

# ACCIDENTS & INJURIES IN AIR LAW: THE CLASH OF THE TITANS ♣

by

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## INTRODUCTION

When the Warsaw Convention of 1929 or the Montreal Convention of 1999 is deemed to apply,<sup>1</sup> the court must determine whether recovery is permitted under it. The most critical provision in much 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*

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\* Copyright © 2008 by Paul Stephen Dempsey. 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.

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<sup>1</sup> Pursuant to Article 1, the treaty applies when travel is according to an international itinerary originating and destined to two different contracting States, or from and to a single contracting State with an agreed stopping place in another State.

*caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*<sup>2</sup>

The Montreal Convention of 1999 made inconsequential changes in the language of Article 17:<sup>3</sup>

*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.*

Though the phrase “or wounding of a passenger” was not carried forward into M99, it appears that the language was merely deleted as being redundant of the phrase “bodily injury” which was retained in M99. Hence, irrespective of whether the Warsaw or Montreal Convention applies, the requirements for recovery are virtually identical, and the past jurisprudence based on the Warsaw system remains highly relevant, if not determinative.<sup>4</sup> 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.<sup>5</sup>

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<sup>2</sup> *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.

<sup>3</sup> “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 *Montreal Convention* or M99], art. 17.

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

<sup>5</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489 (1991) [hereinafter *Floyd*] (the *Warsaw Convention* may or may not allow recovery for mental or psychic injuries unaccompanied by

This article addresses two of those issues: (1) what is contemplated by the term “accident”; and (2) what is meant by “bodily injury”<sup>6</sup> (i.e., what damages are recoverable under these Conventions).

## WHAT IS AN ACCIDENT?

Depending upon whether damages are sought for personal injury or property damage, the treaties use different triggering language. The Warsaw Convention (and the Montreal Convention of 1999) used the term “accident” as the trigger for recovery of passenger death or bodily injury. The Warsaw Convention used the broader term “occurrence” as the trigger for recovery of loss or damage to luggage or goods, while the Hague Protocol used the word “event” for property damage. The failed Guatemala City Protocol would have substituted the word “event” for “accident” in Article 17. The plain meaning<sup>7</sup> of these terms suggests that the drafters intended narrower language triggering recovery for personal damage than property damage.

The term “accident” has spawned much litigation. It seems odd that it would. Any child on a playground can distinguish between an injury caused by an “accident”, versus one caused on purpose, or “intentionally.” A child who

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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).

<sup>6</sup> The term “death” is rather straightforward; it is the absence of life.

<sup>7</sup> See *Chan v. Korean Air Lines*, 490 U.S. 122 (1989).

accidentally trips another elicits one type of cry from the injured child. A child who intentionally trips another elicits a sharper, and more of a shrill response, and sometimes a brawl. In lay parlance, an accident is something done accidentally, not on purpose. An accident could be caused by negligence, but it could also be caused by activities either devoid of fault or consented to, such as rough play. In football, a kick by one player of the shin of another could either be accidental or intentional, and the circumstances of the event would objectively reveal whether the kick was an “accident” or “on purpose.” In legal parlance, the term “accident” has evolved into something quite different.

Before the U.S. Supreme Court addressed the issue, several intermediate appellate courts attempted to address the issue of what constitutes an “accident.” Two are mentioned here.

In *Krysz v. Lufthansa German Airlines*,<sup>8</sup> 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, so that he could go to a hospital, before its scheduled arrival in Frankfurt. 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.”<sup>9</sup>

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<sup>8</sup> 119 F.3<sup>rd</sup> 1515 (11<sup>th</sup> Cir. 1997).

<sup>9</sup> 119 F.3<sup>rd</sup> at 1522.

In *Abramson v. Japan Airlines*,<sup>10</sup> the US Court of Appeals for the Third Circuit addressed a claim brought against Japan Airlines for its refusal to seat him in the first class compartment on a flight from Anchorage to Tokyo. He suffered from a paraesophageal hiatal 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, and she responded that there were no empty seats; in fact, there were nine empty seats in the first class compartment. The plaintiff claimed that her 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.”<sup>11</sup>

In *Air France v. Saks*,<sup>12</sup> the U.S. Supreme Court 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.”<sup>13</sup>

In *Olympic Airways v. Husain*,<sup>14</sup> the U.S. Supreme Court applied this “definition” to allow recovery of a 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

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<sup>10</sup> 739 F.2<sup>nd</sup> 130 (3<sup>rd</sup> Cir. 1984).

