptable in many developed countries. The shortcomings of ICAO have led to unilateral actions by states and airlines in an attempt to bring the system more up to date. Below follows a short presentation of some of these unilateral actions.

In 1992, Japanese air carriers introduced a revolutionary new system with a two-tiered liability scheme with absolute liability up to 100 000 SDRs and presumed liability for damages in excess of this limit. The defence contained in art 20 can be invoked above that sum, making the liability above 100 000 SDRs dependent on the fault of the carrier. The Japanese initiative constitutes an agreement between ten Japanese carriers and has played an important role in future unilateral efforts as well as in the Montreal Convention.

In 1995, IATA replaced the old Montreal Agreement with the new IATA Intercarrier Agreement. Under the Agreement, which is in force for most major airlines, the carrier is strictly liable up to 100 000 SDR and can only escape the liability by showing contributory negligence of the passenger.⁵¹ For damages above 100 000 SDR the passenger will only have to prove his damages and no longer need to show wilful misconduct of the carrier. The carrier can escape liability above 100 000 SDR by showing that he has taken all reasonable measures to avoid the accident.

The European Councils regulation No. 2027/97⁵² as implemented by the Air Carrier Liability Order 1998⁵³ stipulates that the same system of liability as shown above in the Japanese Initiative shall become binding on all Community air carriers. The liability for Community carriers is unlimited for death and personal injury and the carrier shall not exclude or limit his liability up to the equivalent in Euro's of SDR 100 000 by proving that he has taken all necessary measures to avoid the accident or that it was impossible to take such measures.⁵⁴ Any Community carrier that does not include the new provisions in its conditions of carriage shall be guilty of an offence.⁵⁵ Any non-Community carrier that does not apply the rules of the Regulation must provide this information to the passengers, if not the carrier is guilty of an offence.⁵⁶ The validity of the Regulation has however been contested since it was said to conflict with the Warsaw Convention and the

⁵¹ IATA Intercarrier Agreement on Passenger Liability, October 31, 1995.

⁵² O.J 1997 L285/1.

⁵³ S.I 1998 No. 1751.

⁵⁴ EC Regulation 2027/97, Article 3.

⁵⁵ Air Carrier Liability Order, Article 6(1).

⁵⁶ Air Carrier Liability Order, Article 6(3).

IATA therefore moved to have the regulation declared invalid.⁵⁷ The ECJ rejected the IATA application on the grounds that the Warsaw Convention is not an act of the Community Institutions, the IATA then pursued the action in an English Court where it was dismissed.⁵⁸

2.4 The Montreal Convention 1999

The rules of unification of private international air law have become more and more outdated creating a system of several different legal regimes and thereby creating disunification rather than unification of the rules. The co-existence of the multiplicity of conventions and protocols of the Warsaw System as well as the unilateral agreements de facto amending the Warsaw Convention creates a veritable legal labyrinth causing great confusion. The Warsaw Convention has not been updated since 1975 and as shown above some of the amendments of the Convention have not come into force. The de facto amendments made by the airlines cannot, because of the mandatory character of the Convention, legally amend the rules of the Convention. It is of course also preferred to have an international body of law governing the international carriage of air rather than private agreements.

To end the confusion an International Conference to update the Warsaw Convention was convened by the ICAO in Montreal in May 1999. After intense diplomatic negotiating the Conference, on 28 May 1999, adopted the new Convention modernizing the Warsaw System.⁵⁹

Even though adopted by consensus it would be unrealistic to interpret this consensus as unanimity of the international community.⁶⁰ The ICAO had initiated the modernization of the Warsaw Convention in 1995 and the draft that was presented to the Conference was made by the SGMW, a body appointed by the president of the ICAO Council. The draft was based on the Warsaw Convention but used many of the novelties presented in the Guatemala City Protocol and the Montreal Protocol No. 4 as well as the Principles of the IATA 1995 Agreement and the EC Council Regulation 2027/97. The draft was however criticised and the views were deeply divided. Almost all developed states and all Latin American States supported the draft while most of the African, Arabic and many undeveloped Asian countries opposed to the draft.⁶¹ The group of opposing states rejected the introduction of the liability system of the IATA 1995 Agreement as well as the introduction of the 5th jurisdiction. It was held that the new liability rules would negatively affect the interests of small and

⁵⁷ Grief, N. "Challenging the E.C. Regulation on Air Carrier Liability", British Business Law January Issue 92 (2000) at 96.

⁵⁸ R.v. Secretary of State for the Environment, Transport and the Regions, ex p. IATA[1999] 1 C.M.L.R 1287.

⁵⁹ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, May 28, 1999.

⁶⁰ Milde, M. "Liability in international carriage by air: the new Montreal Convention", Unif. L. Rev 1999-4 (1999) at 835.

⁶¹ Ibid at 846-847.

middle size air carriers, making the very survival of these carriers questionable since the new liability rules would raise the insurance premiums quite substantially.⁶²

In order to get the two-thirds majority vote required for the approval of the new Convention the draft had to be renegotiated, securing approval among all of the interest groups of the Conference. The time was however working against the Conference and the usual bodies of ICAO would not be able to negotiate a new draft in time. The President therefore created the “Friends of the Chairman” Group- an informal advisory body not foreseen by the Rules of Procedure consisting of 27 delegates representing a geographical balance. The Group presented in the afternoon of 25 May 1999 a consensus package that was unanimously approved by the Conference.

The New Montreal Convention uses the Warsaw System as the “backbone” of the new Convention but consolidates it to one single document using the novelties presented in the Guatemala City Protocol and the Montreal Protocols No. 3-4 to modernize the legal rules. It further uses a liability schedule with a strict liability up to SDR 100 000 with no monetary limit for compensatory damages above that amount subject to reversed burden of proof. The New Convention is equally authentic in UN’s six official languages.⁶³ Even though the non-developed countries opposed to the introduction of the 5th jurisdiction, the passenger’s domicile if the carrier has an establishment there, it had to be introduced since the US threatened not to accept the new instrument without it.

Many of the Warsaw Convention provisions have been kept unchanged or with only minor cosmetic changes, below follows a brief presentation of the major changes in the new Convention.

- The preamble of the Montreal Convention states that the parties to the Convention “RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments; RECOGNIZING the importance of ensuring the protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution”. The new Convention thereby shifts the focus from the air carriers to the passengers, a change that in practice was made long before the Montreal Convention was drafted.
- The provisions on documentation, chapter two of the Convention, have been modernized to fit the modern technology and are less formalistic than the rules of the Warsaw System. This was a necessary amendment since the Warsaw Convention’s rules on documentation are mandatory and could not be amended by a private agreement. The provisions follow the Guatemala City Protocol with respect to passengers and baggage and Montreal Protocol No.4 with

⁶² Ibid.

⁶³ Arabic, Chinese, English, French, Russian and Spanish.

respect to cargo. With the new simpler documentation system, only one document that states place of departure and destination and the applicability of the new Convention has to be delivered to the passenger. The airlines, and in the end the consumers will save a lot of money with the new less formalistic rules.

- Article 17, the rules on liability with respect to passengers, underwent only minor changes and left the terms “bodily injury” as well as “accident” unchanged. The Conference thereby decided, after much discussion not to use the wider language presented in the Guatemala City Protocol. The fact that the article was left practically unchanged means that case law on the subject stemming from the Warsaw Convention still is applicable.
- The carrier’s liability is unlimited, with strict liability up to SDR 100 000 and above that sum if the carrier does prove that the damage was not due to the negligence or other wrongful acts or omissions of the carrier or its servants or agents. The strict liability is not absolute since the carrier may be exonerated if it is proven that the damage was caused or contributed to by negligence or other wrongful act by the claimant.
- The introduction of the 5th jurisdiction in Article 33(2) establishes that a claimant always can bring an action in his principal and permanent place of residence if the carrier has some sort of establishment there. This introduction was in my view a natural development of the system since most legal systems recognizes the lex fori jurisdiction, especially since the preamble of the new Convention states that it shall ensure the protection of the interest of consumers.
- The Montreal Convention has mandatory application and states in Article 49 that any clause contained in the contract of carriage and all special agreements entered into which contradicts the rules shall be null and void.
- One of the key objectives with the Convention was to unify the Warsaw System and to create certainty and uniformity among the many different legal regimes. From Article 55 of the Montreal Convention it seems clear that the rules of the new Convention shall govern international transport by air between states if both the state of origin as well as the state of destination have ratified the new Convention. What seems less clear is which convention shall govern an international transportation when only one of the above states has ratified the Montreal Convention. The earlier drafts of the new Convention provided for a system where, after a certain number of states representing a certain percentage of the total international air traffic had ratified the new Convention, the Warsaw System would be denounced by those states, leaving only the rules of the Montreal Convention to govern international transportation by air.⁶⁴ This would most likely lead to that states that not yet had ratified the

⁶⁴ Cheng, B “The Labyrinth of the Law of International Carriage by Air”, Zeitschrift Fur Luft- und Weltraumrecht 50.Jg.2 (2001) at 157-159.

Montreal Convention would hurry to ratify it in order not to become isolated from the “Montreal Convention states”.⁶⁵ This would of course reduce the period when several different legal regimes would co-exist and would hurry the process of creating a unified system of international carriage by air. This draft was however rejected in favour of the wording as it stands today. Without the denunciation mechanism all instruments of the Warsaw System as well as all private agreements as presented above will be allowed to survive indefinitely leaving several parallel legal regimes in force resulting in even greater complexity and confusion than before the Montreal Convention. An international transport by air between two states of which only one has ratified the Montreal Convention will be governed by the rules of the joint applicable version of the Warsaw System. If the origin and destination of an air transport are in a “Montreal Convention state” but with an agreed stopping point in a “non-Montreal state”, the Montreal Convention should apply but may not if the action is brought in the state of the agreed stopping point.⁶⁶ If a state after ratifying the new Convention chooses to denounce the Warsaw Convention no treaty will govern international transportation by air touching this state unless both states are parties to the new Convention. The problem may however be practically solved since there has been reports that the United States are planning to denounce the Warsaw Convention after ratifying the Montreal Convention. Many states will therefore have to choose between being without treaty relationship with the US and ratifying the new Convention.⁶⁷

The Montreal Convention will enter into force on the sixtieth day following the date of deposit of the 30th instrument of ratification. This might however take some time since many states await the actions by the U.S.

⁶⁵ Ibid, at 159.

⁶⁶ Whalen, T.J.”The New Warsaw Convention: The Montreal Convention”, Air and Space Law, Vol. XXV, Number 1 (2000), at 297.

⁶⁷ Ibid, at 297.

