航空宇宙法學會誌 第24卷 第2號
2009년 12월 30일 발행, pp. 235~270

논문접수일 2009. 10. 16
논문심사일 2009. 12. 11
게재확정일 2009. 12. 21

ACCIDENTS & INJURIES IN INTERNATIONAL AIR LAW : *THE CLASH OF THE TITANS**

Paul Stephen Dempsey**

Contents

Ⅰ. INTRODUCTION
Ⅱ. WHAT IS AN ACCIDENT?
Ⅲ. WHAT DAMAGES ARE RECOVERABLE?
Ⅳ. CONCLUSION

---

* Readers are encouraged to consult the treatise International Air Carrier Liability: The Montreal Convention of 1999 (McGill 2005) by Paul Stephen Dempsey and Michael Milde, for a broader treatment of the issues discussed herein.

** Tomlinson Professor of Global Governance in Air & Space Law, and Director of the Institute of Air & Space Law, McGill University. From 1979-2002, Dr. Dempsey was Professor of Law & Director of the Transportation Law Program, University of Denver College of Law. A.B.J. (1972), J.D. (1975), University of Georgia; LL.M. (1978), George Washington University; D.C.L. (1986), McGill University. Admitted to the practice of law in Colorado, Georgia, and the District of Columbia.

I. INTRODUCTION

When either the Warsaw Convention of 1929 or the Montreal Convention of 1999 is deemed to apply,[1] the court must determine whether recovery is permitted under the applicable Convention. The most critical provision in personal injury and wrongful death litigation surrounding international commercial aviation is Article 17 of the Warsaw Convention, which provides:

> *The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*[2]

The Montreal Convention of 1999 resulted in inconsequential changes to the language of Article 17:[3]

> *The carrier is liable for damage sustained in case of death or bodily*

---

1) Pursuant to Article 1, the treaty applies when travel is, in accordance with an agreement between the parties, an international itinerary originating at and destined to two different contracting States, or from and to a single contracting State with an agreed stopping place in another State. Thus, one must examine which treaty (Warsaw, Warsaw as amended by the Hague Protocol, Warsaw as amended by Montreal Protocol No. 4, or by the Montreal Convention of 1999) is common to the origin and destination State; if the itinerary is round-trip, the origin and destination State are the same. One can determine which States have ratified which Air Law conventions from the web site of the ICAO Legal Bureau: http://www.icao.int/cgi/airlaw.pl (visited Jan. 11, 2009).

2) *The Convention for the Unification of Certain Rules Relating to International Carriage by Air,* 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838 [hereinafter Warsaw Convention], Art. 17.

3) "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Convention for the Unification of Certain Rules for International Carriage by Air,* 28 May 1999, ICAO Doc. 9740 [hereinafter the Montreal Convention], Art. 17.

injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Though the phrase "or wounding of a passenger" was not carried forward into the Montreal Convention, it appears that the language was merely deleted as redundant of the phrase "bodily injury", which was retained in the new Convention. Hence, irrespective of whether the Warsaw or Montreal Convention applies, the requirements for recovery are effectually identical, and the past jurisprudence based on the Warsaw System remains highly relevant, if not determinative.[4] Article 17 imposes liability upon the carrier if the plaintiff proves: (1) an accident (2) caused (3) death or bodily injury, (4) while the passenger was on-board the aircraft or was in the course of embarking or disembarking.[5]

This article addresses issues raised by two of those elements: (1) what is contemplated by the term "accident"; and (2) what is meant by "bodily injury".[6]

---

4) *See Somo Japan Ins. v. Nippon Cargo Airlines,* 522 F.3d 776 (7th Cir. 2008); *Byrd v. Comair,* 501 F. Supp. 2d 902 (E.D. Ky 2007); *Baah v. Virgin Atlantic Airways,* 473 F. Supp. 2d 591 (S.D.N.Y. 2007); *Continental Insurance Co. v. Federal Express Corp.,* 454 F.3d 951 (9th Cir. 2006).

5) *Eastern Airlines v. Floyd,* 499 U.S. 530, 111 S.Ct. 1489 (1991) [hereinafter *Flo*yd] (the Warsaw Convention may or may not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation thereof). On the issue of causation, see *Sakarina v. Trans World Airlines,* 8 F.3d 164 (4th Cir. 1993), cert. denied 114 S.Ct. 1835 (1994). One treatise on the subject defines an Article 17 accident as follows:

> An accident has been defined as an unexpected and sudden event that takes place without foresight. The occurrence on board the aircraft must be unusual or unexpected. Accidents, under the Convention, have been held to include out-of-the-ordinary, unanticipated incidents "beyond the normal and preferred mode of operation for the flight," including crashes, severe turbulence, or hijacking, but not including a fainting spell, loss of hearing resulting from routine pressurization, or other internal infirmity of the passenger.

Paul Stephen Dempsey, Robert Hardaway & William Thoms, 2 *Aviation Law & Regulation* § 14.13 (1993).

6) The term "death" is rather straightforward; it is the absence of life.

As we shall see, the three Titans of international aviation jurisprudence – the US Supreme Court, the UK House of Lords, and the Australian High Court – disagree on several fundamental principles surrounding these issues.

II. WHAT IS AN ACCIDENT?

The treaties use different triggering language, depending upon whether damages are sought for personal injury or property damage. Article 17 of the Warsaw Convention and the Montreal Convention of 1999 used the term "accident" as the trigger for recovery of damages for passenger death or bodily injury. Article 18 of the Warsaw Convention used the broader term "occurrence" (in the unofficial English language translation) as the trigger for recovery of loss or damage to luggage or goods, while the Hague Protocol substituted the word "event" for property damage, as did the Montreal Convention of 1999.[7] The plain meanings[8] of these terms suggest that the drafters intended narrower language triggering recovery for personal damage than for property damage.

The term "accident" has spawned much litigation. It seems odd that it would. In lay parlance, an accident is something done accidentally, not on purpose. Any child on a playground can distinguish between an injury caused by an "accident", and one caused "intentionally." A child who accidentally trips another elicits one type of cry from the injured child. A child who intentionally trips another elicits a sharper and more shrill response, sometimes followed by a brawl. An accident could be caused by negligence, but it could also be caused by activities either devoid of fault or consented to, such as

7) *See e.g., Sompo Japan Insurance v. Nippon Cargo Airlines,* 522 F.3rd 776 (7th Cir. 2008).
8) *See Chan v. Korean Air Lines,* 490 US 122 (1989).

rough play. In football, a kick by one player to the shin of another could either be accidental or intentional. The circumstances of the event would objectively reveal whether the kick was an "accident" or "on purpose." However, in legal parlance, the term "accident" has evolved into something quite different.