<sup>11</sup> 739 F.2<sup>nd</sup> at 133.

<sup>12</sup> 470 U.S. 392 (1985).

<sup>13</sup> Id. [emphasis supplied].

<sup>14</sup> *Olympic Airways v. Husain*, 541 U.S. 1007, 157 L. Ed. 2d 1146, 124 S. Ct. 1221 (2003).

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. In dissent, Justice Scalia pointed to appellate court decisions in Australia and the United Kingdom which held that inaction could not be an “event”, but was instead 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 U.S. Supreme Court.

The appellate cases relied on in dissent by Justice Scalia 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, a 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 United States Supreme Court in *Saks* and *Husain*.

Recall that *Saks* held that the accident causing 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 *Husein*, 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.*<sup>15</sup>

Several opinions of the Australian High Court in *Povey v. Qantas Airways*,<sup>16</sup> a DVT case (this one occurring on a Sydney to London flight), rebuked the U.S. Supreme Court’s jurisprudential methodology. Judge McHugh pointed out that in *Husain*, the U.S. 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*

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<sup>15</sup> *Olympic Airways v. Husain*, 124 S Ct 1221, 1234 (2004).

<sup>16</sup> M167/2004, 2005 HCA 33 (2005).

*defined “accident” in terms of “an occurrence 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. . . .<sup>17</sup>*

*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.”<sup>18</sup>*

Hence, reliance on the *Saks*’ reformulation of the term “accident” rather than 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 the 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 associated with an action or statement. . . . But a bare omission to do something cannot constitute an accident.”<sup>19</sup> Judge Kirby

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<sup>17</sup> Id. ¶ 68-70.

<sup>18</sup> Id. ¶ 79.

<sup>19</sup> Id. ¶ 85.



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’.”<sup>20</sup> Judge Callihan too, concluded “mere inaction could not constitute an event or an accident.”<sup>21</sup>

But in *Povey*, Judge Kirby was kinder than Judge McHugh, 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.*<sup>22</sup>

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*.<sup>23</sup> *Saks*, it will be recalled, defined the word “accident” in Article 17 as an “unexpected or unusual event or happening that is external to the passenger.” *Husain* and many other American cases in the decades since

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<sup>20</sup> Id. ¶ 147.

<sup>21</sup> Id. ¶ 204.

<sup>22</sup> Id. ¶187-88.

<sup>23</sup> [2005] UKHL 72, [2006] 1 AC 495 (2005).

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 said this about that:

*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.<sup>24</sup>*

*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.<sup>25</sup>*

Hence, the U.S. 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 of 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, and she refuses. Would you return to your seat and explain to your traveling companion, “I have just had an accident!”? Your companion would think you daft. Now suppose instead you

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<sup>24</sup> Id. ¶12.

<sup>25</sup> Id. ¶ 22.

told your traveling companion, “I have just had an unusual or expected event or happening.” Now you just appear a bit odd rather than completely daft.

Lord Scott observed that 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.<sup>26</sup> Moreover, the DVT cases do not have the element relied upon by the U.S. Supreme Court in *Husain* – no passenger experiencing discomfort was refused assistance from a flight attendant.<sup>27</sup>

DVT cases have not fared well in the courts. In *Blansett v. Continental Airlines*,<sup>28</sup> the U.S. Court of Appeals for the Fifth Circuit, though 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

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<sup>26</sup> Id. ¶ 23-24.

<sup>27</sup> Even the lower courts of England have entered the fray. In a case finding no Article 17 accident in a passenger’s 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 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).

<sup>28</sup> 379 F.3<sup>rd</sup> 177 (5<sup>th</sup> Cir. 2004).

transatlantic Houston-London flight to warn passengers about DVT or what a passenger might do to avoid its adverse consequences was not, 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 might constitute accidents; some might 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.<sup>29</sup>

Similarly, in *Blotteaux v. Qantas Airways*,<sup>30</sup> the U.S. 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 development of DVT was triggered by anything other than his own internal reaction to the prolonged sitting activity attendant to any lengthy flight.”<sup>31</sup> Again, DVT cases can be distinguished factually from *Husain* in that no passenger asked for, and was denied, assistance from the airline cabin crew to avert its causes.

A Canadian court also concurred with the UK and Australian courts that inaction is a non-event rather than 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.”<sup>32</sup>

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<sup>29</sup> 379 F.3<sup>rd</sup> at 181.