3 Article 17 of the Warsaw Convention

The issues of liability represent the core subject of the Warsaw Convention and govern liability for death and injury to passengers, loss of or damage to baggage and cargo, and damage to passengers, baggage and cargo caused by delay.⁶⁸ The rules that regulate the carrier's passenger damage liability are contained in the Warsaw Convention's Article 17. The text is still valid even though there have been efforts to amend it and will continue to be so since the Montreal Convention only has made minor changes to the text.

3.1 Article 17

The only authentic text of the Convention is, as mentioned above, the French version. The authentic text of Article 17 reads as follows:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

The English translation of Article 17 of the Warsaw Convention used in the United States reads as follows:

*The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*⁶⁹

The Article is on several points unclear and has been described as “stark and undefined”.⁷⁰ Many of the terms used are not “technical legal terms” with a clearly defined meaning, something that has made the article subject to discussion both in courts and in doctrine.⁷¹

The carrier is liable up to the monetary limits stipulated by the Convention, with relevant amendments thereto and agreements entered into by the carrier, if the claimant suffered damages due to:

1. death, wounding or other bodily injury;

⁶⁸ Warsaw Convention, Article 17,18,19.

⁶⁹ Warsaw Convention, Art. 24.

⁷⁰ Weigand T.A., at 913.

⁷¹ Abeyratne R.I.R., “Liability for personal injury and death under the Warsaw Convention and its relevance to fault liability in tort law”, *Annals of Air and SpaceLaw*, Vol. XXI, (1996), at 15.

2. while a passenger;
3. in international transportation;
4. in an accident;
5. while on board or in the course of any of the operations of embarking or disembarking.

Most of the requisites seem to be clear and self-explanatory and will therefore only be briefly discussed below, while the terms “accident” and “bodily injury” are much more nebulous and will be discussed under chapters 4 and 5.

3.2 Damage Sustained

The phrase “damage sustained” assures in itself that only compensatory damage is recoverable to the exclusion of any punitive, exemplary or other non-compensatory damages.⁷² The damage has to be assessable with accuracy and it must be the direct result of an accident.⁷³

3.3 Passenger

The Convention does not define precisely who is a passenger, but Article 1 states that the Convention is only applicable to international transportation of persons for reward or gratuitous transportation performed by an air transportation enterprise and that said transport has to be covered by a contract of carriage. The crew, while working, is therefore exempted from the scope of the Convention but can be included if just “deadheading” to or from a job.⁷⁴

A passenger has a right to bring an action for wounding or other bodily injury that befalls him. If the passenger dies, it is up to the forum court to decide who has the right to bring action against the carrier as well as the respective rights between the persons who are entitled to bring such an action.⁷⁵

3.4 Duration of Liability

An accident that causes a damage must, according to article 17, occur on board the aircraft or in the course of any of the operations of embarking or disembarking the aircraft. The duration of the carrier’s liability is not clearly stated in the Convention, but has been held to begin when the passenger puts himself in the hands of the carrier or an agent of the carrier, and end when

⁷² Milde, M. “Liability in international carriage by air: the new Montreal Convention”, at 853.

⁷³ Diederiks-Verschoor, I.H.Ph., at 79.

⁷⁴ Goldhirsch L.B. The Warsaw Convention Annotated : A Legal Handbook, (1988) at 58.

⁷⁵ Warsaw Convention, Article 24 (2).

the passenger enters the arrival hall at the point of destination.⁷⁶ The duration of liability has been subject to much litigation and courts in different jurisdictions have not been consistent in their rulings, creating uncertainties and a non-uniform application of the rule.

“On board an aircraft” is a concept that in most cases is self-explanatory and seems relatively clear to adopt. The concept has however in one case been extended to cover a situation where an aircraft was hijacked and forced to land in the Jordanian desert, where the passengers were taken from the aircraft to a hotel.⁷⁷ It was held that, even though the event that caused the injury occurred at the hotel, the accident took place on-board the aircraft within the meaning of Article 17. The court argued that the hotel was a forced substitution of the aircraft and that the passengers would have been on-board if the aircraft had not been hijacked. This judgement has however not been followed.

The terms embarking and disembarking can also cause some problems, but have been clarified through the Day/Evangelinos test.⁷⁸ According to the test three questions have to be answered:

1. the location of the passenger at the time of the accident,
2. the nature of his/her activity at the time of the accident and
3. the degree of control exercised by the airline at the relevant time.

By answering these questions, courts can assess whether the passenger was under control of the aircarrier at the time of the accident or not. The test has created a uniform way of determining whether an accident has occurred during the process of embarking or disembarking.⁷⁹ Not all jurisdictions use this test however, but for those who do, the task of deciding the duration of liability has become much easier.

In most cases the airlines do not themselves operate the airports. The carriers will in these cases be excluded from liability where the accident occurs at the airport and before an agent of the carrier has taken control over the passengers. There are also some differences among different jurisdictions as to when the carrier exercises control over the passengers. In France it has been held that the liability begins when the contract of carriage begins. This has been defined as the time the passenger is placed in a zone of air transportation risks.⁸⁰ In Germany the liability begins when the carrier requests the passengers to go from the waiting room to the aircraft.⁸¹ In Sweden the carrier is liable for passenger damages occurring “ ombord på luftfartyget eller i samband med att passageraren går ombord på eller lämnar

⁷⁶ Diederiks-Verschoor, I.H.Ph., at 74.

⁷⁷ *Husserl v. Swissair*, 485 F.2d 1240 (2d Cir. 1975).

⁷⁸ *Abeyratne R.I.R.*, at 23.

⁷⁹ *Ibid.*

⁸⁰ *Goldhirsch L.B.*, at 65.

⁸¹ *Ibid.*

(luft)fartyget”, which is a literal translation of the English text.⁸² I believe however that an interpretation of the Swedish text would result in a situation where the carrier is liable only for damages occurring in direct physical connection to the aircraft. So far no Swedish court has decided this question.

The Warsaw Convention has, as will be explained under chapter 6, a pre-emptive effect. The Convention’s pre-emptive effect extends no further than the Conventions own substantial scope, leaving the carrier subject of liability under local law for injuries arising outside of the air transportation or any of the operations of embarking or disembarking. Since only the carrier falls within the ambit of the Convention, a claimant can always direct an action under local law against any third party, which is not the carrier or any of its servants or agents, e.g. the airport operator.

⁸² Lag 1986:619, 9 kap. 17§.

4 Accident

In order to claim compensation for an injury sustained within the liability period stipulated in Article 17 of the Convention, the injury must have been caused by an accident. It is up to the claimant to prove that an accident occurred. If the claimant successfully proves that an accident caused the injury, the only defence the carrier can use under the Warsaw System is that it took all necessary measures to avoid the damage or that it was impossible for him to take such measures.⁸³ However, this defence has been limited by the amendments to the Convention, and the new Montreal Convention, which stipulates a strict liability up to SDR 100 000. Above this limit the carrier can use the same defence as under the Warsaw Convention.

The Convention is, however, silent on what constitutes an accident, something that has led to uncertainties. The ill-defined term has been subject of much litigation, especially in the U.S. where claimants, in order to receive what they consider full compensation, have argued that an “accident” had not occurred and that the Convention does not preclude claims under local law in such a case.⁸⁴

Since the adoption of the Montreal Protocol No. 4, the Tseng case, and the soon to come in force Montreal Convention the term is in need of clarity more than ever, because in the absence of an accident, the claimant will have essentially no cause of action against the airline.⁸⁵

According to Article 31.1 of the Vienna Convention, “a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁸⁶ It is the responsibility of the states party of the Convention to give the specific words of the Convention a meaning consistent with the shared expectations of the contracting parties.⁸⁷ In order to bring uniformity to the interpretation of the Convention it is important to examine the authentic text and compare it with the translated texts. The French legal meaning of the term “l'accident” differs little from the meaning of the same term in Great Britain, Germany, or in the United States.⁸⁸

⁸³ Warsaw Convention, article 20.

⁸⁴ Cobbs, L., “The Shifting Meaning of ‘Accident’ under Article 17 of the Warsaw Convention : What did the Airline know and what did it do about it?” *Air and Space Law* Vol. XXIV, Number 3, 1999., at 121.

⁸⁵ See chapter 6.

⁸⁶ Vienna Convention on the Law of Treaties, Vienna, May 23, 1969.

⁸⁷ *Air France v. Saks*, 470 U.S. 392 (S.Ct. 1985), at 399.

⁸⁸ *Ibid.*

4.1 Ordinary Meaning

The term accident is often used to refer to the event of a person's injury but it is also used to describe a cause of injury. When the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event.⁸⁹ Lord Lindley, observed in 1903 that:

*“The word ‘accident’ is not a technical legal term with a clearly 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 or unexpected loss or hurt apart from its cause; and if the cause is not known the loss or 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.”*⁹⁰

It follows from the observation above that the ordinary meaning of the term “accident” is both an unexpected cause of the injury as well as the injury alone. The ordinary meaning is a good step stone for the future discussion, but it is also important to examine the term in its context and in light of its object and purpose.

4.2 Context and Purpose

It follows from the text of Article 17 that the carrier only is liable for damages caused by an accident. The text thereby indicates that not every injury causing event onboard an aircraft will result in a Convention violation.⁹¹

In a comparison between the texts of Article 17, the liability for injury and death to passengers, and Article 18, the liability for damage to baggage, it has to be noted that the texts differ from each other. While Article 17, both in the French and the English texts, imposes liability for injuries caused by an “accident”, Article 18, both in the French and the English text, imposes liability for destruction or loss of baggage caused by an “occurrence”. The differences in the texts inflict according to the U.S. Supreme Court that “the drafters of the Convention understood the word ‘accident’ to mean something different than the word ‘occurrence’, for they otherwise would have used the same word in each article”.⁹² Article 18 has therefore been interpreted to be broader than Article 17.⁹³ It follows that not every event causing the damage will qualify as an accident under the Convention. The Convention does however not instruct where to draw the line between “occurrence” and “accident”.

⁸⁹ Ibid, at 400.

⁹⁰ *Fenton v. J. Tholey & Co.*, [1903] A.C 443, 453.

⁹¹ Wright, p. 459.

⁹² *Air France v. Saks*, 470 U.S. 392 (S.Ct. 1985), at 402-403.

⁹³ Goldhirsch, L.B., at 86.

To give the specific words of the Convention a meaning consistent with the shared expectations of the contracting parties it is important not only to look at the text as it stands but also to look at the drafting and negotiation history of the text. The U.S. Supreme Court stated in *Saks*: “In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation. In part because the ‘travaux préparatoires’ of the Warsaw Convention are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text.”⁹⁴

An examination of the travaux préparatoires of the Warsaw Convention shows that CITEJA, the expert committee assigned to draft the Convention, did not mention nor reference to the term “accident” in its draft.⁹⁵ The term was never negotiated, but simply appeared in the final form as revised by the drafting committee at the Convention.⁹⁶ The “travaux préparatoires” of the Warsaw Convention are therefore not very helpful in defining the term “accident”. I will, in order to find suitable definition for the Convention, examine the case law on the subject.

