Institute of Air & Space Law

International Air Carrier Liability for Death & Personal Injury: To Infinity and Beyond

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The Warsaw Regime, or M99 Apply if:

The place of departure and place of destination are:

- ✈ **both in "Warsaw System" or M99 States**

or

- ✈ **in the same "Warsaw System" or M99 State with an agreed stopping place in another State**

And both States have ratified a common liability Convention or Protocol.

Chubb & Son v. Asiana Airlines

The US had ratified the Warsaw Convention but not the Hague Protocol of 1955.
South Korea had ratified the Hague Protocol, but not the Warsaw Convention.

Because the US and South Korea were “not in treaty relations with regard to the international carriage of goods by air”, federal subject matter jurisdiction was deemed not to exist. The court concluded that “no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States.”

THE IMPACT OF CHUBB

- Chubb holds that the nation of the origin and destination of the passenger's itinerary must have ratified the identical treaty. Korea and the U.S. were held to have ratified different treaties – the Hague Protocol and the Warsaw Convention, respectively. Hence, no liability convention was common to both States.
- The U.S. ratified Montreal Protocol No. 4, which entered into force for the United States on March 4, 1999. Though it principally addresses cargo issues, it brings the US under the Hague Protocol of 1955. Just to be sure, the U.S. separately ratified the Hague Protocol, nearly half a century after it was drafted.
- *Chubb* also became a major catalyst for U.S. Senate ratification of the Montreal Convention of 1999, which entered into force on November 4, 2003.

COMPEN$ATION HAS ALWAYS BEEN THE PROBLEM

- *Warsaw Convention of 1929*
- Capped liability at $8,300, unless the carrier engaged in wilful misconduct

- *The Hague Protocol of 1955*
- Doubled liability to $16,600

- *The Montreal Agreement of 1966*
- Raised liability to $75,000

THE MONTREAL CONVENTION OF 1999

- The Montreal Convention establishes a two-tier liability system, with strict liability up to 100,000 SDRs (US $146,000), and presumptive liability in an unlimited amount;
- The claimant may recover court costs and attorney's fees if the amount of damages awarded exceeds any written settlement offer made within six months of the accident but before suit is commenced;
- For personal injury or death, the Convention establishes a "fifth jurisdiction" of the passenger's residence, so long as the carrier (or its code-sharing partner) does business there; inexplicably, claims for damage or loss to the passenger's accompanying luggage do not enjoy the fifth jurisdiction;
- "Punitive, exemplary or other non-compensatory damages" are not recoverable;
- There is no provision for recovery of emotional damages; and
- States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention

Montreal 99 supplants Warsaw and its progeny for States that ratify it.

LIABLITY CONVENTION RATIFICATIONS

- UN Members – 191 States
- The Chicago Convention – 190 States
- The Warsaw Convention – 151 States
- The Hague Protocol – 136 States
- The Guadalajara Convention – 84 States
- Montreal Protocol No. 4 – 53 States
- The Montreal Convention of 1999 – 86 States

See

http://www.icao.int/cgi/airlaw.pl for an up-to-date listing of High Contracting Parties.

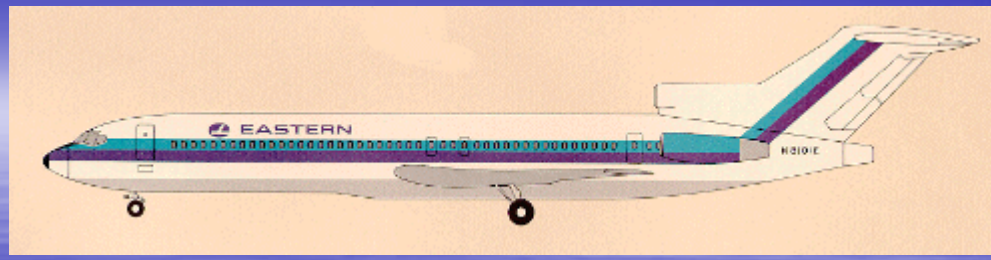
ACCIDENT, INJURY, CAUSATION & LOCATION

- Significantly, the Montreal Convention of 1999 made no significant change to Article 17 of the Warsaw Convention:
- "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."