Before the US Supreme Court addressed this issue, several intermediate appellate courts attempted to address the issue of what constitutes an "accident." In *Krys v. Lufthansa German Airlines*,[9] a passenger who suffered a heart attack on a transatlantic flight from Miami to Frankfurt brought suit against Lufthansa for aggravating the damage to his heart by not landing the plane before its scheduled arrival in Frankfurt, so that he could have made it to a hospital sooner. The U.S. Court of Appeals for the Eleventh Circuit concluded,

> *looking solely to a factual description of the aggravating event in this case – i.e., the continuation of the flight to its scheduled point of arrival – compels a conclusion that the aggravation injury was not caused by an 'unusual or unexpected event or happening that is external to the plaintiff . . ." and therefore did ". . . not constitute an 'accident' within the meaning of the Warsaw Convention.*[10]

In *Abramson v. Japan Airlines*,[11] the US Court of Appeals for the Third Circuit addressed a claim brought against Japan Airlines for its refusal to seat Mr. Abramson in the first class compartment on a flight from Anchorage to Tokyo. He suffered from a paraesophageal haital hernia. His wife asked a stewardess to move the plaintiff to a place where he could lay down and massage his stomach to induce vomiting. The stewardess responded that there

---

9) 119 F.3d 1515 (11th Cir. 1997).
10) *Id.* at 1522.
11) 739 F.2d 130 (3rd Cir. 1984).

were no empty seats; but in fact, there were nine empty seats in the first class compartment. The plaintiff claimed the refusal to assist him aggravated his injury. The court responded that, "aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within Article 17."[12]

The US Supreme Court in *Air France v. Saks*,[13] denied recovery to a passenger who suffered deafness as a result of a routine depressurization during landing. The court found that injury to her inner ear was caused by sinus problems internal to her rather than by anything unusual about the flight. According to Justice O'Connor, an "accident" under Article 17 "arises only if a passenger's injury is caused by an *unexpected or unusual event or happening that is external to the passenger*. This definition should be flexibly applied after assessment of all circumstances surrounding a passenger's injuries."[14]

In *Olympic Airways v. Husain*,[15] the US Supreme Court applied the "definition" articulated in *Air France v. Saks* to allow recovery of damages for passenger who died aboard a flight because he was allergic to second-hand smoke. His wife had asked a flight attendant to move him to a seat farther away from the smoke, and the attendant had falsely informed her that there were no vacant seats. The court held that any chain in the causal link could be such an "unexpected or unusual event or happening that is external to the passenger", and that the flight attendant's failure to lend assistance was such an event.[16]

---

12) *Id.* at 133.

13) 470 U.S. 392 (1985).

14) *Id.* [emphasis supplied].

15) *Olympic Airways v. Husain,* 541 US 1007, 157 L. Ed. 2d 1146, 124 S. Ct. 1221 (2003).

16) Paul Stephen Dempsey, *Olympic Airways v. Husain: The US Supreme Court Gives the Term "Accident" a Whole New Meaning,* XXVIII Annals of Air & Space Law 333 (2003).

In dissent, Justice Scalia pointed to appellate court decisions in Australia and the United Kingdom which held that inaction could not be considered an "event", but was instead deemed a "non-event", and therefore not an accident under Article 17. Writing for the majority, Justice Thomas dismissed these as mere intermediate court decisions, not binding on the US Supreme Court.

The appellate cases relied on in dissent by Justice Scalia in *Hussein* and dismissed by Justice Thomas eventually made their way up to the highest courts in Australia and the United Kingdom. Both cases involved passengers who suffered from deep vein thrombosis [DVT] – also known as "economy class syndrome" - a situation where sitting in a cramped position for a long period of time causes the formation of blood clots in the legs, which if they break loose, can cause a stroke, heart attack, paralysis or death. The two opinions are interesting decisions indeed, inasmuch as the judges had the benefit of reflecting on the *Husain* decision. Though both courts emphasized the need to preserve uniformity between State parties to a common liability Convention, they both were critical of the analysis of the US Supreme Court in *Saks* and *Husain*.

Recall that *Saks* held that the accident causing the plaintiff's injuries must be "external to the passenger" and not the passenger's own "internal reaction" to normal flight operations. In *Saks*, the passenger's sinuses were plugged, and she suffered pain and a loss of hearing as a result of routine depressurization of the aircraft – a consequence suffered by no other passenger on the flight. In *Husain*, the passenger's asthma, triggered by second-hand smoke, caused his death – again, a consequence suffered by no other passenger on the flight.

Justice Scalia wrote:

> *A legal construction is not fallacious merely because it has harsh results. The Convention denies a remedy, even when outrageous conduct and grievous injury have occurred, unless there has been an "accident". Whatever that term means, it certainly does not equate to "outrageous conduct that causes grievous injury". It is a mistake to assume that the Convention must provide relief whenever traditional tort law would do so. To the contrary, a principal object of the Convention was to promote the growth of the fledgling airline industry by limiting the circumstances under which passengers could sue. . . . Unless there has been an accident, there is no liability, whether the claim is trivial . . . or cries out for redress.*[17]

Several opinions of the Australian High Court in *Povey v. Qantas Airways,*[18] a DVT case occurring on a flight from Sydney to London, rebuked the US Supreme Court's jurisprudential methodology. Judge McHugh pointed out that in *Husain,* the US Supreme Court had insisted that the term "accident" has two plausible but distinct definitions: (1) an unintended happening; or (2) "an unusual, fortuitous, unexpected, unforeseen, or unlooked for event, happening or occurrence." Judge McHugh disagreed:

> *With great respect for the U.S. Supreme Court, however, the Saks definition of "accident" does not exhaustively define the scope of Art. 17. . . In Saks, it would have made no sense for the Court to describe the operation of the pressurization as "a happening that is not . . . intended." The system operated independently of any actor who could have formed an intention to do an act that had consequences that were not intended or expected. For this reason, the Court relied on authorities that defined "accident" in terms of "an occurrence*

17) *Id.,* at 1234.
18) (2004), 2005 HCA 33.

associated with the operation of an aircraft".

But it would be contrary to one of the objects of the Convention to hold that Art 17 must be given only one of two available meanings that the Supreme Court has acknowledged. One of the objects of the Convention is to provide compensation for injured passengers without the need to prove fault on the part of the air carrier. . . .

The wording of Art 17 makes clear that the "accident" is associated with something that "took place on board the aircraft". This may include, for example, the actions of flight attendants. Those actions fall under the first category of events that are "accidents", that is to say, intended or voluntary acts that have unintended, unexpected or reasonably unforeseeable consequences. . . .[19]

In my opinion, the Saks definition, if read literally and as intended to be exhaustive, is too widely stated. It excludes cases where the causative conduct of a human actor has unintended and reasonably unforeseeable consequences and which, in ordinary speech, would constitute an "accident". . . . With great respect to the Supreme Court in Saks, it went too far in insisting that the harm-causing occurrence must always be "caused by an unexpected or unusual event or happening that is external to the passenger."[20]

Hence, reliance on the *Saks'* reformulation of the term "accident", rather that the plain meaning of the term itself, is to fail to extricate it from the facts of *Saks* in which it was formulated. It is telling that Justice O'Connor, who wrote *Saks,* joined in Justice Scalia's dissent in *Husain.* Judge McHugh went on to address whether inaction can constitute an "accident" under Article 17: "An omission may . . . constitute an 'accident' when it is part of or

19) *Id.* ¶ 68-70.
20) *Id.* ¶ 79.

associated with an action or statement. . . But a bare omission to do something cannot constitute an accident." [21] Judge Kirby concurred on this point, concluding, "In ordinary parlance, the absence of a happening, mishap or event may be an 'occurrence'. However, depending on the context, it will not usually qualify as an 'accident'."[22] Judge Callihan also concluded that "mere inaction could not constitute an event or an accident."[23]

Judge Kirby was kinder than Judge McHugh in *Povey*, finding *Husain* distinguishable and criticism unnecessary:

> *It is unnecessary for this Court to choose between the conflicting opinions expressed in Husain. . . [C]ases will present that are at the borderline of establishing an "accident" or failing to do so. There were peculiar features of the confrontation between the wife, the passenger and the flight attendant in Husain that arguably lifted the case from the classification as a "non-event" into classification as an unexpected or unusual happening or event and hence an "accident". Especially is this so because . . . the conduct of the flight attendant was in "blatant disregard of industry standards and airline policies" applicable at the time. . . .*
>
> *Any criticism of the logic of the reasoning of the two opinions in Husain is not this Court's business.*[24]

American aviation jurisprudence interpreting Article 17 again was subjected to a thrashing by the UK House of Lords in *In re Deep Vein Thrombosis and Air Travel Group Litigation*.[25] *Saks*, it will be recalled, defined the word "accident" in Article 17 as an "unexpected or unusual event or happening

21) *Id.* ¶ 85.
22) *Id.* ¶ 147.
23) *Id.* ¶ 204.
24) *Id.* ¶187-88.
25) [2005] UKHL 72, [2006] 1 A.C. 495.

that is external to the passenger." *Husain* and many other American cases in the decades since have relied heavily on that formulation in interpreting Article 17. Justice Thomas in *Husain* concluded that a plaintiff need only prove "some link in the [causal] chain was an unusual or unexpected event external to the passenger." Lord Scott voiced his disagreement with Justice Thomas:

> *It is not the function of the court in any of the Convention countries to try to produce in language different from that used in the Convention a comprehensive formulation of the conditions which will lead to article 17 liability. The language of the Convention itself must always be the starting point. . . . [A] judicial formulation of the characteristics of an article 17 accident should not, in my opinion, ever be treated as a substitute for the language used in the Convention.*[26]
>
> *I venture . . . to express my respectful disagreement with an approach to interpretation of the Convention that interprets not the language of the Convention but instead the language of the leading judgment interpreting the Convention. This approach tends, I believe, to distort the essential purpose of the judicial interpretation, namely, to consider what "accident" in Article 17 means and whether the facts of the case in hand can constitute an article 17 accident.*[27]

Hence, the US Supreme Court's reliance on the *Saks'* definition of "accident" in *Husain* constituted flawed jurisprudential methodology. Instead of asking whether the inaction of a flight attendant was an "unusual or unexpected event or happening external to the passenger", the court instead should have asked whether the flight attendant's inaction was an "accident." Imagine you are on a flight, and you ask a flight attendant to reseat you,

---

26) *Id.* ¶12.
27) *Id.* ¶ 22.

and she refuses. Would you return to your seat and explain to your (non-lawyer) traveling companion, "That flight attendant refused to reseat me; her refusal was an accident!"? Your companion would think you daft. The only way you might be able to extricate yourself from her low opinion of you would be to urge her to read Justice Thomas' opinion in *Husain,* though if she did she might then think you both daft. Now suppose instead you told your traveling companion, "That flight attendant refused to reseat me; that was a most unusual or unexpected event or happening." Now you only appear a bit odd rather than completely daft. If you companion had flown regularly, she likely would not think the flight attendant's refusal to assist you to be unusual or unexpected, but rather, in the contemporary airline industry, quite usual and expected.

Lord Scott observed the two requirements identified in *Saks* – that an event that is no more than the normal operation of the aircraft in normal conditions is not an "accident", and that to be an accident, the event that caused the damage must be external to the passenger – ruled out recovery for DVT, where no more can be said than the passenger was obliged to remain in cramped seating during an extended flight, and there was no industry practice to warn of the dangers of DVT or the precautions to be taken against it.[28] Moreover, the DVT cases lack the element relied upon by the US Supreme Court in *Husain* – no passenger experiencing discomfort was refused assistance from a flight attendant.[29]

---

28) *Id.* ¶ 23-24.

29) Even the lower courts of England have entered the fray. In a case finding no Article 17 accident in a passengers slip and fall on a piece of plastic while moving between seats on a Phoenix-London flight, after citing favorably to Justice Scalia's dissent in *Husain,* Judge West-Knights of the Oxford County Court repeated the words of Lord Scott in *Deep Vein Thrombosis:*

> The language of the Convention itself must always be the starting point. The function of the court is to apply that language to the facts of the case in issue. In order to do so and to explain its decision, and to provide a guide to other courts that may subsequently be faced with similar facts, the court may well need to try to

DVT cases have not fared well in the courts.[30] In *Blansett v. Continental Airlines*,[31] the US Court of Appeals for the Fifth Circuit, while acknowledging *Husain's* holding that a specific refusal to render requested assistance might constitute an Article 17 "accident", concluded that the failure of the carrier on a transatlantic Houston-London flight to warn passengers about DVT or what a passenger might do to avoid its adverse consequences was not an accident, even if there was an industry practice to warn. The court refused to adopt a *per se* rule that a departure from an industry standard constituted an "accident." Some departures may constitute accidents; some may not. The court concluded that Continental Airlines' failure to warn of DVT was not "an unusual or unexpected event", and therefore not an Article 17 accident.[32]

Similarly, in *Blotteaux v. Qantas Airways*,[33] the US Court of Appeals for the Ninth Circuit found that, "No evidence has been presented that anything unusual occurred aboard the Qantas flight in question, or that Blotteaux's

---

> express in its own language the idea inherent in the language used in the Convention. So a judge faced with deciding whether particular facts do or do not constitute an article 17 accident will often describe in his or her own language the characteristics that an event or happening must have in order to qualify as an article 17 accident. But a judicial formulation of the characteristics of an article 17 accident should not, in my opinion, ever be treated as a substitute for the language used in the Convention. It should be treated for what it is, namely, an exposition of the reasons for the decision reached and a guide to the application of the Convention language to facts of a type similar to those of the case in question.

Barclay v. British Airways, [2008] 1 Lloyd's Rep 661 [2008].

30) However, the airlines have not prevailed in all cases. In one unreported case, a US Federal District Court refused to dismiss defendant airlines' motions for summary judgment in instances where the carrier refused to divert a plane after a passenger suffered a stroke, and where a flight attendant refused to reseat a passenger claiming it the cause of her contracting DVT. *In re Deep Vein Thrombosis Litigation,* 2007 WL 3273553 (N.D.Cal. 2007). In a companion DVT case, that court also held that a two-hour confinement in an aircraft with no drink service, and no apparent reason for delay might also constitute an "accident." *In re Deep Vein Thrombosis Litigation,* 2008 WL 217478 (N.D.Cal. 2008).

31) 379 $F.3^{rd}$ 177 (5th Cir. 2004).

32) *Id.*, at 181.

33) 71 Fed. Appx. 566 (9th Cir. 2006).

development of DVT was triggered by anything other than his own internal reaction to the prolonged sitting activity attendant to any lengthy flight."[34] Again, DVT cases can be distinguished factually from *Husain* in that no passenger asked for, nor was denied, assistance from the airline cabin crew to avert its causes.