4.3 Conduct and Interpretations of the Signatories

The term “accident” was changed to “event” in the Guatemala City Protocol. “Event” is a much broader term and a significant expansion of the potential liability of the aircarrier. Under the Protocol, the carrier would be liable for all injuries that take place during the duration of the liability. The Protocol, however, never came into force since the necessary number of states did not ratify it. Neither the Montreal Protocol No. 4 nor the Montreal Convention adopted the Protocol’s expanded definition.

4.4 Case Law

In the *DeMarines* case, the U.S. Court of Appeals in general terms addressed the question of what constitutes an accident: “An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things.”⁹⁷ The Court further stated that: “If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed as an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening.”⁹⁸

⁹⁴ *Air France v. Saks*, 470 U.S. 392 at 400 (S.Ct. 1985).

⁹⁵ Weigand, T.A., at 912.

⁹⁶ *Ibid.*

⁹⁷ *DeMarines v. KLM*, 580 F.2d 1193 (A.Ct. 1978) at 1196.

⁹⁸ *Ibid.*

The fact that the occurrence leading up to the injury has to be unusual or unexpected has led to much debate and litigation. Hijacking and acts of terrorism have been regarded as unusual or unexpected happenings on board the aircraft, while passenger to passenger assaults have been inconsistently ruled as to sometimes be considered as an unusual or unexpected happening and sometimes not.⁹⁹

In *Husserl*, an U.S. District Court further narrowed the term “accident” by stating that an event was not an accident if it arose exclusively from the passenger’s state of health.¹⁰⁰ The rulings in the *DeMarines* and the *Warshaw* cases have not been consistently followed but were used in *Saks*, the leading case as to the Warsaw Convention Article 17 “accident” requirements.¹⁰¹

4.5 The Saks decision

Ms. Saks, a passenger on an Air France flight from Paris to Los Angeles, felt severe pressure and pain in her left ear while the aircraft descended to land in Los Angeles. The pain continued after landing, but Ms. Saks disembarked without informing any Air France crewmember. Shortly thereafter, Ms. Saks consulted a doctor who concluded that she had become permanently deaf in her left ear. Ms. Saks then filed suit in a California State court. Air France argued that Ms. Saks could not prove that her injury was caused by an accident within the meaning of Article 17 since the evidence indicated that the pressurization system had operated in a normal manner and that the suit should be dismissed because the only alleged cause of the injury was the normal operation of the pressurization system and therefore could not qualify as an accident.¹⁰²

The case was removed to a Federal District Court that relied on the decisions in *DeMarines* and *Warshaw*, which defined the Article 17 term “accident” as an “unusual or unexpected happening”. The Court ruled that Ms. Saks could not recover under Article 17, as she could not demonstrate some malfunction or abnormality in the aircrafts operation.¹⁰³

The Court of Appeals reversed, holding that the language, history, and policy of the Warsaw Convention and the Montreal Agreement impose absolute liability on airlines for injuries immediately caused by the risks inherent in air travel; and that normal cabin pressure changes qualify as an “accident” within the meaning of the Warsaw Convention.¹⁰⁴ According to the Court an accident is “an occurrence associated with the operation of

⁹⁹ E.g. terror: *Husserl v. Swiss Air*, 485 F.2d 1240, (2d. Cir. 1975); *Day v. TWA*, 528 F.2d 3, (A.Ct. 1975); *Evangelinos v. TWA*, 550 F.2d 152 (A.Ct. 1977).

¹⁰⁰ *Warshaw v. TWA*, 442 F.Supp.400, (ED.Pa.,1977).

¹⁰¹ Weigand, T.A. at 935.

¹⁰² *Air France v. Saks*, 470 U.S. 392, (S.Ct. 1985).

¹⁰³ *Air France v. Saks*, 470 U.S. 392, (S.Ct. 1985), at 395.

¹⁰⁴ *Saks v. Air France*, 724 F.2d, (9th Circ. Cal., 1984), at 1385.

aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked”.¹⁰⁵ This expanded view fails in my opinion to make a distinction between the language in Article 17 and Article 18 of the Convention.

The US Supreme Court reversed the Court of Appeals decision and held that liability under Article 17 of the Warsaw Convention arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger.¹⁰⁶ This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.¹⁰⁷

The U.S. Supreme Court relied on the general observation made by Lord Lindley in 1903 and made a significant distinction that Article 17 refer to an accident that caused the passenger’s injury and not to an accident that *is* the passenger’s injury.¹⁰⁸ The Court stated “however we define ‘accident’, it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone.”¹⁰⁹ It was held that “Any injury is the product of a chain of causes, and we require only that the passenger is able to prove that some link in the chain was an unusual or unexpected event external to the passenger.”¹¹⁰ Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents.”¹¹¹ The Court thereby established a causal connection between the unusual or unexpected event and the injury. It further made clear that it is the passenger that has the burden of proving that the event was an unusual or unexpected event external to the passenger. The “accident” requirement of Article 17 involves an inquiry into the nature of the event that caused the injury rather than the care taken by the airlines to avert the injury.¹¹²

When the injury indisputably results from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot be applied.¹¹³

The prerequisites for an accident can according to the Court be summarized as follows:

- An unexpected or unusual event,
- That is external to the passenger.

The Court also gave some guidelines on how to use the definition:

¹⁰⁵ Ibid.

¹⁰⁶ *Air France v. Saks*, 470 U.S. 392 at 405, (S.Ct. 1985).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, at 398.

¹⁰⁹ Ibid, at 399.

¹¹⁰ Ibid, at 399.

¹¹¹ Ibid, at 407.

¹¹² Ibid, at 407.

¹¹³ Ibid, at 406.

- Flexibly applied after assessment of all the circumstances,
- The cause of the injury rather than the injury itself has to satisfy the definition,
- The Warsaw System does not impose absolute liability on the carrier.

The Court found that Ms. Saks could not meet her burden of proof to establish that an “accident” was the cause of her injury, as the Court found that the normal operation of an aircraft does not constitute an Article 17 “accident”. The Court found that the injury was not a product of a chain of causes, and that the injury itself cannot constitute an “accident”.

4.6 After Saks

Can a passenger claim compensation for an injury caused by *any* unusual or unexpected event during the carrier’s duration of liability as long as it is external to the passenger? Or does the event that caused the injury has to have some causal connection to the operation of the aircraft or be an inherent risk characteristic of air travel? These questions were, rather unfortunately, not answered by the court in Saks, and have ever since been subject to many debates.

4.6.1 Strict Application of Saks

Courts viewing the Saks judgement literally (mainly U.S. courts) have established a single test rule of whether the damage was caused by an unexpected or unusual event that was external to the passenger.¹¹⁴ According to this view, the carrier becomes liable for most injuries, as long as they are unexpected and occur during its duration of liability. This view is in my opinion unreasonable. To hold the carrier liable for all damages occurring is not within the intent of the Convention. It is not the purpose of the Convention to function as a kind of general insurance of the passengers.¹¹⁵ Therefore the carrier cannot be held liable for any misfortune that befalls an airline passenger without any causal connection between the damage and the operation of the aircraft. There is no reasonable justification for shifting the common risks in everybody’s life to a third party when referring to air carriage.¹¹⁶ Since the carrier is not the insurer of its passenger’s safety, the passengers will have to insure themselves against all other risks that are not associated with the operation of the aircraft.

Some authors have argued that a literal interpretation of Article 17 should be followed.¹¹⁷ Goldhirsch argues that to require a causal role in the chain of

¹¹⁴ E.g. *Gezzi vs. British Airways*, 991 F.2d 603, (9th Cir. Cal., 1993).

¹¹⁵ Schmid, Warsaw Convention (E. Giumulla & R. Schmid,ed), Article 17, para 6.

¹¹⁶ *Ibid*, at Article 17, para 13 b.

¹¹⁷ E.g. Goldhirsch, L.B., “Definition of Accident: Revisiting *Air France v. Saks*”, *Air & Space Law* 86, (2001), at. 87.

events leading to an injury is “a throwback to a negligence cause of action where one must prove a proximate cause of action between the act of negligence and the injury” and that “the purpose of the Convention was to compensate the passenger without their having to prove negligence”.¹¹⁸ The view presented by Goldhirsch, is in my opinion not convincing and has been contested by several authors.¹¹⁹ The following reason against it can be noted. The passenger has, as the Supreme Court stated in *Saks*, the burden of proving the accident and the damages sustained. In order to prove the accident, the claiming passenger only has to show that the accident was caused by a series of events leading up to the injury and that some link in the chain was an unusual or unexpected event external to the passenger.¹²⁰ This does not require the passenger to show that the carrier has been negligent, especially not since there is a presumption of fault on the carrier.¹²¹ The mere happening of an accident gives rise to a presumption of liability on the carrier. The new Montreal Convention, as well as the private agreements already in force, stipulates a strict liability of the carrier up to SDR 100 000 and above that sum if the carrier cannot prove that it was not negligent. This means that a claimant who can prove an accident will be compensated up to SDR 100 000 regardless of the carrier’s negligence.

The reasoning above does, however, not give us any answers to the question whether an accident has to have some causal connection to the operation of the aircraft or be an inherent risk characteristic of air travel. In order to examine if this connection is needed we need to look into a “wider” application of *Saks*.

4.6.2 Causal Connection

One of the main objectives in creating the Warsaw Convention was, as explained above, the concern over aircraft accidents and the risks associated with aircraft operations. It was obvious to the drafters of the Convention that they were addressing aircraft operational accidents only.¹²² In imposing liability for accidents, the drafters envisioned injuries arising out of the hazards of flying related to the abnormal operation of the aircraft, rather than the traditional risks undertaken by a common carrier.¹²³ Professor Goedhuis, one of the founders of the Convention, stated that the accident had to be related to the operation of the aircraft.¹²⁴

Courts, however, seem to have problems in deciding what constitutes the “usual, normal and expected operation of the aircraft”. I will under chapters

¹¹⁸ Goldhirsch, L.B., “Definition of Accident: Revisiting *Air France v. Saks*”, at. 88.

¹¹⁹ E.g. Schmid, Weigand.

¹²⁰ *Air France v. Saks*, 470 U.S. 392 at 399, (S.Ct. 1985).

¹²¹ Schmid, Warsaw Convention (E. Gjemulla & R. Schmid,ed),at Article 17, para 17.h.