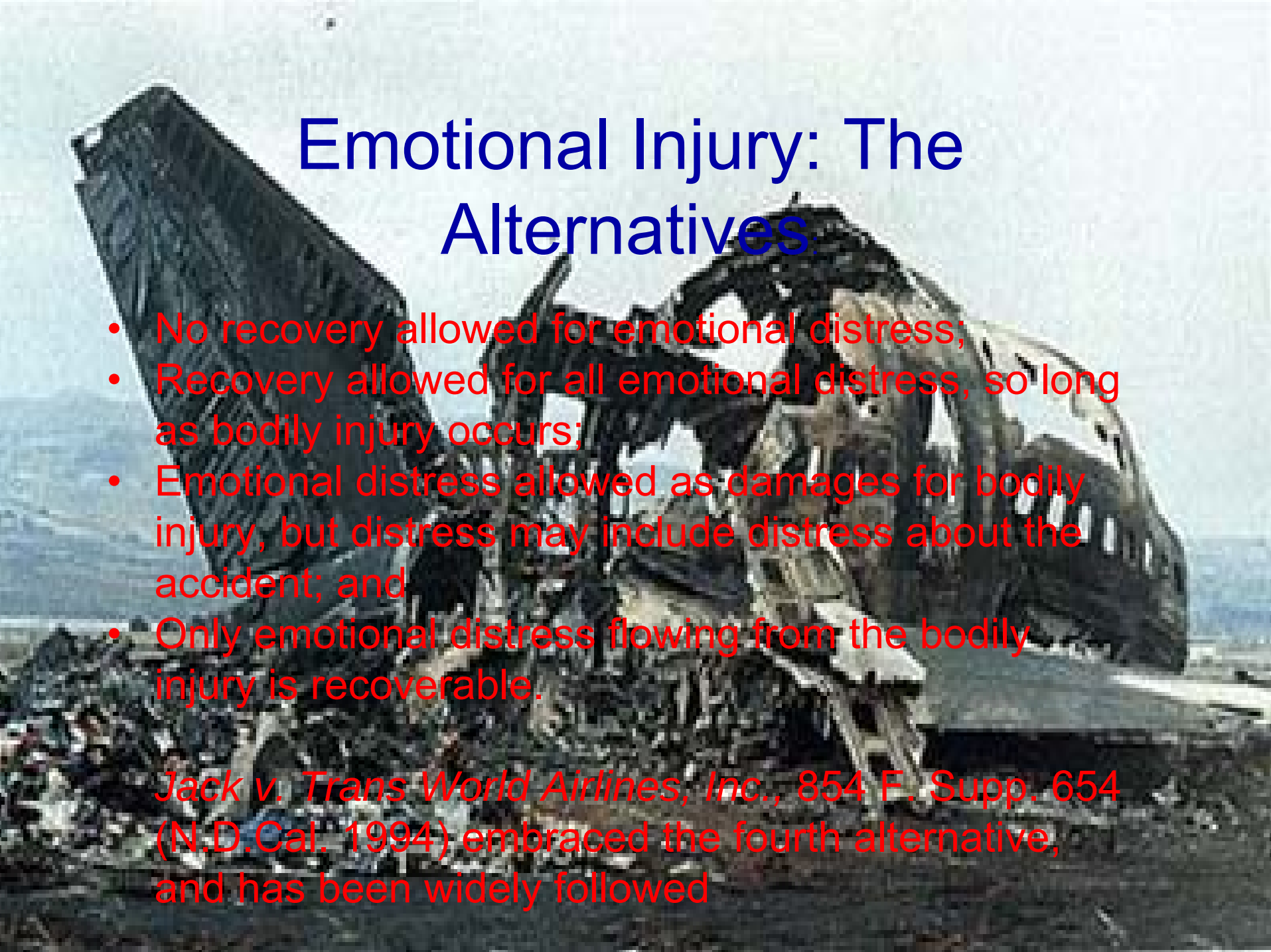
Issues arising under Article 17

- What kind of "accident" must have occurred?
- What types of injuries are contemplated by the term "damage sustained in the event of death or bodily injury"?
- Where does one draw the line at "embarking or disembarking"?

Eastern Airlines v. Floyd



- Several passengers claimed to have suffered mental distress when their aircraft, bound for the Bahamas, lost power in all three engines and began a sharp and terrifying descent. The flight crew informed the passengers that it would be necessary to ditch the plane in the ocean. Almost miraculously, the pilots managed to restart the engines and land the jet safely back at Miami International Airport.
- The U.S. Supreme Court held that Article 17 does not allow recovery for purely mental injuries. This conclusion was based on the French translation (interpreting "lesion corporelle" to mean "bodily injury"),and on the primary purpose of the Warsaw Convention -- limiting liability in order to foster growth of the infant airline industry. Writing for the majority, Justice Marshall concluded:
- "*The narrower reading of 'lesion corporelle' also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. . . . Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read 'lesion corporelle' in a way that respects that legislative choice.*"



Emotional Injury: The Alternatives

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

Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 (N.D.Cal. 1994) embraced the fourth alternative, and has been widely followed

Air France v. Saks

- Facts: a passenger lost her hearing in one ear after a routine depressurization of an Air France aircraft landing normally at Los Angeles.
- The definition of an accident under Article 17 should be flexibly applied after assessing all the circumstances surrounding the passenger's injuries;
- The “event or happening” that caused the passenger's injury must be abnormal, "unexpected or unusual";
- The event must be "external to the passenger", and not the passenger's own "internal reaction" to normal flight operations; and
- Where the evidence is contradictory, the trier of fact must determine whether an accident, so defined, has occurred.
- in *Saks*, the U.S. Supreme Court noted that liability extends under Article 17 "only if a passenger's injury is caused by an unexpected or unusual event or happening that is *external to the passenger*. . ."