A Canadian court concurred with the UK and Australian courts that inaction is a non-event and not an Article 17 accident:

> *[The plaintiff's] DVT came as a result of his remaining seated for the whole trip. It was his inaction which caused his deep vein thrombosis; and inaction is a non-event, not an Article 17 accident. There was no unexpected or unusual event or happening that was external to this passenger. Deep vein thrombosis is endemic to long-distance travelling by air. Exercise during the flight is the answer.*[35]

Neither DVT nor PTSD[36] cases have fared well in the courts, but on sharply different grounds. In DVT cases, airlines have prevailed because there was no "accident". In PTSD cases, airlines have prevailed where there was no physical injury.[37]

There are sharp divisions between the analytical approaches of the highest

---

34) *Id.* See also *Caman v. Continental Airlines,* 455 F.3d 1087 (9th Cir. 2006): "It is well settled that the development of DVT as the result of international air travel, without more, does not constitute an 'accident' for purposes of Article 17 liability." *Id.*, at 4-5.

35) *Ben-Tovim v. British Airways,* [2006] O.J. No. 3027; 2006 ON.C. Lexis 3241 (2006). Similarly, an Ontario court in *McDonald v. Korean Air* [2002] O.J. No. 3655; 2002 ON.C. Lexis 482 (2002), concluded, "that in not advising passengers of the risk they assume, an airline may be negligent, but this negligence is not in itself an accident within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger." ¶ 17.

36) PTSD is the acronym for "Post Traumatic Stress Disorder".

37) *See* John F. Easton, Jennifer E. Trock & Kent A. Radford, *Post Traumatic "Lesion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention,* 68 J. Air L. & Com. 665 (2003).

courts in the United States, the United Kingdom and Australia. The US courts ask whether an injury occurring on board a flight constitutes an "unusual or unexpected event or happening external to the passenger." The UK and Australian courts ask whether the injury was caused by an "accident." While the US Supreme Court concludes that inaction can constitute an "unexpected event or happening", the UK, Australian, and Canadian courts conclude that inaction cannot constitute an "accident." These are great ships passing in a foggy night, hearing only their horns blowing in the distance, warning of a potential collision.

In the author's opinion, and with some chagrin as an American lawyer, the better jurisprudential methodology is that advanced by the highest courts in the UK and Australia – the focus should be on the language of Article 17 in the Warsaw and Montreal Conventions, not on the skilled redefinition of the term "accident" in *Saks.* Though that definition fit the facts of that case, it is beyond the competence of the judiciary to graft its interpretation of a word in a convention onto a multilateral convention as if it were an effective amendment thereto. Further, it was unnecessary for the US Supreme Court in *Husain* to conclude that the interpretations of the appellate courts in the UK and Australia – that found inaction not to constitute an Article 17 "accident" – were flawed. The facts in *Husain* – the refusal of a flight attendant to lend requested assistance – could well be interpreted to constitute action, not inaction.[38] Had the US Supreme Court so concluded, there would be no facial inconsistencies in these judicial opinions delivered by these respected courts of people, as Churchill observed, "separated by a common language.". However, the US methodological adherence to the *Saks* "definition" of "accident", as effectively grafted onto Article 17, still would place it at odds with the UK and Australian focus on the language of the

38) See the opinion of Lord Walker in *Deep Vein Thrombosis,* [2005] UKHL 72, [2006] 1 AC 495 (2005) ¶ 46.

Convention itself.

More recent cases have also addressed the issue of what constitutes an "accident." In *Prescod v. AMR,*[39] the US Court of Appeals for the Ninth Circuit found an accident where airline employees confiscated a 75-year old passenger's bag containing her life sustaining breathing devices and related medication. The defendant's employee erroneously assured the passenger that her bag it would remain with her during the journey, and that when removed would accompany her on the same flight. The court held that the defendant's failure to comply with a health-based request, like the rejection of the request for assistance in *Husain,* constituted an unusual or unexpected event or happening external to the passenger, and therefore was an Article 17 accident.[40]

Ⅲ. WHAT DAMAGES ARE RECOVERABLE?

The issue of whether emotional damages are recoverable has long troubled common law courts. The jurisprudence on this issue reflects several major concerns: (1) that emotional harm can be feigned, or imagined; (2) some harm is the price we pay for living in an industrial society; (3) emotional damages are difficult to measure; and (4) unconstrained liability could impede industrial and economic growth. Early on, no recovery was allowed for emotional harm.

---

39) 383 F.3d 861 (9th Cir. 2004).

40) *Id.*, at 868. The Supreme Court of Victoria, Australia, in *Malaysian Airline Systems v. Krum,* 8700 of 2001, [2005] VSCA 232 [2005], found an accident in a broken first class seat which, when it was manually reclined, had its lumbar support positioned so as to cause the passenger discomfort, aggravating his pre-existing lumbo-sacral disc degeneration. A federal district court in *Rafailov v. El Al Airlines,* 2008 US Dist. Lexis 38724 (S.D.N.Y. 2008), concluded that the presence of refuse (in this case a discarded plastic blanket wrapper) on the floor of an aircraft was not an "unusual or unexpected event or happening", and that the passenger's injuries caused by slipping on it were not recoverable under Article 17.

Though a liberal rule was crafted for recovery of physical damage (the "thin skull" rule, allowing recovery for unforeseeable physical harm), no such "thin psyche" rule emerged for emotional harm.

The early common law cases that moved away from the prohibition on recovery for emotional harm involved railroad defendants.[41) These courts adopted the "impact rule," which prohibited a plaintiff from recovering for emotional damages unless he or she had suffered an actual impact.[42) Gradually, some courts opted for a "zone of danger rule," allowing a plaintiff who was nearly injured, but in fact suffered no physical injury, to recover for emotional trauma. [43)

For example, a court denied recovery for a mother's emotional trauma when her child was negligently killed. The court reasoned that otherwise

> *liability [would be] wholly out of proportion to the culpability of the negligent tortfeasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point.*[44)

To protect against feigned claims of emotional harm, some courts have insisted that, in order to recover for emotional harm unrelated to physical harm, there must be a physical manifestation of emotional harm (e.g., hair falling out, hives, and shingles). [45)

Later, certain California courts decried "the hopeless artificiality of the zone of danger rule," and instead adopted an analysis which focuses on the proximity

---

41) See e.g., *Pentoney v. St. Louis Transit Co.,* 84 S.W. 140 (Mo. 1904).

42) *Marchica v. Long Island R.R.,* 31 F.3d 1197 (2nd Cir. 1994).

43) *Gillman v. Burlington Northern R.R. Co.,* 878 F.2d 1020 (7th Cir. 1989).

44) *Waube v. Warrington,* 258 N.W. 497 (Wis. 1934).

45) *Waube* was abandoned in Wisconsin in *Bowen v. Lumbermen's Mut. Cas. Co.*, 517 N.W.2d 432 (Wis. 1994), where it was found that "the physical manifestation requirement has encouraged extravagant pleading, distorted testimony, and meaningless distinctions between physical and emotional symptoms.

of the plaintiff to the injured person in terms of time, space and relationship.[46) But even the California courts have stepped back, concluding that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages are for an intangible injury."[47) Finding it necessary "to avoid limitless liability out of all proportion to the degree of a defendant's negligence . . . the right to recover for negligently caused emotional distress must be limited."[48) Thus, many courts have drawn lines on proximate cause grounds, precluding recovery for intangible injuries.

Turning now to private international air law, courts that have examined the *travaux preparatiores* of the Warsaw Convention of 1929 concluded that there was no discussion of whether its drafters contemplated recovery for emotional damage. They also concluded that recovery for emotional damages was not permitted by most civil or common law jurisdictions prior to 1929.