¹²² Weigand, T.A. at 914.

¹²³ *Ibid*, at 949.

¹²⁴ Goedhuis, D., National Airlegislations and the Warsaw Convention, The Hague : (1937), at 200.

4.6 and 4.7 discuss whether passenger assaults and terrorist acts are included in the definition. I will below try to further present the Saks aftermath.

In most cases it appears easy to decide what is considered to be the usual, normal and expected operation of the aircraft. If for example a passenger gets drunk and hurts himself, no accident has occurred since the injury is not caused by the operation of the aircraft, but rather by the intoxicated condition of the passenger.¹²⁵ Such an accident can occur in any sphere of life and it would be absurd to hold the carrier liable. If, on the other hand, the intoxicated passenger would fall because of a sudden and unexpected event, this would most certainly be held to be an accident. In a similar case a drunken passenger fell and injured a fellow passenger. A district court held that the injured passenger had been involved in an accident for which the carrier was liable.¹²⁶ The *Oliver* case fails in my opinion to examine whether the event that caused the injury had any relation to the operation of the aircraft and should in my view not be considered to be an accident.

It has been considered not to be an accident where a passenger is injured due to an “everyday activity”, such as pulling a muscle while trying to store a hand luggage in an overhead bin.¹²⁷ It has likewise been held not to be an accident where a passenger is injured by tripping over another passenger’s shoes or hand luggage placed in the aisle during boarding.¹²⁸ A passenger taking his shoes off during the flight is an expected event and so is the placing of hand luggage in the aisle during boarding.¹²⁹ These cases would however be considered to be accidents if a literal reading of Saks would be used since the damage causing was event unexpected or unusual and external to the injured passenger.

It is clearly stated in the Saks case that a passenger’s own internal reaction to the usual, normal and expected operation of the aircraft is not covered by the accident definition. The cases since Saks indicate however that there is a type of event that not in itself falls under the definition, but that the event can become an accident through an act or omission by the carrier.¹³⁰

For example, in instances where a passenger becomes ill during a flight and the airline crew has tried to assist the passenger, but done it in a negligent manner and as a result has worsen the passenger’s condition, it has been held that the aircarrier is liable for the injury.¹³¹ In another case it was decided that the failure by the crew to provide medical care to a passenger suffering a heart attack was an accident.¹³² The court made an analogy to hijacking cases where the “accident” is the failure by the carrier to provide adequate security. The heart attack was no “accident” in itself but rather the

¹²⁵ *Padilla v. Olympic Airways*, 765 F.Supp 835, (S.D.N.Y., 1991).

¹²⁶ *Oliver v. SAS*, 17 Avi 18, 283, (US District Court DMd., 1983).

¹²⁷ *Gotz v. Delta Airlines*, 12 F.Supp.2d 199 (D. Mass., 1998).

¹²⁸ *Craig v. Compaigne Nationale Air France*, 45 F.3d 435 (9th Cir. 1994).

¹²⁹ *Sethy v. Malev-Hungarian Airlines*, 2000 WL 1234660 (S.D.N.Y., 2000).

¹³⁰ Cobbs, L., at 123.

¹³¹ *Fishman v. Delta Airlines*, 132 F.3d 138, (2nd Cir. 1998).

¹³² *Seguritan v. Northwest Airlines*, 86 A.D. 2d 658 (N.Y.A.D., 1982).

failure to provide the aid. The Seguritan case has been criticized to be too far reaching.¹³³ A heart attack is not the type of external, unusual event for which liability is imposed under the Convention. In my opinion the criticism is well founded since a heart attack is the passenger's own internal reaction to the usual operation of the aircraft. The carrier cannot be held liable for not being able to provide the adequate medical treatment for every type of health condition onboard the airplane. To hold the carrier liable in this type of situation would present an interesting dilemma since the carrier can become liable both for not providing the medical service as well as for providing the medical service, but not in a prudent manner. The carriers would be forced to employ medical staff to accompany the flights and to install expensive equipment on the airplanes such as defibrillators, which ultimately would lead to increased flight prices.

The "act or omission reasoning" has not been consistently followed, and it seems to be up to each court's own discretion to decide where to draw the line where the act or omission by the crew is qualifies an event as an accident. This line can be especially difficult to draw in cases that do not directly involve the crew of the airline. Such cases involve passenger-to-passenger assaults and acts of terrorism.

4.7 Passenger-to-Passenger Assaults

In-flight disturbances by and between passengers and/or flight crew have become an increasingly growing problem in modern air travel. More people travel these days, and airplanes as well as airports tend to become more crowded. The stress felt by the passengers in combination with the excessive serving of alcohol can, and sometimes will, lead to "air rage". The question that will be discussed under this chapter is whether passenger upon passenger assault is included in the "accident" definition in Article 17.

The courts rendering judgements on the matter have come to different conclusions, leaving no bright line rule to follow. The courts are split over whether a passenger upon passenger assault, absent some causal connection to the airline operation, constitutes an accident.¹³⁴

If a strict application of Saks would be used it would be enough to consider whether the assault is unexpected or unusual and external to the passenger. This question would in most cases be affirmatively answered, thereby making the carrier liable for the assault. However most courts have used the wider application of Saks, finding that passenger upon passenger assaults are not an inherent risk of air travel, or an incident derived from air travel, and thereby not holding the carrier liable for the event.¹³⁵

¹³³ Schmid, Warsaw Convention (E. Giumulla & R. Schmid,ed), at Article 17, para 15.

¹³⁴ Weigand, T.A., at 955.

¹³⁵ Ibid, at 956.

In the Price-case, a court found that a fistfight between two passengers on board an aircraft was not an accident relating to the operation of the aircraft. The court relied on the above-discussed comments made by Professor Goedhuis, and further stated that it would be absurd to hold the carrier liable for a fistfight between two passengers since this is not a characteristic risk of air travel.¹³⁶ This decision can be compared to the above-discussed *Oliver* case where a court held that drunken passenger's fall onto another passenger constituted an accident.

In the Tsevas case a female passenger was grabbed, fondled, kissed, and *bitten* by a drunken passenger seated next to her.¹³⁷ Before the accident, Ms. Tsevas asked the cabin crew to be seated somewhere else. The crew failed to respond to her complaints and kept serving the intoxicated passenger more alcohol. The court held that the assault was unexpected, unusual and external to the passenger and that the crew's refusal to reseat Ms. Tsevas as well as the over serving of alcohol was causal to the accident. The service from the flight attendants was held to be characteristic of air travel and had a relation with the operation of the aircraft. The airline was therefore found liable for the damage.

In a similar case the court held that:

“Of course not every tort committed by a fellow passenger is a Convention accident. Where the airline personnel play no causal role in the commission of the tort, courts have found no Warsaw accident. On the flip side, courts have found Warsaw accidents where airline personnel play a causal role in passenger-on-passenger torts.”¹³⁸

It can therefore be concluded that not only unexpected or unusual events related to the technical operation of the aircraft constitute a Warsaw accident, but also unexpected or unusual events related to other services provided by the carrier.

4.7.1 The Wallace Decision

The reasoning presented in the *Langadinis* case was however not upheld in the well-debated *Wallace* case.¹³⁹

Ms. Wallace, a female passenger on an overnight flight between Seoul and Los Angeles, sued KAL after being sexually assaulted by a male passenger seated next to her. Ms. Wallace woke up during the flight, finding that the passenger seated next to her had unbuttoned her shorts and put his hand inside her underwear and that he was fondling her. Ms. Wallace turned away to make him stop, but the assault continued, forcing Ms. Wallace to hit the perpetrator and flee. Ms. Wallace was instantly resealed and the perpetrator

¹³⁶ *Price v. British Airways*, No. 91 Civ. 4947, WL 170679, (1992).

¹³⁷ *Tsevas v. Delta Airlines*, WL 767278, (N.D. Ill., 1997).

¹³⁸ *Langadinis v. American Airlines*, 199 F.3d 68, p. 71, (1st Circ. Mass, 2000).

¹³⁹ *Wallace v. Korean Air*, 214 F3d 293 (2nd Cir. N.Y., 2000).

was arrested upon landing in L.A. The fondling passenger was not served any alcohol and did not show any signs of being a sexual molester prior to the attack.

The court held, however, that “it is plain that the characteristics of air travel increased Ms. Wallace’s vulnerability to Mr. Park’s assault” since she was “cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark.”¹⁴⁰ The assault was held to be an accident according to Article 17 of the Warsaw Convention.

Even though this case seems to be a strict application of Saks, the court tried to connect the event with the operation of the aircraft by stating that the assault was caused by characteristics of air travel. In my opinion the decision fails to define, in prudent manner, what constitutes a risk characteristic of air travel. A sexual assault can occur on any mean of transportation, or in any situation, and is not a characteristic of air travel. Neither is the fact that the lights in the cabin were dimmed and that Ms. Wallace was seated next to unknown passengers. It is in the nature of travelling on a public transportation to be seated next to someone you do not know. The fact that the lights are dimmed during a night flight is likewise for the passengers’ comfort. It would be absurd to hold that these circumstances caused Ms. Wallace’s injury and would create a strict liability on the carrier for sexual assaults occurring onboard the plane. The carrier’s would be forced to have the lights turned on during the entire flight and maybe even to go as far as separating male and female passengers. The purpose of the Convention was not, as discussed above, to function as a kind of general insurance of the passengers. A sudden and unexpected assault by one passenger upon another passenger has nothing to do with the operation of the aircraft and can therefore in my opinion not be held to be an accident according to Article 17 of the Warsaw Convention. The Wallace case is presently being appealed to the U.S. Supreme Court, which will hopefully reverse the decision.

4.8 Terrorist Acts

The risk of being subject of a terrorist attack has for the last decades been a grave concern for the airlines. After the horrific acts of violence committed by terrorists in the US on 9/11, 2001, and the risk of future attacks involving aircrafts, the question of liability for these acts are perhaps more important than ever. However the Warsaw Convention is, as discussed above, only applicable to injuries sustained by passengers on an international flight. The Convention is therefore not applicable to the passengers killed on the domestic flights nor to any of the persons killed or injured on the ground.

¹⁴⁰ Ibid, at299.