El Al Israel Airlines v. Tseng

- Ms. Tsui Yuan Tseng alleged emotional injury because of a security search at JFK in which she was forced to drop her jeans to mid-hip and was wanded by a female security guard.
- But emotional injury unaccompanied by physical injury is not recoverable under *Eastern Airlines v. Floyd,* 499 U.S. 530 (1991).
- And it was not clear that Ms. Tseng suffered an Article 17 "accident" under *Air France v. Saks,* 470 U.S. 392 (1985), which defined an accident as "an unusual or unexpected event or happening . . . external to the passenger."
- Nevertheless, in *Tseng,* the Supreme Court held that Warsaw "precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention."
- In other words, recovery for an injury occurring on an international itinerary, on board the aircraft or in the course of embarking or disembarking, "if not allowed under the Convention, is not available at all." Under such circumstances, Warsaw provides the exclusive remedy, and no separate common law cause of action exists.
- In a footnote, the Supreme Court observed, "It is questionable whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in Saks."

WALLACE v. KOREAN AIRLINES

Three hours into a flight from Seoul to Los Angeles, Brandi Wallace “awoke in the darkened plane to find that Mr. Park [the male passenger seated next to her] had unbuckled her belt, unzipped and unbuttoned her jean shorts, and placed his hands into her underpants to fondle her.”

The Second Circuit concluded this act of sexual predation was an Article 17 accident, whether or not an accident must be an incident of air travel.

The court in Wallace wrote:

- "[I]t is plain that the characteristics of air travel increased Ms. Wallace's vulnerability to Mr. Park's assault. When Ms. Wallace took her seat in economy class on the KAL flight, 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. . . .
- "[I]t is undisputed that for the entire duration of Mr. Park's attack not a single flight attendant noticed a problem. And it is not without significance that when Ms. Wallace woke up, she could not get away immediately, but had to endure another of Mr. Park's advances before clambering out to the aisle."

Deep Vein Thrombosis and Air Travel Group Litigation,
[2003] EWCA Civ. 1005, 2003 WL 21353471 (July 3, 2003).

the Master of Rolls of England's Court of Appeal concluded, "I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident."

Qantas Ltd. v. Povey
[2003] VSCA 227 p. 17, 2003 WL 23000693 (Dec. 23, 2003).

the appellate division of the Supreme Court of Victoria, Australia concluded that "a failure to do something . . . cannot be characterized as an event or happening . . . ." The court went on to opine that a pilot's failure to drop the landing gear would not constitute an Article 17 accident, but the resulting crash of the aircraft would.

Olympic Airways Husain

- Recovery allowed for the death of an asthma-suffering passenger exposed to second-hand smoke.
- The refusal of a flight attendant to assist a passenger who requested assistance constitutes “an unexpected or unusual event or happening” under *Saks*.
- *Both* the passenger’s exposure to the second-hand smoke, *and* the refusal of the flight attendant to assist the passenger, contributed to Husain’s death.
- Inaction can be an accident irrespective of the conclusions of appellate courts in England and Australia.
- The *Guatemala City Protocol* would have substituted the word “event” for the narrower term, “accident”.
- But it has received only 7 ratifications and 5 accessions, well short of the 30 needed to enter into force.

Day v. Trans World Airlines

- What does this phrase mean: *in the course of any of the operations of embarking or disembarking?*
- 1. What was the activity of the passengers at the time of the accident;
- 2. What control or restrictions was placed on their movement by the carrier;
- 3. What was the imminence of their actual boarding; and
- 4. What was the physical proximity of the passengers to the gate?

TWA
TRANS WORLD AIRLINES

Areas of Conflict Remain

Coupling the expansive interpretation given an "accident" in Wallace (to an act of sexual predation) and Husain (to a failure of a flight attendant to assist a passenger) inspired by the unsavory exclusiveness mandated by Tseng,

with the entry into force of the Montreal Convention of 1999,

the airline industry is now subject absolute liability up to 100,000 SDRs, and presumptive liability beyond, for a wider array of "unusual or unexpected" events or happenings than at any time in the history of commercial aviation.

Article 21 *The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:*
(a) *such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or*
(b) *such damage was solely due to the negligence or other wrongful act or omission of a third party.*

Moreover, Montreal 99 did not clarify whether an "accident" must be an incident of air travel, and the circumstances under which recovery may be had for emotional damages.