<sup>30</sup> 171 Fed. Appx. 566 (9<sup>th</sup> Cir. 2006).

<sup>31</sup> *Id.* See also *Caman v. Continental Airlines*, 455 F.3<sup>rd</sup> 1087 (9<sup>th</sup> 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.

<sup>32</sup> *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,

Both DVT and PTSD<sup>33</sup> cases generally have not 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.

But note the sharp divisions between the analytical approaches of the highest courts in the United States, the United Kingdom and Australia. The U.S. courts ask whether an injury occurring on board a flight constitutes an “unusual or unexpected event or happening external to the passenger.” The U.K. and Australian Courts ask whether the injury was caused by an “accident.” While the U.S. Supreme Court concludes that inaction can constitute an “unexpected event or happening”, the U.K., 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 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 U.K. and Australia – the focus should be on the language of Article 17 in the Warsaw and Montreal Conventions, not on its 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 U.S. Supreme Court in *Husain* to conclude that the interpretations of the appellate courts in the U.K. and Australia – that found inaction not to constitute an Article 17 “accident” – to be flawed. The facts in *Husain* – the refusal of a flight attendant to lend requested assistance

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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.” *Id.* ¶ 17.

<sup>33</sup> PTSD = Post Traumatic Stress Disorder.

- could well be interpreted to constitute action, not inaction.<sup>34</sup> Had the U.S. Supreme Court so concluded, there would be no facial inconsistencies in these judicial opinions delivered by these respected courts separated a common language and by great oceans, though the US methodological adherence to the *Saks* “definition” of “accident” still would place it at odds with the UK and Australian focus on language of the Convention itself.

More recent cases also have addressed the issue of what constitutes an “accident.” In *Prescod v. AMR*,<sup>35</sup> the U.S. Court of Appeals for the Ninth Circuit found an accident in confiscation by airline employees of a 75-year old passenger’s bag containing her life sustaining breathing devices and related medication. The court held that the defendant’s failure to comply with a health-based request - their erroneous assurances by that the bag would remain with her during her journey, and that the bag when removed would accompany her on the same flight - 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.<sup>36</sup>

## WHAT DAMAGES ARE RECOVERABLE?

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<sup>34</sup> See the opinion of Lord Walker in *Deep Vein Thrombosis*, [2005] UKHL 72, [2006] 1 AC 495 (2005) ¶ 46.

<sup>35</sup> 383 F.3<sup>rd</sup> 861 (9<sup>th</sup> Cir. 2004).

<sup>36</sup> 383 F.3<sup>rd</sup> 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.

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

The early English cases that moved away from the prohibition on recovery for emotional harm involved railroad defendants.<sup>37</sup> These early courts adopted the “*impact rule*,” – a plaintiff was prohibited from recovering for emotional damages unless he or she had suffered an actual impact.<sup>38</sup> Gradually, some courts opted for a “*zone of danger rule*,” whereby a plaintiff could recover for emotional trauma where plaintiff was not actually injured, but nearly was.<sup>39</sup>

For example, in a case involving a mother’s emotional injury occurring when defendant negligently killed her child on the highway, the court denied recovery on grounds 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.”<sup>40</sup> To get around their skepticism of feigned claims of emotional harm, some courts have insisted that, in order to recover for emotional harm unrelated to physical harm, there must nonetheless

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<sup>37</sup> See e.g., *Pentoney v. St. Louis Transit Co.*, 84 S.W. 140 (Mo. 1904).

<sup>38</sup> *Marchica v. Long Island R.R.*, 31 F.3d 1197 (2nd Cir. 1994).

<sup>39</sup> *Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020 (7th Cir. 1989).

<sup>40</sup> *Waube v. Warrington*, 258 N.W. 497 (Wis. 1934).

be a physical manifestation of emotional harm (e.g., hair falling out, hives, and shingles).<sup>41</sup>

Certain California courts decried the “the hopeless artificiality of the zone of danger rule,” and instead adopted an analysis which focuses on the proximity of the plaintiff to the injured person in terms of time, space and relationship.<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup> Thus, many courts have drawn lines on proximate cause grounds precluding recovery for intangible injuries in such circumstances.

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

In the Legal Committee of ICAO, meeting in Madrid in 1951, in negotiations for what became the Hague Protocol of 1955, the French representative urged that the term “*affection corporelle*” be substituted for “*lesion corporelle*.” He

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<sup>41</sup> *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.