The Legal Committee of ICAO met at Madrid in 1951 and negotiated what would become the Hague Protocol of 1955. During these negotiations, the French representative urged that the term "affection corporelle" be substituted for "lesion corporelle." He reasoned that the word "lesion" meant a rupture in the tissue, and that recovery should be allowed for emotional damages unconnected to physical injury. The proposed amendment failed.[49) But the effort to amend the term suggests that it was commonly understood at the time that emotional damages – or at least those unaccompanied by physical injury – were not recoverable under Article 17.

The failed Guatemala City Protocol[50) would have expanded Article 17 in two significant ways. First, it would have substituted the word "event" for

46) *Dillon v. Legg,* 441 P.2d 912 (Calif. 1968).
47) *Thing v. La Chusa,* 771 P.2d 814 (Calif. 1989).
48) *Id.*
49) *See Morris v. KLM,* [2002] UKHL 7 ¶ 103 (UK House of Lords 2002).
50) The Guatemala City Protocol never received a sufficient number of ratifications to enter into force.

the much narrower phrase "accident." Second, it would have substituted the phrase "personal injury" for the much narrower term, "bodily injury", thereby allowing recovery for emotional damages. However, the Protocol would have disallowed recovery for "death or injury resulting solely from the state of health of the passenger."

In *Eastern Airlines v. Floyd*,[51] the US Supreme Court concluded that recovery under Article 17 of the Warsaw Convention requires either death or bodily injury; emotional damages alone will not suffice. This case involved a flight from Miami to the Bahamas that lost power in all three engines and was preparing to ditch in the ocean. Miraculously, the engines restarted and the plane returned safely to Miami. Nonetheless, the event frightened the passengers out of their wits, and many suffered severe emotional injury. The court concluded: "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury." No plaintiff alleged death, physical injury nor physical manifestation of injury. They alleged emotional damages only. *Floyd* stands for the proposition that emotional damages, alone, are not recoverable; its musings as to whether one may recover for physical manifestation of emotional harm are mere *dictum.*

Most courts have followed *Floyd's* holding. For example, in addressing a class action brought by passengers suffering only psychological injuries from an emergency landing, the Court of Appeal of Quebec (Canada) held that they could not recover.[52] Appellant had argued that "the Montreal Convention changed the state of the law with respect to compensation for psychological harm by an air carrier."[53] Following the exhaustive review of the *travaux preparatiores* in the U.S. Court of Appeals decision in *Ehrlich v. American*

---

51) 499 US 530 (1991).

52) *Plourde v. Service Aerien F.B.O. Inc.*

53) *Id.* at 30.

Airlines,[54] the Quebec Court held that the textual alterations of the Montreal Convention were not intended to alter the existing case law interpreting Article 17 under the Warsaw Convention, and that neither allowed recovery for psychological harm absent actual physical injury.[55] Further, the Court held that "the interpretation and application of international treaties cannot vary from country to country."[56] This is a point that should be kept in mind as one reads what follows.

The explicit imprecision and ambivalence of the Supreme Court's dictum in *Floyd* -- "we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries"[57] -- left the door ajar for numerous types of litigation.[58] For example, to recover under Article 17, need the emotional injury result from the physical harm, or may the physical harm result from the emotional injury? In other words, may the physical injury simply be the physical manifestation of emotional harm (e.g., what if plaintiff was not physically touched, but suffered hives, diarrhea, or hair loss because of her fright), or must there instead be some direct physical contact which produces a bruise, lesion, or broken bones causing emotional harm?[59] And if the accident causes emotional harm which, in turn, causes bodily injury, may the passenger recover for the emotional harm that precedes its physical manifestation, or only the pain and suffering flowing subsequently from the bodily injury? If death or direct bodily injury occurs, may the

54) 350 F.2nd 366 (2nd Cir. 2004).

55) *Plourde* at 47-48.

56) *Id.* at 55, 62.

57) 499 US 530, 552 (1991).

58) Jean-Paul Boulee, *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,* 24 Ga. J. Int'l & Comp. L. 501 (1995).

59) The court in *Burnett v. Trans World Airlines,* 368 F. Supp. 1152 (D.N.M. 1973) declined to adopt a contact rule: "Brief reflection allows one to pose many instances in which a bodily injury may result without any physical contact whatsoever. Such a sterile interpretation would surely do violence to the intent of the Warsaw framers."

passenger recover for pre-impact injuries?

One also must read Article 17 in conjunction with Article 29 which emphasizes that the remedies allowable under the Convention are exclusive for injuries caused by accidents to which the Convention applies. But what about the issue left unresolved in *Floyd* – does Warsaw cover a passenger who suffers emotional distress accompanied by bodily injury? One federal court identified several alternatives:

1. No recovery allowed for emotional distress;
2. Recovery allowed for all emotional distress, so long as bodily injury occurs; and
3. Only emotional distress flowing from the bodily injury is recoverable.[60]

In a case involving a crash during an aborted takeoff at New York's John F. Kennedy International Airport, the court in *Jack v. Trans World Airlines* embraced the last alternative, concluding:

> *The damage is not damage from the accident, it is damage from the bodily injury. Viewing emotional distress as damage caused by bodily injury does read a causal component into the phrase "damage sustained in the event of", but that is not prohibited under Floyd.*[61]

Jack embraced the requirement that the emotional distress be caused by the physical harm, fearing "the happenstance of getting scratched on the way down the evacuation slide [might] enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash."[62] The court noted that there were

---

60) *Jack v. Trans World Airlines, Inc.,* 854 F. Supp. 654 (N.D.Cal. 1994) [hereinafter Jack]. Actually, Jack enumerated four such criteria; yet it is difficult to understand the difference between two of the, so they have been consolidated in this article.

61) *Id.*, at 668.

62) *Id.*, at 668.

three types of potential injuries in cases like these:

1. *Impact injuries* – bodily injuries (e.g., bruises, lacerations, broken bones);
2. *Physical manifestations* – bodily injuries or illnesses (e.g., skin rashes, heart attacks) resulting from the distress one experiences during or following an accident; and
3. *Emotional distress* – psychic trauma that one experiences during or after the accident.[63)]

Actually, there is a fourth – pain and suffering (as distinguished from anxiety or trauma) flowing from impact injuries or physical manifestation injuries. *Jack* appears to be the mainstream view in US international aviation jurisprudence: recovery for emotional injury is permissible only to the extent that emotional damages are caused by physical injuries suffered.[64)] In *dicta,* the court also concluded that while one may not recover for pre-impact emotional harm, one may recover for the physical manifestation of emotional harm (though not for the emotional distress that led to it).[65)] Thus, according

---

63) *Id.*, at 664.