Acts of terrorism, such as hijackings and bomb threats, are intentional criminal acts, often committed by a third party who has no connection to the air carrier. It seems clear from the wording of the Convention that if the person who commits the act is employed by the carrier, or has any other substantial connection to the carrier, the carrier will be held liable for the acts. More surprising is the fact that even when, as in most cases, there is no connection between the carrier and the person committing the criminal act, it has been universally accepted that terrorist acts are considered accidents for which the carrier is liable.¹⁴¹

With the rise in terrorist acts in the 1970's and the 1980's, courts did not hesitate to find the carriers liable for injuries resulting from acts of terrorism committed by third parties.¹⁴² In the *Haddad* decision, a French court allowed a suit brought by passengers injured in a hijacking situation and determined that the term "accident" could not be restricted to technical and mechanical events on the aircraft.¹⁴³ The court held that the term had to be extended even to unexpected actions of third parties during the course of the flight. Different courts in the US had before the *Haddad* decision held that terrorist acts were deemed characteristics of air travel and held the airlines liable under the Warsaw Convention.¹⁴⁴ The carrier will be liable for these acts as long as the injury occurs during the carrier's duration of liability. By holding the carrier liable for these accidents the risks of terrorism are allocated, thereby complying with modern tort law theories.¹⁴⁵

Since the carriers are in the best position to enact and implement safety and security measures, the carriers are considered to be liable if such security measures are insufficient.

4.9 Conclusion

According to Article 17 of the Warsaw Convention, the carrier is liable for damages caused by an accident. A quick comparison between the texts of Articles 17 and 18 show that the term "accident" means something different than the wider term "occurrence", thereby indicating that the carrier is not liable for every damage producing event. This reasoning is also in line with one of the purposes of the Convention: to protect the infant industry from major claims following an accident.¹⁴⁶ This early form of risk management shows that the Convention was only meant to cover the inherent risks of air

¹⁴¹ Goldhirsch, at 86.

¹⁴² Karp, J.R., "Mile High Assaults: Air Carrier Liability Under The Warsaw Convention", *Journal of Air Law and Commerce*, (2001), at 1597.

¹⁴³ *Haddad c. Air France* 1982 RFDA 342.

¹⁴⁴ E.g. *Martinez Hernandez v. Air France*, 545 F.2d 279, (1976); *Husserl v. Swiss Air*, 351F.Supp 702; *Evangelinos v. TWA*, 550 F2d 152; *Day v. TWA*, 528 F.2d 31.

¹⁴⁵ Wright, at 467

¹⁴⁶ Milde, "The Warsaw System of Liability in International Carriage by Air", at 159.

travel, and not every risk of injury that can occur while a passenger is under the carrier's control.¹⁴⁷

The U.S. Court of Appeals stated in *DeMarines* "An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things".¹⁴⁸ The U.S. Supreme Court further developed this definition in the *Saks* case where it was held that an Article 17 accident is an unexpected or unusual event that is external to the passenger.¹⁴⁹ The court failed, however, to give an answer to whether it is sufficient that an event is unexpected or unusual and external to the passenger (a strict application) or if it has to have some causal connection to the operation of the aircraft or be an inherent risk characteristic of air travel (a wide application).

The intent of the drafters of the Convention was, as previously mentioned, to protect the carriers from claims arising from an accident. The passengers would be informed of this limited liability and would thereby be able to protect themselves against damages not covered by the carrier's liability by obtaining additional insurance. The aviation industry expanded rapidly, grew financially strong and air travel became safer, making the carriers subject of raised limits of liability. With the new Montreal Convention, if the passenger can prove an accident the carrier will be strictly liable up to 100 000 SDR and beyond that if it cannot prove that it has not been negligent.

If a strict application of *Saks* is to be used, the carrier will be strictly liable up to 100 000 SDR for every unexpected or unusual event that is not the passengers own internal reaction to the normal operation of the aircraft. This reasoning has in my opinion strayed too far from the original purpose of the Convention. I believe that a causal connection needs to exist between the cause of the damage and the operation of the aircraft. The Convention was meant to allocate the risks of flying between the carrier and the passenger, but is now holding the carrier liable also for other passenger injuries occurring during the carriers duration of liability. The Convention has come to function as a general insurance for the passengers, holding the carrier liable for injuries that have no connection to the operation of the aircraft at all. The Convention does thereby not only allocate the risks of the actual travel, but also the risks of damage that can happen in any sphere of life. This view of the Convention as a general insurance originate from consumer friendly US courts that in my opinion have gone to far and created a liability system that is well beyond the intent of the drafters as well as the signatory states.

Some courts have held that the service given by the flight crew is part of the operation of the aircraft. The carrier can therefore become liable for injuries sustained by a passenger if acts or omissions by the crew cause the accident.

¹⁴⁷ Muller-Rostin, *Warsaw Convention* (E. Giumulla & R. Schmid,ed), at Article 17, para 13.

¹⁴⁸ *DeMarines v. KLM* 580 F.2d 1193, (A.Ct. 1978), at 1196.

¹⁴⁹ *Air France v. Saks*, 470 U.S. 392, (S.Ct. 1985).

I share this view. A passenger who purchases a flight ticket expects the carriage to be performed according to general standards. This is what the carrier should be responsible for. As a passenger you expect the crew to assist you in a normal and prudent manner during the course of the flight. If the crew would act in a reckless manner, or omit to act, then the carriage is not performed according to general standards and the carrier should be held liable for any passenger damage resulting from such an event.

With the rise in terrorist activity in the 1970's and 1980's courts world-wide responded to passengers concerns and limited the carriers liability protection provided by the Warsaw Convention. With the rise in passenger-to-passenger assaults there has been yet another response to passengers' concerns and further limitations of the carriers' ability to use the Convention for protection. This extended liability has in most cases been used in a sensible manner, but has also been used in cases where the injury has no connection with the operation of the aircraft at all. I believe, as discussed above, that the carriers shall be liable for passenger-to-passenger assaults where an assault is caused by the operation of the aircraft. The carrier is in the best position to enact and implement safety and security measures that would deter dangerous passenger behaviour. Drunken passengers cause most cases of assaults. By holding the carrier liable for damages where the crew has served an excessive amount of alcohol is relevant since the carrier is in the best position to prevent the damage.

Over serving of alcohol, with drunken passengers as result, is not transportation according to general standards.

The Wallace decision does however take the carriers responsibilities too far. A dimmed cabin and unknown neighbour passengers are typical events related to air carriage that the passenger is aware of. The carriage was in the Wallace case performed according to general standards and had nothing to do with risks characteristic of air travel. In my opinion the carrier should therefore not be held liable for Ms. Wallace's injury.

5 Bodily Injury

Article 17 does not specify the types of damages that are recoverable under the Warsaw Convention. Instead it establishes the conditions under which a carrier is liable.¹⁵⁰ If these conditions are met, the Convention does not impose any additional restrictions on the types of damages that may be recovered.¹⁵¹ The carrier shall be liable for damage sustained in the event of:

1. death, wounding or any other bodily injury suffered by a passenger,
2. if the damage so sustained was caused by an accident, which
3. took place on board the aircraft or in the course of embarking or disembarking.

The meaning of the terms “death” and “wounding” is clear and cause no problems. The third term, “bodily injury”, is however nebulous and has, as will be shown below, been subject of discussion in several cases.

The phrase “bodily injury” raises three major questions to be answered: can a passenger who has suffered mental anguish without at the same time suffering any physical injuries, i.e. nervous shock, anxiety, psychic trauma, claim compensation from the carrier? Secondly, if there also is physical injury, to what extent can mental anguish be compensated? Thirdly, to what extent is the carrier liable for physical injuries flowing from a psychic trauma?

5.1 Mental Anguish Alone

The question whether the carrier can be held liable for mental anguish without any accompanying physical injury was never discussed during the drafting of the Convention or in the Conventions early years.¹⁵² The first claims for emotional distress were not brought under the Convention until the mid-1970's, following in the wake of several terrorist hijackings. Passengers who had not received any identifiable physical injuries nevertheless claimed compensation for the terror and mental anguish they had experienced.¹⁵³ The litigation that followed raised the question whether article 17 encompasses a claim for emotional distress that does not result from a bodily injury.

In order to answer the question courts have, with varying results, mainly focused on the French official text, trying to ascertain the proper meaning of “lesion corporelle”, the French term used in Article 17 that has been

¹⁵⁰ Sisk, G.C. "Recovery for emotional distress under the Warsaw Convention", 25 Tex. Int'l L.J. 127, (1990) at 134.

¹⁵¹ *Ibid.*, at 134.

¹⁵² *Ibid.*, at 132.

¹⁵³ Rivers, R.J Jr. "Torts – International infliction of emotional distress", 14 Suffolk Transnat'l L.J. 353, (1990) at 357.

translated into “bodily injury”.¹⁵⁴ The following three cases illustrate the different views and approaches taken by US courts. Even though the underlying situation was the same in all three cases the courts adopted different reasoning to resolve the question. The cases stem from a terrorist hijacking on September 6 1970, where a Trans World Airlines aircraft was forced to land in the dessert near Amman, Jordan.

In *Burnett*, a federal court in New Mexico examined the French legal meaning of “lesion corporelle” and noted that French law sharply distinguishes between bodily injury (lesion corporelle) and mental injury (lesion mentale), and that the two terms are mutually exclusive.¹⁵⁵ The court therefore found that mental anguish is not within the purview of Article 17.

Before the US Supreme Courts decision in *Floyd* (see below 5.1.2), the leading American decision denying recovery for emotional distress unaccompanied by physical injury was *Rosman v. Trans World Airlines*.¹⁵⁶ The New York Court of Appeals focused on the English translation of Article 17 and held that a carrier is liable for “palpable, objective bodily injuries, including those caused by the psychic trauma of an accident, and for the damage flowing from those bodily injuries, but not for the trauma as such or for the non bodily or behavioural manifestation of that trauma”.¹⁵⁷ The Court thereby allowed recovery for emotional distress relating to the injury, and also for physical injuries flowing from a psychic trauma, but denied recovery for emotional distress unaccompanied by a physical injury and for emotional distress about the accident as such.

In *Husserl*, the leading case allowing recovery for purely emotional distress, a federal court in New York found the French legal meaning of “lesion corporelle” not binding. The court therefore looked into the intentions of drafters and signatories and found that the drafters of the Convention did not intend to preclude recovery for any particular type of injury and that purely mental injuries thus should be compensated.¹⁵⁸

5.1.1 The Teichner Decision

The first case decided by a Supreme Court of a signatory state on the question whether mental anguish alone can be recovered under Article 17 is the Israeli case *Air France v. Teichner*.¹⁵⁹ The case stems from the hijacking of an Air France aircraft on June 27, 1976. The hijackers forced the pilot to land at the Entebbe Airport in Uganda, where the passengers were held for several days before they were rescued by Israeli forces. The Israeli Supreme

¹⁵⁴ Sisk, at 128.

¹⁵⁵ *Burnett v. TWA*, 368 F Supp 1152 (D.Ct. 1973).

¹⁵⁶ *Rosman v. TWA*, 358 N.Y.S2d 97 (A.Ct. 1974).