Hence, there is much fertile soil for lawyers to plough.

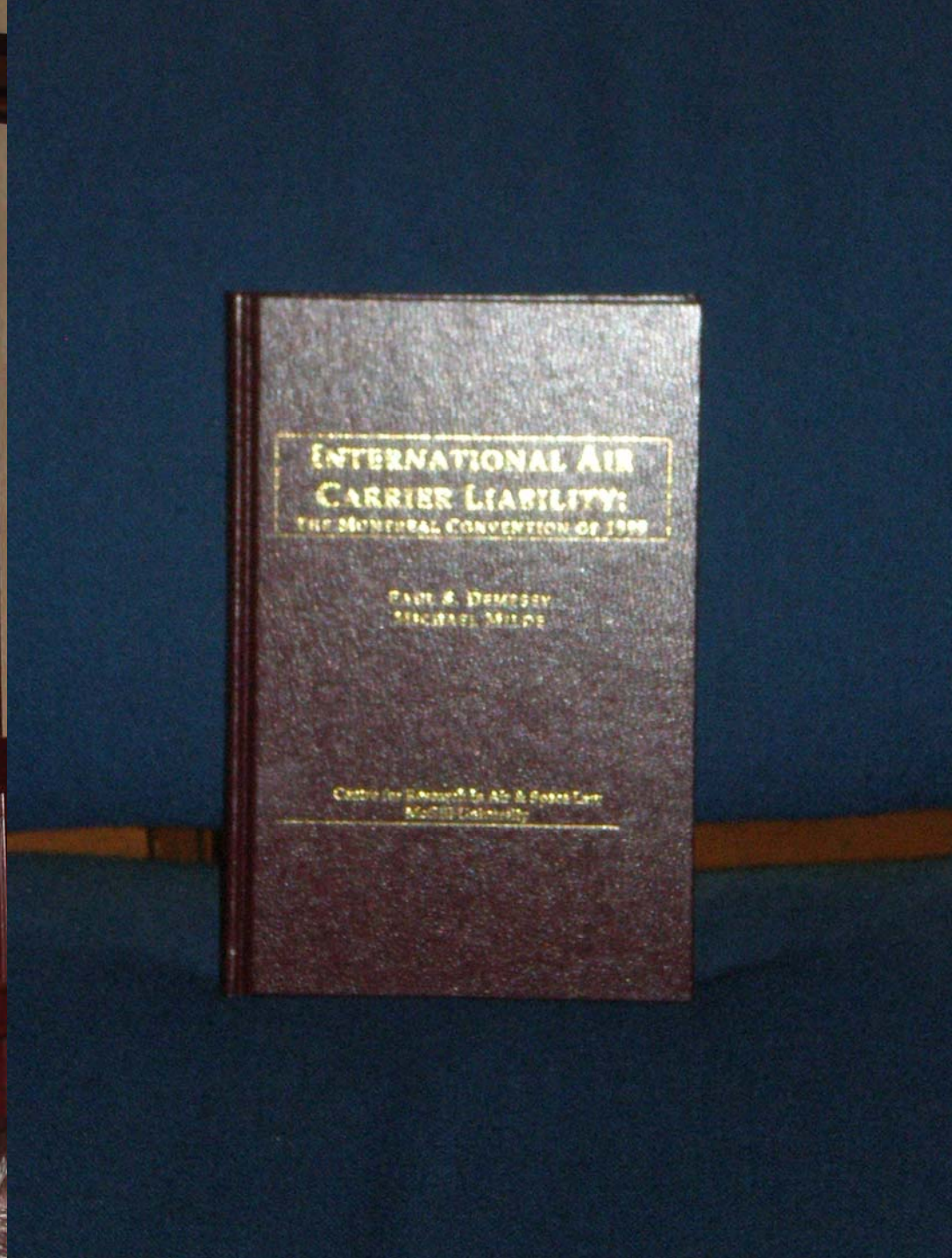
Plaintiff Advantages of M99

- No proof required of carrier negligence … need only prove the injury resulted from an "accident"
- Strict liability up to 100,000 SDRs bodily injury or death
- Nearly certain recovery beyond (to the extent of provable damages)
- Ability to file suit in home country
- But . . . No recovery if only were emotional, and no recovery of punitive damages.

Carrier Defenses

- The transportation was not "international carriage"
- The event was not an "accident"
- The event occurred before embarkation or after disembarkation
- The damage did not constitute "bodily injury"
- The plaintiff was contributorily negligent (liability discounted by π's fault)
- Above 100,000 SDRs, the carrier was not negligent, or the damage was "solely" caused by a third party.


Hilton
Montreal Bonaventure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