64) In fact, for a lower court decision, its impact has been uncommonly wide. See *Ehrlich v. American Airlines*, 360 F.3d 366, 376 (2nd Cir. 2004) (mental injuries are recoverable under Warsaw, and under the Montreal Convention, only if they were caused by physical injury), and cases cited therein; B*obian v. Czech Airlines*, 2004 U.S. App. Lexis 5898 (3rd Cir. 2004) (PTSD is not bodily injury under Warsaw); *Lee v. American Airlines*, 355 F.3d 386 (5th Cir. 2004) (mental anguish damages not recoverable under Warsaw); *In re Air Crash at Little Rock, Arkansas*, on June 1, 1999 (*Lloyd v. American Airlines*), 291 F.3d 503, 509 (8th Cir.) (Lloyd), cert. denied, 537 US 974 (2002) (physical manifestation of emotional harm not recoverable under Warsaw, but emotional damages caused by physical injury are recoverable); *Carey v. United Airlines*, 255 F.2nd 1044 (9th Cir. 2001); *Terrafranca v. Virgin Atlantic Airways*, 151 F.3rd 108 (3rd Cir. 1998); *In re Inflight Explosion on Trans World Airlines, Inc*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991) (Ospina), rev'd sub nom. on other grounds *Ospina v. Trans World Airlines*, 975 F.2d 35 (2d Cir. 1992). Only two U.S. federal district courts have embraced a different interpretation of art. 17 than *Jack*. See, *In re Air Crash at Little Rock, Arkansas on June 1, 1999*, 118 F. Supp. 2d 916, 918-21 (E.D. Ark. 2000) [hereinafter *Little Rock*], rev'd, Lloyd, 291 F.3d at 509-11; and *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 954 F. Supp. 175, 179 (N.D. Ill. 1997).

to the court in *Jack*, one may recover for physical injuries caused by an accident, and for the emotional damages caused by the physical injury. One also may recover for the physical manifestation of emotional distress caused by the accident. Presumably, though the court did not say so, one could recover for the pain and suffering caused by the physical manifestation of emotional harm caused by the accident (though it is unclear whether such emotional damages are limited to pain and suffering, or include such additional injury as grief, anxiety and sleeplessness, for example).

While agreeing that mental injuries flowing from physical injuries are recoverable, several US Courts of Appeals have disagreed with the *dicta* in *Jack*, holding that a plaintiff may not recover under Article 17 for physical manifestation of emotional harm.[66] However, in the UK House of Lords, Lord Steyn in *Morris v. KLM*,[67] while agreeing that pain caused by physical injury is recoverable, also, "would hold that if a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms, such as strokes, miscarriages or peptic ulcers, the threshold requirement of bodily injury is satisfied."[68]

In *In re Inflight Explosion on Trans World Airlines*,[69] the court recognized that there were three levels of hierarchy for cases involving psychic harm:

1. *Purely psychic harm* – this is the most troubling to courts;
2. *Mental anguish that precedes physical injury or death* – recovery is allowed only in some jurisdictions;
3. *Psychic harm that directly results from or occurs with physical injury*

---

65) *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 668 (N.D.Cal. 1994)

66) *See e.g., Carey v. United Airlines,* 255 F.3d 1044, 1052 (9th Cir. 2001); *Terrafranca v. Virgin Atlantic Airways,* 151 F.3d 108, 110-11 (3rd Cir. 1998); *Lloyd v. American Airlines,* 291 F.3d 503, 512 (8th Cir. 2002).

67) [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).

68) *Id.* ¶ 20, citing to a New York state court decision.

69) 778 F. Supp. 625 (E.D.N.Y. 1991).

– recovery is allowed in most jurisdictions as "parasitic" psychic injury.[70]

In *Inflight Explosion,* defendant airline argued that allowing recovery for emotional damages subsequent to physical injury would set a dangerous precedent; that any physical injury, no matter how trivial, would serve as a "tripwire" to allow recovery for injuries predominantly mental in nature. A slight scratch or bruise would allow recovery for emotional harm, while another passenger without physical injury would be denied recovery.

The court acknowledged that an argument could be made to exclude prior psychic damages, but that the case here involved a physical wounding preceding emotional harm. This case involved a bomb explosion aboard TWA flight 840 as it was approaching Athens en route from Rome. The bomb had been placed aboard the aircraft by a young woman who boarded in Cairo, set the bomb trigger timing device and exited the plane in Rome, proceeding to a self-congratulatory television appearance in Lebanon. Alberto Ospina was blown out of the plane by the explosion, causing massive burns and tearing his torso nearly in two. There was testimony that he probably lived between five and ten seconds after the explosion, and was aware that his body had been blown apart and that he was falling to the ground, for which the jury awarded his estate $85,000 for pain and suffering.[71] Heartlessly, TWA objected on grounds that pain and suffering are unrecoverable under Article 17 of the Warsaw Convention. However, the court read *Floyd* to permit recovery for psychic damage accompanying physical injury:

> *The passengers on the Eastern Airlines fight [in Floyd] were justifiably terrified as the plane lost altitude over the Atlantic, but no one was physically harmed or lost his life. The passengers' mental suffering is different from the agony Mr. Ospina suffered while in pain*

70) *Id.*, at 639.
71) *Id.*, at 626-27.

> *from his wounds, falling to certain death after the bomb tore through his body and he was ejected from the aircraft.*[72]

In *Terrafranca v. Virgin Atlantic Airways*,[73] the Third Circuit addressed a claim brought by a woman who allegedly suffered post traumatic stress disorder [PTSD], after the pilot on a Virgin Atlantic flight to London informed the passengers of a threat that there was a bomb aboard the aircraft. Mrs. Terrafranca became very upset during the flight, and the flight attendants attempted to calm her. She and the passengers safely disembarked at London Heathrow Airport, and it turned out that the bomb threat was a hoax. Nonetheless, Mrs. Terrafranca alleged that she continued to suffer from PTSD complicated by anorexia, causing her to lose 17 pounds and to lose the desire to socialize with her husband or go to work – alleged physical manifestations of emotional harm. She pointed to one grammatically dubious double-negative sentence in *Floyd* in which the Supreme Court said:

> *We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.*[74]

If we exclude the double negative language, the sentence, as edited, would read, "We conclude that an air carrier can be held liable under Article 17 when an accident has caused a passenger to suffer . . . physical manifestation of harm." Finding that this "physical manifestation" language referred only to "bodily injury", the Third Circuit concluded that her argument stretched *Floyd* too far: "[w]e reject the argument that we can ignore the full text of the [Supreme] Court's opinion and the plain language of Article 17 because of imprecise dictum at the end of the opinion."[75] The Third Circuit reiterated

---

72) *Id.*, at 638.
73) 151 F.3d 108 (3rd Cir. 1998) [hereinafter *Terrafranca*].
74) 499 US 530, 553 (1991).

Floyd's requirement of bodily injury, concluding that neither purely psychic injuries, nor the physical manifestation of harm, constitutes bodily injury under Article 17.[76]

Efforts to recover for PTSD also did not fare well in the Eighth Circuit. In *Lloyd v. American Airlines*,[77] Anna Lloyd was returning from a three week trip to Europe with a group of college singers when her flight crashed at Little Rock Airport. Her leg was punctured and scraped, and she suffered traumatic quadriceps tendonitis and smoke inhalation. The Eighth Circuit noted that the mainstream view followed *Jack*, in that "recovery for mental injuries is permitted only to the extent the distress is caused by the physical injuries sustained."[78] "[D]amages for mental injury must proximately flow from physical injuries caused by the accident."[79] In other words, mental injuries flowing from physical injuries are recoverable; physical manifestations of emotional harm are not.