¹⁵⁷ *Ibid*, at 110.

¹⁵⁸ *Husserl v. Swiss Air*, 388 F.Supp. 1238 (2nd Cir., 1975)

¹⁵⁹ *Air France v. Teichner*, S & B Av R VII/141.

Court held that Article 17 of the Warsaw Convention permits recovery for emotional distress damages.¹⁶⁰

In order to come to this conclusion the Israeli Supreme Court focused its analysis on the French legal meaning of "lesion corporelle". The Court found that French tort law, at the time the Convention was drafted, allowed recovery for mental damages unaccompanied by physical injury. The Court argued that if purely mental injuries were allowed at the time of the drafting, there was no reason to believe that the drafters intended to exclude such recovery under the Convention.¹⁶¹

The Israeli Supreme Court relied heavily on the subsequent agreements of the parties to the Convention, which changed the translation of "lesion corporelle" to "personal injury" in The Hague Protocol, the Montreal Agreement and the Guatemala City Protocol. The changes were, according to the Court instituted to clarify the original meaning of the term rather than to alter it, and should therefore be read as granting recovery for purely psychic injuries.¹⁶²

The Israeli Supreme Court held that in order to prevent the Convention from becoming old-fashioned, the plain meaning of the Convention must be adapted to the current conditions of both the aircraft industry and international law. The Court held that even though one of the main purposes of the Convention was to limit the air carriers liability in order to foster the growth of the industry it is necessary to make a new examination of the goals of the Convention in light of modern air travel and modern tort law.

5.1.2 The Floyd Decisions

On May 5, 1983, an Eastern Airlines flight departed from Miami bound for the Bahamas. Shortly after takeoff, one of the plane's three jet engines lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engine failed due to loss of oil pressure. The plane began losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport.¹⁶³

A group of passengers brought separate complaints against Eastern Airlines and claimed compensation under the Warsaw Convention solely for the mental distress experienced onboard the unfortunate flight.

¹⁶⁰ Yoran, D. "Recovery for emotional distress damages under Article 17 of the Warsaw Convention: The American versus the Israeli approach", Brookly Journal of International Law 811, (1992), at 819-820.

¹⁶¹ *Ibid*, at 825.

¹⁶² *Ibid*, at 837.

¹⁶³ *Eastern Airlines v. Floyd*, 499 U.S 530, (S.Ct. 1991), at 533.

Unlike the court in *Husserl*, the Court of Appeals for the Eleventh Circuit, in *Floyd v. Eastern Airlines*, based its decision on the French legal meaning of Article 17. The court argued that the literal translation of “lesion corporelle” into “bodily injury” does not capture its French legal meaning, and that even though “bodily injury” is a grammatically correct translation of “lesion corporelle”, the term would be better translated into “personal injury”, which also encompasses compensation for mental distress. This translation would also be in line with French law that does not prohibit compensation for any particular kind of damage, including emotional trauma. The Court therefore held that recovery for purely mental distress was to be allowed under Article 17 of the Convention.¹⁶⁴

In order to resolve the conflict between the Eleventh Circuit’s decision in *Floyd v. Eastern Airlines* and the New York Court of Appeal’s decision in *Rosman v. Trans World Airlines* the Supreme Court granted certiorari in the Floyd case.¹⁶⁵

The US Supreme Court finally settled the question of whether or not mental anguish alone can be compensated under the Convention. The Court concluded that an air carrier cannot be held liable for mental anguish unaccompanied by physical injury, but failed to answer the question whether passengers can recover for mental injuries that are accompanied by physical injuries. In order to come to its decision the Supreme Court construed the Convention in the same manner as it did in the *Saks* decision, beginning with the text of the treaty and the context in which the written words are used. Since the phrase “lesion corporelle” is both difficult and ambiguous the Court also looked beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.¹⁶⁶

5.1.2.1 Text and context

Because French is the only authentic language of the Convention, the French text must guide the Courts analysis.¹⁶⁷ The question the Court had to answer was therefore whether or not the condition “lesion corporelle” is satisfied when a passenger suffers only psychic injury. To answer this question the Court had to examine the shared expectations of the parties to the Convention.

Since continental jurists drafted the Convention the shared expectations of the parties are best ascertained by examining the “French legal meaning” of the specific terms.¹⁶⁸ In order to find the proper “French legal meaning” the Supreme Court consulted many bilingual dictionaries and concluded that such dictionaries clearly suggest that a proper translation of “lesion corporelle” is “bodily injury”. This translation indicates that Article 17 does

¹⁶⁴ *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir., 1989), at p. 1471-1472.

¹⁶⁵ *Ibid*, at 534.

¹⁶⁶ *Ibid*, at 535.

¹⁶⁷ *Ibid*, at 535.

¹⁶⁸ *Air France v. Saks*, 470 U.S. 392, (S.Ct. 1985), at 399.

not permit recovery for purely psychic injuries.¹⁶⁹ This dictionary translation was also found to accord with the text used in Great Britain.¹⁷⁰

The Court then turned to the French legal materials and found that the term “lesion corporelle” was not a widely used legal term in French law in 1929.¹⁷¹ The Court found no French legislative provisions in force in 1929 that contained the phrase, nor did it find any treaty or scholarly writing from that time indicating that “lesion corporelle” embrace purely psychic injury.¹⁷² It further found no French court decisions in or before 1929 that explain the term.¹⁷³ The Court concludes that “neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that “lesion corporelle” should be translated other than as “bodily injury”, a narrow meaning excluding purely mental injuries”.¹⁷⁴

Because a broader interpretation of “lesion corporelle” is plausible and the term is both ambiguous and difficult the Supreme Court then turned to additional aids to construction.

5.1.2.2 Drafting history of the Convention

The Warsaw Convention is, as discussed under chapter 2, the creation of two international conferences held in Paris in 1925 and in Warsaw in 1929. The final protocol from the Paris Conference contained a provision broadly holding the carrier liable in the event of an accident and would most certainly have admitted passengers to recover for pure psychic injuries.¹⁷⁵ This provision was however changed by CITEJA, the committee appointed to revise the Paris protocol, and the text was altered into the version that was contained in the Warsaw Convention.¹⁷⁶ Even though there is no evidence explaining why CITEJA adopted the narrower language the Supreme Court inferred that it was to limit the types of recoverable injuries, an indication that purely psychic injuries were not intended to be included under the carrier’s liability.¹⁷⁷

In 1929 many countries did not recognize recovery for purely psychic injuries, a fact that persuaded the Supreme Court that neither the drafters nor the signatories had specific intent to include such remedy in the Convention.¹⁷⁸ Since such a remedy was unknown to many jurisdictions at that time, the drafters of the Convention would most certainly have made a clear reference to psychic injuries if they were to be included.¹⁷⁹

¹⁶⁹ *Eastern Airlines v. Floyd*, 499 U.S. 530, (S.Ct. 1991), at 537.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, at 538-539.

¹⁷³ *Ibid.*, at 538.

¹⁷⁴ *Ibid.*, at 543.

¹⁷⁵ *Ibid.*, at 542.

¹⁷⁶ *Ibid.*, at 543.

¹⁷⁷ *Ibid.*, at 543.

¹⁷⁸ *Ibid.*, at 544.

¹⁷⁹ *Ibid.*, at 545.

In order to reach its conclusion that mental injuries were not intended to be recoverable under the Convention, the Court analogised another international transport treaty: the Berne Convention on International Rail¹⁸⁰. The Berne Convention closely paralleled the language of Article 17 and permitted recovery for bodily injury only, but was later modified to specifically include mental injuries as well. The Court found that this alteration showed that an amendment to the Warsaw Convention was needed if psychic injuries were to be included.¹⁸¹

5.1.2.3 Conduct and interpretations of the signatories

The Hague Protocol, The Montreal Agreement and the Guatemala City Protocol all refer to “personal injury” rather than “bodily injury”. The Eleventh Circuit in *Floyd* relied on this fact to support their broad interpretation of “lesion corporelle” as to encompass purely mental injuries.¹⁸² The Supreme Court did however not share this view, and held that there is no evidence that any of these agreements intended to effect a substantive change in, or clarification of, the provisions of Article 17.¹⁸³ The Court specifically pointed out that the Montreal Agreement is not a treaty, but rather an agreement among the major international air carriers and therefore cannot speak for the signatories to the Warsaw Convention.¹⁸⁴ Moreover, the Court found that only a few countries have ratified the Guatemala City Protocol and that “the Protocol therefore is not in effect in the international arena”.¹⁸⁵

At the time of the Supreme Courts judgement only one court in another signatory state had addressed the question whether mental distress alone is recoverable. The Supreme Court of Israel held in *Air France v. Teichner* that Article 17 does allow recovery for emotional distress alone, and that such a development of the Convention is desired as a policy goal.¹⁸⁶ The US Supreme Court however criticised the *Teichner* decision on the grounds that the Israeli Supreme Court failed to consider whether the drafters of the Convention intended to include compensation for purely psychic injuries.¹⁸⁷

5.1.2.4 Purpose of uniformity

One of the Conventions main purposes was, as mentioned under chapter 2.2.1, to achieve unified rules governing claims arising from international air transportation, thereby avoiding major conflicts of law and conflicts of jurisdiction. This purpose would however be hindered if recovery for emotional distress unaccompanied by physical injury were to be allowed

¹⁸⁰ International Convention Concerning the Carriage of Passengers and Luggage By Rail, Berne, Oct. 25, 1952.

¹⁸¹ *Eastern Airlines v. Floyd*, 499 U.S 530, (S.Ct. 1991), at 545.

¹⁸² *Floyd v. Eastern Airlines*, 872 F.2d 1462, (11th Cir. 1989) at 1474-1475.

¹⁸³ *Eastern Airlines v. Floyd*, 499 U.S 530, (S.Ct. 1991), at 547-551.

¹⁸⁴ *Ibid*, at 549.

¹⁸⁵ *Ibid*, at 550.

¹⁸⁶ See chapter 5.1.1.

¹⁸⁷ *Eastern Airlines v. Floyd*, 499 U.S 530, 111 S.Ct. 1489 at 551.

since recovery for purely psychic injury is not recognized in many of the signatory states.¹⁸⁸

The Supreme Court also stated that the second goal of the Convention, the limitation of air carrier's liability in order to foster the growth of the infant aviation industry, would be upset if recovery for psychic injuries were to be included in Article 17. The Court held that the current view among the signatories was irrelevant in finding the proper meaning of "lesion corporelle" and that the term should be read in a way that respects the "legislative choice" of the signatories in 1929.¹⁸⁹

The Court held, for the above stated reasons that a passenger that has suffered only psychic injury cannot recover for such injury under the Convention. The Court thereby ended the long debate in the United States whether such recovery was contemplated under Article 17 or not. The Supreme Court's decision has been followed in the United States, and has, as will be shown below, also been followed by courts in other signatory states.

5.1.3 The Kotsambasis Decision

On 28 May 1992, Miss Kotsambasis boarded a Singapore Airlines aircraft in Athens, which was scheduled to fly to Sydney via Singapore. Shortly after takeoff Miss Kotsambasis saw smoke coming out of a starboard engine, which had caught alight. The crew announced that there was an engine problem and that the aircraft would be returning to Athens, but that fuel had first to be jettisoned. The aircraft landed over an hour after takeoff, and because of lack of facilities provided by Athens airport the passengers were prevented from disembarking the aircraft for another 2.5 hours. Miss Kotsambasis sued Singapore Airlines for the mental distress she suffered during the short, but misfortunate, flight.¹⁹⁰

The New South Wales Court of Appeal stated that the two phrases "bodily injury" and "lesion corporelle" can be regarded as essentially equivalents, and that both are ambiguous as to whether they refer to psychological injuries.¹⁹¹ The Court construed Article 17 in the same way as the US Supreme Court did in *Eastern v. Floyd*, a case that it also refers to in its judgement. By looking at the common law position in relation to the interpretation of international agreements, which is repeated in articles 31 and 32 of the Vienna Convention on the Law of Treaties, the Court came to the conclusion that the ambiguity only can be resolved by looking at the intention of the contracting parties and adopting a purposive approach to the interpretation of the Convention.¹⁹² The Court concluded that the term

¹⁸⁸ Ibid, at 552.

¹⁸⁹ Ibid, at 546.

¹⁹⁰ *Kotsambasis v. Singapore Airlines*, 148 ALR 498 (42 NSWLR 110), at 111E-F.

¹⁹¹ Ibid, at 114 E.

¹⁹² Ibid, at 114 A.

“bodily injury” was not intended to, and on a proper interpretation of the Convention does not include purely psychological injury.¹⁹³

5.2 Mental Anguish Accompanied by Physical Injury

The Supreme Court in *Eastern v. Floyd* did not express any view as to whether passengers can recover for mental injuries that are accompanied by physical injuries, which presents an interesting dilemma for courts in signatory states that follow the Supreme Courts decision. This question however does not present a dilemma for courts that follow the position taken by the Israeli Supreme Court in *Teichner* since recovery for mental injuries always must be allowed if mental distress is read to be included in “lesion corporelle”. In the following discussion I will present some views as to whether psychic injury that is accompanied by a physical injury can be compensated under Article 17.

In an Article 17 situation there are three possible approaches to recovery for physical injury that is accompanied by bodily injury:

- Disallow recovery for emotional distress.
- Allow recovery for all emotional distress, as long as bodily injury occurs.
- Allow recovery for only for emotional distress flowing from a bodily injury.

5.2.1 Disallow Recovery for Emotional Distress

The approach to disallow recovery for emotional distress, even if bodily injury occurs, is supported by the US Supreme Courts decision in *Eastern v. Floyd*. It can be argued that since many of the signatory states do not recognize compensation for mental distress at all, the purpose of uniformity would be equally upset if recovery for mental anguish accompanied by physical injury were to be allowed.¹⁹⁴

The Supreme Court also held that the primary purpose of the Convention, the limitation of air carrier’s liability in order to foster the growth of the infant aviation industry, would be upset if recovery for psychic injuries were to be included in Article 17.¹⁹⁵ The same reason can be used against recovery for psychic injuries accompanied by physical injuries since allowing such a recovery most certainly would increase the carrier liability.

This position has however not been widely supported. One argument that has been put forward is that by disallowing compensation for emotional

¹⁹³ Ibid, at 115 F.

¹⁹⁴ See chapter 5.1.2.4.

¹⁹⁵ See chapter 5.1.2.4.

distress, only pecuniary losses will be recovered, providing minimal compensation for passengers who have suffered injuries.¹⁹⁶ Another argument against this position is that Article 17 only establishes the conditions for air carrier liability and does not impose any further restrictions on the types of damages that may be recovered.¹⁹⁷ Damages may under this view be compensated if all conditions of Article 17 are met.

5.2.2 Allow Recovery for All Emotional Distress, as Long as Bodily Injury Occurs

This approach allows recovery for all emotional distress, as long as bodily injury occurs, regardless of a connection between the distress and the bodily injury. A bruise, or a twisted ankle can therefore open the door to liability for all emotional distress connected to the accident.

Those who support this view have argued that since Article 17 only requires damage to be *sustained in the event of* death, wounding or any other bodily injury, there is no requirement of a causal link between the damage and the bodily injury.¹⁹⁸ If the drafters of the Convention had intended to require such causal link they would probably have used the phrase “damage caused by” instead of the phrase “damage sustained in the event of”.¹⁹⁹

Those who read Article 17 more narrowly have rejected this second approach.²⁰⁰ One commentator opposes the broad construction of Article 17 presented above and states that the language of Article 17 is to be understood as requiring the damage to be associated with the requisites of death, wounding or bodily injury.²⁰¹ Emotional distress should in his opinion only be compensated if it is caused by a physical injury.

This second approach has also been criticised for creating inequities among passengers subject to the Warsaw Convention.²⁰² A passenger with only minor physical injuries can under this approach recover for both his physical injuries as well as for all emotional distress connected to the accident, while an equally horrified passenger without any physical injuries cannot claim compensation at all.

¹⁹⁶ Boulee, J-P. "Recovery for mental injuries that are accompanied by physical injuries under Article 17 of the Warsaw Convention: the progeny of *Eastern Airlines, Inc. v. Floyd*" Georgia Journal of International and Comparative Law 501, (1995), at 514.

¹⁹⁷ Sisk, G., at 134.

¹⁹⁸ Miller, G. Liability in International Air Transport, Deventer : Kluwer International Law, (1977) at 130

¹⁹⁹ Boulee, J-P., at 515.

²⁰⁰ Desbiens, C. "Air Carrier's Liability for emotional distress under Article 17 of the Warsaw Convention: Can it still be invoked?" Journal of Air and Space Law 92 part III 153 (1992), at 182.

²⁰¹ Sisk, G., at 134.

²⁰² Boulee, J-P., at 520.

5.2.3 Allow Recovery Only for Emotional Distress Flowing from a Bodily Injury

Under this approach, damages are allowed for emotional distress to the extent the distress is caused by the bodily injury. An injured passenger may therefore recover for physical injuries, i.e. a twisted ankle, as well as for his emotional distress related to the twisted ankle, but not for emotional distress related to the accident as such.

Since a passenger only can recover for emotional distress related to the physical injury, this approach prevents the inequities among the passengers presented under the second approach. This approach has also been held to be consistent with the intentions of the drafters of the Warsaw Convention since it makes passengers recoveries more reasonable and predictable.²⁰³

5.3 Physical Injury Flowing from Psychic Trauma

In a hijacking situation, a passenger might become so terrified that the mental distress leads to an actual physical injury, i.e. a heart attack. The distress has in such a situation a separate role as the causal link between the accident and the bodily injury. The question that will be discussed here is whether or not such an injury is recoverable under Article 17.

Article 17 establishes the conditions under which a carrier is liable, thereby listing the causes, rather than the nature, of the damage.²⁰⁴ Following the US Supreme Courts decision in *Eastern v. Floyd*, one could argue that if mental anguish cannot be fitted within the phrase “lesion corporelle”, then the condition for air carrier liability is not satisfied when a physical injury flows from a psychic trauma. If such recovery were to be allowed, it would be the emotional distress rather than the physical injury that is the cause of the damage.²⁰⁵

5.4 Conclusion

Article 17 of the Warsaw Convention establishes the conditions under which a carrier is liable for passenger damages. The article does not, as many commentators have pointed out, specify the types of damages that are recoverable and does not further restrict the types of damages that are recoverable if the conditions are met. It can therefore well be that damages for emotional distress can be recovered if a bodily injury is caused by an accident on board the aircraft.

²⁰³ Boulee, J-P., at 520.

²⁰⁴ Desbiens, C., at 184.

²⁰⁵ Desbiens, C., at 184.

In order to find out whether emotional distress unaccompanied by a physical injury is recoverable under the Convention one has to examine the condition “bodily injury”. The term is the English translation of the authentic French phrase “lesion corporelle”, a term that because of its authenticity shall guide the further analysis.

Courts in different countries have turned to additional aids of construction to find out whether the phrase includes purely psychic injuries since “lesion corporelle” does not seem to have a specific French legal meaning. The Israeli Supreme Court held in *Teichner* that it must have been the intent of the drafters to include such recovery under the Convention as well since French tort law at the time the Convention was drafted allowed recovery for purely mental damages unaccompanied by physical injury.

The US Supreme Court on the other hand stated in its *Eastern v. Floyd* decision that the intent of the drafters was to exclude recovery for purely psychic injuries. The Court held that the purpose of uniformity would be upset if such compensation were allowed since many states did not recognize recovery for purely emotional distress in 1929. The purpose of limiting the carrier’s liability would according to the Court also be upset since allowance for claims for emotional distress would broaden the scope of Article 17.

Both courts correctly point out that the French legal term “lesion corporelle” has to determine whether recovery for emotional distress unaccompanied by physical injury is allowed under the Convention or not. The Courts also seek other means of construing the term since it is both ambiguous and does not have a specific legal meaning in French language. The Israeli Court erroneously looks at French tort law at the time the Convention was drafted instead of looking at how the term was used in the French legal system at that time. The US Supreme Court on the other hand looks at how the term was used in the French legal system as well as the intentions of the signatory states in 1929.

There can be no clear answer to the question whether purely psychic injury is recoverable since both courts resort to alternative means of treaty interpretation. I believe however that the US Supreme Courts position is the alternative that best reflects the intentions of the signatory states. The two major purposes of the Convention have to play an important role when one interprets an ambiguous term in the Convention. The term must therefore be read in the light of these purposes in order to reflect the shared expectations of the signatory parties. Based on these purposes it seems clear that the Convention was not meant to include damages for emotional distress that is not accompanied by a physical injury. If such damages were contemplated it would broaden the carriers liability in a way I do not believe was intended by the drafters. Such recovery would further impose a system of liability that not all signatory states recognized at that time, which instead of creating a unified system would lead to confusion as to which rules apply.

In the *Teichner* decision the Court further held that extending Article 17 to encompass emotional distress was a welcomed extension of the carrier's liability and would prevent the Convention from becoming old-fashioned. The purpose of limiting the carrier's liability therefore had to be adapted to reflect the needs of modern aviation and tort law.