Terrafranca for the Third Circuit and *Lloyd* for the Eighth Circuit US Courts of Appeals both stand for the proposition that physical manifestation of emotional harm does not constitute bodily injury under Article 17. So too concluded the Ninth Circuit in *Carey v. United Airlines*.[80] In *Carey,* a passenger was flying in the first class compartment on a flight from Costa Rica to New York while his three daughters were flying in coach. Two of his daughters came to the first class cabin where they complained to their father of earaches. The flight attendant scolded Mr. Carey after warning him that his children were not allowed to enter the first class cabin. Insults and profanity were exchanged between Mr. Carey and a representative of the

75)151 F.3d 108, 111 (3rd Cir. 1998)
76) *Id.*, at 111.
77) 291 F.3d 503 (8th Cir. 2002).
78) *Id.*, at 509.
79) *Id.*, at 510.
80) 255 F.3d 1044 (9th Cir. 2001).

Federal Aviation Administration on board, and the flight attendant allegedly humiliated Mr. Carey in front of the other first class passengers. As a result he suffered physical manifestations of emotional harm in the form of "nausea, cramps, perspiration, nervousness, tension, and sleeplessness."[81] Though the Ninth Circuit observed that the intentional infliction of emotional harm could constitute an "accident" under Article 17, nevertheless the physical manifestation of emotional harm does not satisfy the bodily injury requirement of Article 17. [82]

The issue of recovery for emotional damages has spawned a string of questionable jurisprudence. In *Weaver v. Delta Airlines*,[83] a U.S. District Court found "bodily injury" for PTSD in the form of physical evidence of actual trauma of brain cell structures; in *Weaver* the Court recognized that extreme stress could cause actual brain damage, ruling that "fright alone is not compensable, but brain injury from fright is."[84]

Some courts have held that third parties need not suffer bodily injury to recover; only the passenger must. A lower US federal court in *Lugo v. American Airlines* allowed a husband to recover for emotional distress and loss of consortium where his wife suffered the physical damage of coffee burns to her pelvic and gluteal areas while aboard an American Airlines flight bound for the Dominican Republic, arguing an analogy to the fact that wrongful death claims by spouses are recoverable.[85] The court held that Article 17 does not limit recoverable damages to those suffered by the passenger, but instead says that the carrier shall be liable for damage sustained in the event a

---

81) *Id.*, at 1046.
82) *Id.*, at 1048, 1051. See also Bloom v. Alaska Airlines, 36 Fed. Appx. 278 (9th Cir. 2002).
83) 56 F. Supp. 2d 1190 [hereinafter *Weaver*].
84) See also, *In re Crash at Little Rock, Ark.,* 118 F. Supp. 2d 916 (2000), rev'd 291 F.3d 503 (2nd Cir. 2002).
85) *Diaz Lugo v. American Airlines, Inc.* 686 F. Supp. 2nd 373 (D.P.R. 1988).

passenger suffered bodily injury. The wife sustained bodily injury, so the husband was allowed recover for his emotional damages.

Similarly, in *Kruger v. United Airlines*,[86] the court concluded that damages flowing from a loss of consortium were recoverable for a husband whose wife was struck in the head by a backpack swung by a fellow passenger on the jetway, causing her to lay in the lavatory, falling into unconsciousness during the flight. The court observed that Article 29 of the Convention leaves to domestic law the determination of what claim is cognizable and by whom.[87]

These decisions flow not from Article 17, but from Article 24 of the Warsaw Convention (replicated in Article 29 of the Montreal Convention of 1999) which provides that actions for damages may be brought "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." The US Supreme Court in *Zicherman v. Korean Airlines*[88] concluded that this provision leaves to domestic law the question of who may recover and what compensatory damages are available to them. Thus, apparently, Article 17 prohibits recovery where the passenger suffers only emotional damages; yet if local law allows recovery for a spouse's emotional injury for the passenger's death or bodily injury, the Convention has nothing to say about it.

It is paradoxical and incongruous that a passenger would be denied recovery of emotional damages unless he suffers personal physical injury, whereas a spouse can recover emotional damages absent his or her own personal physical injury.

In contrast to *Lugo* and *Kruger,* the Second Circuit in *Fishman v. Delta Air Lines*,[89] concluded that a mother could not recover for the emotional

86) 2007 US Dist. Lexis 14747 (N.D. Cal. 2007).
87) *Id.*, at 9.
88) 515 US 217 (1996).
89) 132 F. 3d 138 (2nd Cir. 1998).

injuries she suffered when witnessing a flight attendant spilling hot scalding water on her daughter's neck and shoulder. Presumably, however, the child could recover from the emotional harm suffered as a consequence of having her body burned by scalding water. Similarly, the U.S. District Court of Puerto Rico in *Montanez-Baez v. Puerto Rico Ports Authority*[90] denied recovery for a husband who claimed "great emotional pain and mental anguish" when he witnessed his wife fall on an escalator.

Another case arguably beyond the pale is *Air Crash Disaster Near Roselawn, Indiana*,[91] in which all 68 people aboard an American Eagle flight were killed. Rejecting *Jack*, the lower federal court held that the passengers could recover for the pre-impact terror they suffered before bodily injury and death, concluding

> *[o]ur decision here, which permits those passengers who sustained physical injury in the accident to recover for any pre-impact terror they may have experienced, is no more unfair than the rule recognized in Floyd which permits only passengers with physical injuries to recover at all.*[92]

Perhaps, but the lines drawn by Warsaw were not solely focused on fairness; they were instead focused on uniformity, and strict, albeit circumscribed, liability. Ultimately also, the highest court in a jurisdiction draws the lines, not the trial court, irrespective of perceived "fairness."

In *Floyd,* the US Supreme Court held that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. . . . [W]e express no view as to whether passengers can recover for mental injuries that are

---

90) 509 F. Supp. 2nd 152 (D.P.R. 2007).
91) 954 F. Supp. 175 (N.D. Ill. 1997).
92) *Id.*, at 179.

accompanied by physical injuries."[93] In a footnote to *El Al Israel Airlines v. Tseng,*[94] the Supreme Court tersely summarized *Floyd* as holding: "The Convention provides for compensation under Article 17 only when the passenger suffers 'death, physical injury, or physical manifestation of injury,'". . . .[95] Albeit in dictum, and in a footnote, *Tseng* appears to read *Floyd* as limiting recovery for emotional injury to three circumstances: (1) death; (2) physical injury; and (3) physical manifestation of emotional harm. Yet the Supreme Court has decided no case in which damages were sought in the latter case; hence its musings about the law on the subject of recovery for physical manifestation of emotional harm under the Warsaw or Montreal Conventions are but *dictum*. Still, this leaves open several questions:

- May the passenger recover for pain and suffering flowing from a bodily injury caused by the accident;
- May the passenger recover for all his emotional harm (including emotional harm which preceded bodily injury) if it results in development of a psychologically triggered physical manifestation of injury; and,
- May the passenger recover only for the pain and suffering flowing from the eruption of the physical manifestation of injury?

The UK House of Lords opinions in *Morris v. KLM Royal Dutch Airlines*[96] addressed the issue of whether a 16-year old girl could recover for the clinical depression she suffered after being fondled by another passenger aboard a flight from Kuala Lumpur to Amsterdam. Lord Nicholls wrote, "The expression 'bodily injury' or 'lesion corporelle', in article 17 means, simply, injury to the passenger's body."[97] However, he observed that the brain too, is part

93) 499 US 530, 552 (1991).
94) 525 US 155 (1999) [hereinafter *Tseng*].
95) *Id.*, at 166 n. 9.
96) [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).
97) *Id.* ¶ 3.