The Warsaw Convention is an international treaty with more than 140 signatory states. The Convention has been altered on a numerous occasions and has therefore been subject of some development. These alterations are the result of negotiations between the signatory states, where all parties to the Convention have been able to express their view as how the Convention should be amended. The practical application of the rules of the Convention has also been altered by private agreements between the air carriers, agreements that have constantly been held not to amend the Convention. The Israeli Supreme Court's reasoning must in the light of the above discussion therefore be rejected, since a single signatory state cannot alter an international treaty in a way as it sees fit. The Convention's system of uniformity would rather rapidly become crushed if all parties to the Convention were able to interpret nebulous terms in a manner that best accords with that state's political and legal point of view. Even though the Israeli Court had good intentions when it ruled that recovery for purely psychic injuries are allowed under the Convention such a position cannot be accepted since it is only the desire of one signatory state out of more than 140. The Convention can be amended to cover emotional distress unaccompanied by physical injury but such an amendment has to evolve in accordance with the rules of treaty interpretation that are contained in the Convention.

It is my conclusion that nothing speaks for that purely emotional distress can be recovered under the Convention. A literal translation of the phrase "lesion corporelle" into "bodily injury" clearly suggests that the term excludes mental injuries. Further, there is nothing in French law that suggest that the term has a precise legal meaning or that the term shall be read to encompass such injury. The most important reason to reject such recovery is therefore the purposes of the Convention. These purposes in my opinion clearly indicate that the Warsaw Convention was not intended to encompass recovery for emotional distress unaccompanied by physical injury.

The question whether emotional distress can be recovered if it is accompanied by a physical injury has not been decided by a Supreme Court of a signatory state and is therefore open to discussion.

The easiest way to resolve the question would be to exclude all emotional distress claims from the scope of the Convention. Such an approach would also accord with the US Supreme Courts decision in *Eastern v. Floyd* since it is in line with the purposes of the Convention. Article 17 does however only establish the conditions under which a carrier is liable for passenger damages and does not exclude any damages when these conditions are met.

It would therefore in my view be against Article 17 to completely exclude all emotional recovery.

Under which situations is recovery for emotional distress allowed under the Convention? One can either adopt a position where emotional distress only is recovered for the distress connected to the physical injury or a position where all emotional distress can be compensated as long as a physical injury occurs. Both positions have their advantages and weaknesses. It is in my opinion preferable if emotional distress recovery is admitted only for the distress connected to the injury and not for the distress caused by the accident. This position best accords with the view that purely emotional distress cannot be recovered under the Convention. If recovery were allowed for the fear relating to the accident, the *Eastern v. Floyd* decision would become almost useless. A passenger would be able to show a bruise or claim that he has sustained any other minor injury in order to claim compensation for the emotional distress caused by the accident. This would most certainly open the floodgates to major lawsuits in the US and cause major forum shopping problems. This position is however supported by the fact that the Convention does not explicitly state that the damage has to be caused by bodily injury in order to be compensated.

In sum, there seems to be much confusion whether emotional distress accompanied by physical injury is encompassed by Article 17. Since the term is ambiguous one might look at the other means of construction. The *Eastern v. Floyd* judgement seems to suggest that compensation will never be rewarded for emotional distress since such compensation would be against the purposes of the Convention. I would however like to argue that the liability scheme established by the Convention tries to strike a balance between the carriers and the passengers. It would be possible to uphold this balance by enabling passengers to claim compensation for emotional distress flowing from a physical injury since such a liability scheme would not be to one-sided. It would however be difficult to determine the size of such compensation, which might lead to forum shopping. It can also be argued that this position goes against the purpose of uniformity. It is however in my view the position that best reflects the intentions of the drafters as well as the shared expectations of the signatory states.

The last question that will be discussed is whether physical injury flowing from psychic trauma can be recovered under Article 17. The general opinion seems to be that such recovery is not possible since the physical injury is caused by a non-recoverable psychic injury. The conditions for carrier liability are not met since the emotional distress rather than the accident is the cause of the damage. A heart attack caused by a near death experience would therefore not be compensated under the Convention. This position can be criticised as being too one-sided in favour of the carrier, and that the drafters of the Convention probably intended heart failure caused by a terrifying experience to be included within the scope of Article 17. It has however one positive side effect. The position makes it impossible to claim

compensation under the Convention for damages that are in between physical- and psychic injuries such as post stress disorder, PSD.

The question whether physical injury flowing from psychic trauma can be recovered under Article 17 is still open but will, because of the increasing number of PSD claims most likely be decided in the future. I am however willing to agree with those who argue that such recovery is not encompassed by the Convention since the cause is not the accident but rather the distress.

6 Exclusivity

The question that will be discussed under this chapter is whether, in a situation when the Warsaw Convention does not allow recovery for damages, the Convention correspondingly precludes a passenger from maintaining an action for damages under another source of law, e.g. a tort action under the applicable national law? This question is important for all cases where a passenger cannot successfully claim under chapter III of the Convention and therefore cannot recover an alleged damage.

6.1 Article 24

The Warsaw Convention Article 24 reads as follows:

1. In the cases covered by article 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

2. In cases covered by article 17, the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The Warsaw Convention expressly provide for resort to local law, based on the forum's conflict of law rules, on issues such as recoverable damages, contributory negligence and the definition of wilful misconduct.²⁰⁶ This taken together with the imprecise wording of the Convention has created some confusion whether the Convention has pre-emptive power or not.

It seems clear from the wording of Article 24 that a claim that satisfies the conditions set out in Article 17, e.g. accident, physical injury, onboard the aircraft etc., only can be brought *subject to the conditions and limits set out in the Convention*. What seems less clear is whether a claim that is not covered by article 17 precludes a claimant from resorting to local law.

The question of exclusivity has created a court split where courts finding the Convention to be nonexclusive interpret article 24's language to establish an intent that state law causes of action would survive the Convention but subject to the limitation imposed by the Convention.²⁰⁷ Under this approach, article 24 permits a passenger, whose personal injury claim do not satisfy the liability conditions of article 17, to pursue the claim under local law. Courts finding the Convention to be exclusive state that Article 24 of the

²⁰⁶ E.g. Warsaw Convention Article 17-19, 21,22,28,29.

²⁰⁷ Weigand T.A., "Accident, Exclusivity and Passenger Disturbances Under the Warsaw Convention", Am. U. Int'l L. Rev. 16:890, (2001), at 926-927.

Convention always preclude a passenger from maintaining an action against the carrier under local law.

6.2 Amendments

The text in the Guatemala City Protocol is more clear and provides in its 2nd paragraph of article IX:

In the carriage of passengers and baggage, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liabilities set out in this Convention.

By amending the text of article 24 to cover actions founded not only under the Convention, but also actions founded under contract or in tort the preemptive scope of the Convention seems clear. The Guatemala City Protocol has, as mentioned above, not yet come into force. The text of article IX was however adopted by the Montreal Protocol No. 4 and later by the new Montreal Convention.

6.3 The Tseng Decision

In the Tseng case a female passenger, Ms Tseng, was for security reasons taken to a private security room at the John F. Kennedy International Airport where a female security guard employed by El Al Airlines by hand searched Tseng's body outside her clothes. Tseng filed suit against El Al in New York, alleging a state law personal injury claim based on the episode at JFK. Tseng's pleading charged, inter alia, assault and false imprisonment, but alleged no bodily injury.²⁰⁸

The US Supreme Court decided in January 1999 that a passenger is precluded from maintaining an action against the carrier for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.²⁰⁹ The main purpose of the Warsaw Convention is, according to the judgement, to achieve uniformity of rules governing claims arising from international air transport, and that "recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster".²¹⁰ The Court states that "To provide the desired uniformity, Chapter III sets out an array of liability rules applicable to all international air transportation of persons, baggage and goods" and that "Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, the Court would be hard put to conclude that the Warsaw delegates meant to subject air carriers to the distinct, non uniform liability rules of the individual

²⁰⁸ *El Al Israel Airlines, Inc. v. Tseng*, 525 U.S 155 (S.Ct. 1999).

²⁰⁹ *Ibid*, at 156

²¹⁰ *Ibid*, at 169

signatory nations.”²¹¹ The Court further stated that by allowing passengers to pursue claims under local law when the Convention does not permit recovery some anomalies could arise, e.g. passengers injured physically in an emergency landing might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside the Convention for potentially unlimited damages.²¹² This would, needless to say, go against the purpose of the Convention and rather disunify the system than create unity.

The Convention’s pre-emptive effect on local law extends, according to the Court, no further than the Convention’s own substantive scope. The carrier is consequently subject to liability under local law for passenger injuries occurring before any of the operations of embarking or disembarking.²¹³

6.4 Conclusion

A passenger who is injured on an international flight or during any of the operations of embarking or disembarking can only bring an action for damages under the rules of the Convention. This regardless of whether the liability conditions “accident” or “bodily injury” has been satisfied or not. The mere fact that a court finds that no Article 17 “accident” or “bodily injury” has occurred does not make the claim actionable under local law.

Since the preemptive effect on local law extends no further than the Convention’s own substantial scope, the only way to escape the rules of the Convention is to establish that the claim arises out of an event that did not take place during the transportation or the process of embarking or disembarking.

The Montreal Protocol No. 4, which came into force in the US just a couple of months after the Tseng case was decided, as well as the new Montreal Convention, have brought clarity to the pre-emptive scope of Article 24. It can however be argued that the new text does not exclude other causes of claims, but only makes them subject to the same conditions and limits as set out in the Convention.²¹⁴ It has however no practical effect if the claim is based on the Convention, the contract of carriage or an illegal act done by the carrier if the Court has to use the same material rules to decide the case. This view seems to be contested by the court in Tseng who claim that their judgement is in conformity with Montreal Protocol No. 4 and that a passenger who cannot bring an action for damages under the Convention is precluded from bringing the action under the applicable law. It seems to be up to the courts in different jurisdictions to decide where to draw the line. The question is however theoretical since the outcome for all involved parties is likely to be the same.

²¹¹ Ibid, at 169.

²¹² Ibid, at 171.

²¹³ Ibid, at 171-172.

²¹⁴ E. Giumulla, Warsaw Convention (e. Giumulla & R. Schmid, ed), at Article 24, para 5.

A possible outcome of the new exclusivity rules is that since a claimant falling within the substantial scope of the Convention is completely precluded from maintaining an action for damages if he cannot show any of the Article 17 liability conditions, courts may be more inclined to broadly apply the Convention's liability prerequisites. This is in my opinion most likely to happen in "consumer friendly" U.S. courts, which throughout the history of the Convention have been keen to bypass the liability rules in order to, in their view, fully compensate injured passengers.

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