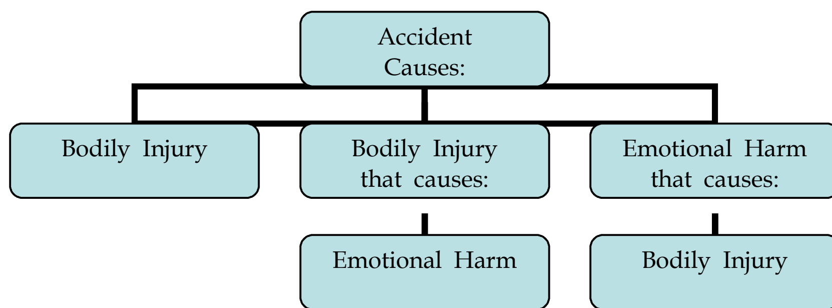
of the body, and sometimes subject to injury; the question as to whether the brain has suffered an injury is a question of medical evidence. The inference from his opinion is that when medical science has advanced to the level that it can point to an injury in the brain causing clinical depression, then such damages may be recoverable. However, a US federal district court allowed a claim for PTSD on the basis of medical evidence "that extreme stress causes actual physical brain damage, i.e., physical destruction or atrophy of portions of the hippocampus of the brain."[98]

In *Morris,* Lord Steyn examined the *travaux preperatoires* of the Warsaw Convention and found no discussion of the issue mental injury or illness. In 1929, it would have been thought that opening to door to strict liability for mental injury and illness would have stimulated an avalanche of intangible claims, which would have subjected the nascent airline industry to large exposure to litigation and expense. From his review, he concluded that, "a line was drawn in article 17 which excludes liability where a person suffers no physical injury but only mental injury or illness, such as clinical depression."[99]

Though Lord Steyn concluded that Article 17 does not allow one to recover for emotional damages where he has suffered no physical injury, he would allow recovery under two circumstances: (1) pain and suffering resulting from physical injury; and (2) in cases where there is physical manifestation of emotional harm, or in his words, "if a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms, such as strokes, miscarriages or peptic ulcers, the threshold requirement of bodily injury under the Convention is satisfied."[100] In *Morris v. KLM's* companion case of *King v. Bristow Hellicopters,*[101] the House of Lords allowed recovery for physical

98) *Weaver v. Delta Air Lines.* 56 F. Supp. 2d 1190 (D. Mont. 1999).
99) [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).,at ¶ 17.
100) *Id.*, ¶ 20.

manifestation of emotional harm (here, an ulcer, developed by a passenger aboard a helicopter that fell from the sky onto an oil platform in the North Sea frightening all aboard immensely, but drawing no blood). The following Chart is how we might diagram this approach to recoverable damages:



In negotiating the Montreal Convention of 1999, the Swedish delegation proposed, and the UK delegation supported a provision allowing recovery for mental damages. This change was opposed by the airline industry and the US delegation, among others. Finding insufficient support for its inclusion, the proposal was withdrawn.[102] But in what has been described as a "back door attempt to cloud the fact that recovery under the Convention is for 'bodily injury' only, some delegates proposed an 'interpretive statement' on this issue . . ."[103]

In an exhaustive review of the negotiating history of the question of potential recovery of emotional damages in the Montreal Convention, the US Court of Appeals for the Second Circuit in *Ehrlich v. American Airlines*,[104] concluded that there was no consensus or common understanding among the

---

101) *Id.*

102) *Id.*, ¶ 31.

103) Thomas Whalen, *The New Warsaw Convention: The Montreal Convention,* XXV Air & Space L. 304, 306, (2000), quoted in *Croteau v. Air Transat,* (2005), Montreal 200-06- 000053-051 (Qc. Sup. Ct.).

104) 360 F.3rd 366 (2nd Cir. 2004).

delegates on the issue of whether, and under what circumstances, recovery should be allowed for mental damages.[105] The US delegate at the conference erroneously asserted that the state of Article 17 jurisprudence in US courts at the time allowed recovery for mental injuries even when such injuries were not caused by physical injuries, and sought to include legislative history to the effect that the Montreal Convention was not intended to disturb that jurisprudence. The court held that those views were wrong, and that prevailing American jurisprudence required that, to recover for emotional damages, those emotional damages must have been caused by physical injury.[106] That would make the far right column in the foregoing Chart unrecoverable.[107]

Dr. Kenneth Rattray, who served as President of the Conference, led the "Friends of the Chairman" working group, a select group of the delegates.[108] Dr. Rattray insisted that in coming to an accommodation of a definition of the term "injury" under Article 17, the drafting changes "were not intended to interfere with the jurisprudence under the Warsaw System of liability."[109] In fact, there was no accommodation, no consensus, and no amendment of the definition of "accident" by either the Friends of the Chairman nor the conference as a whole. The court in *Ehrlich* observed that "the views expressed by such Friends were the opinions of a select and limited group of delegates whose views did not necessarily correspond to those of many other delegates who did not sit on the working group."[110] Perhaps more importantly,

---

105) *Id.*, at 393.

106) *Id.*, at 400.

107) Damages would be unrecoverable unless perhaps recovery is sought for emotional damages caused by physical manifestations of emotional harm, such as the pain felt from shingles.

108) As Solicitor General of Jamaica, Dr. Rattray was an odd choice for such a leadership role in the drafting of the Montreal Convention, as Jamaica was among the minority of States that had never ratified the Warsaw Convention or any of its Protocols.

109) 360 F.3rd at 384.

110) *Id.*, at 392.

encouraging an expansive jurisprudence of additional damages runs directly counter to the fundamental purpose of both the Warsaw Convention and the Montreal Convention – to achieve uniformity of the law of carrier liability in international civil aviation.

As noted above, three US Circuit Courts of Appeals in *Terrafranca, Lloyd,* and *Carmeu* have held that physical manifestation of emotional harm is not recoverable under Article 17, while the UK House of Lords in *Morris v. KLM* concluded that they were. Though the US Supreme Court has not yet had occasion to rule on the issue, the stage is set for jurisprudential confrontation yet again between the Titans of jurisprudence.

IV. CONCLUSION

Issues of what constitutes an "accident" and under what circumstances emotional damages are recoverable under Article 17 have proceeded under different jurisprudential paths in the US, UK and Australia. That the highest courts in all three of these influential common law jurisdictions have spoken on the subject is of some importance to the development of Air Law worldwide. That these courts have disagreed so fundamentally on these important issues however, is troubling.

This *Clash of the Titans* does not square well with a Convention intended for the *Unification of Certain Rules for International Carriage by Air*. Both the Warsaw Convention of 1929 and the Montreal Convention of 1999 are so titled. Hence, the unification of private international Air Law is their principal purpose, a purpose seriously frustrated by divergent interpretations.

Abstract

This Article examines what is contemplated by the term “accident,” what is meant by “bodily injury,” and what damages are recoverable under Article 17 of both the Warsaw Convention of 1929 and the Montreal Convention of 1999. It examines differences in the jurisprudence of the US Supreme Court, the UK House of Lords, and the Australian High Court in interpreting these terms, and the problems posed by these different interpretations in achieving the uniformity of international aviation liability law contemplated by the Warsaw and Montreal Conventions

Key Words : Accident, Bodily injury, International air law, Clash of Titans