<sup>42</sup> *Dillon v. Legg*, 441 P.2d 912 (Calif. 1968).

<sup>43</sup> *Thing v. La Chusa*, 771 P.2d 814 (Calif. 1989).

<sup>44</sup> *Id.*



reasoned was 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.<sup>45</sup> But the effort to amend it 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<sup>46</sup> would have expanded Article 17 in two significant ways – it would have substituted the word “event” for the much narrower phrase – “accident.” 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.”<sup>47</sup>

The U.S. Supreme Court, in *Eastern Airline v. Floyd*,<sup>48</sup> concluded that recovery under Article 17 of the Warsaw Convention requires either death or bodily injury; emotional damages alone will not suffice. This was a case in which a flight lost power in all three engines and was preparing to ditch in the ocean; however, miraculously, the engines restarted and the plane landed safely. Nonetheless, the passengers were frightened 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.”

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<sup>45</sup> See *Morris v. KLM*, [2002] UKHL 7 ¶ 103 (UK House of Lords 2002).

<sup>46</sup> The Guatemala City Protocol never received a sufficient number of ratifications to enter into force.

<sup>47</sup> See the opinion of Lord Walker in *Deep Vein Thrombosis*, [2005] UKHL 72, [2006] 1 AC 495 (2005) ¶ 56.

<sup>48</sup> 499 U.S. 530 (1991).

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"<sup>49</sup> -- left the door ajar for all sorts of litigation.<sup>50</sup> 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?<sup>51</sup> 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 passenger recover for pre-impact injuries?

One must also 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 that has since explored the issue identified several alternatives:

1. No recovery allowed for emotional distress;

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<sup>49</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

<sup>50</sup> 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).

<sup>51</sup> 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." *Id.* at 1158.

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.<sup>52</sup>

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*.<sup>53</sup>

*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."<sup>54</sup> The court noted that there were 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

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<sup>52</sup> *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.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> 854 F. Supp. at 668.

3. *Emotional distress* – psychic trauma that one experiences during or after the accident.<sup>55</sup>

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 U.S. international aviation jurisprudence, that recovery for emotional injury is permissible only to the extent that emotional damages are caused by physical injuries suffered.<sup>56</sup> 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).<sup>57</sup> Thus, according 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

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<sup>55</sup> 854 F. Supp. at 664.

<sup>56</sup> In fact, for a lower court decision, its impact has been uncommonly wide. See *Ehrlich v. American Airlines*, 360 F.3rd 366, 376 (2nd Cir. 2004) (mental injuries recoverable under Warsaw, and under M99, only if they were caused by physical injury), and cases cited therein; *Bobian 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.3rd 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 U.S. 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 Article 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 Aircrash Disaster Near Roselawn, Indiana on October 31, 1994*, 954 F. Supp. 175, 179 (N.D. Ill. 1997).

<sup>57</sup> 854 F. Supp. at 668/

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 U.S. 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.<sup>58</sup> However, in the U.K. House of Lords, Lord Steyn in *Morris v. KLM*,<sup>59</sup> 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.”<sup>60</sup>

In *In re Inflight Explosion on Trans World Airlines*,<sup>61</sup> 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* – recovery is allowed in most jurisdictions as “parasitic” psychic injury.<sup>62</sup>

In *Inflight Explosion*, defendant airline argued that allowing recovery for emotional damages subsequent to physical injury would set a dangerous

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<sup>58</sup> See e.g., *Carey v. United Airlines*, 255 F.3<sup>rd</sup> 1044, 1052 (9<sup>th</sup> Cir. 2001); *Terrafranca v. Virgin Atlantic Airways*, 151 F.3<sup>rd</sup> 108, 110-11 (3<sup>rd</sup> Cir. 1998); *Lloyd v. American Airlines*, 291 F.3<sup>rd</sup> 503, 512 (8<sup>th</sup> Cir. 2002).

<sup>59</sup> [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).

<sup>60</sup> *Id.* ¶ 20, citing to a New York state court decision.

<sup>61</sup> 778 F. Supp. 625 (E.D.N.Y. 1991).

<sup>62</sup> 778 F. Supp. at 639.

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 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.<sup>63</sup> 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 flight [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 from his wounds, falling to certain death after the bomb tore through his body and he was ejected from the aircraft.*<sup>64</sup>

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<sup>63</sup> *Id.*, at 626-27.

<sup>64</sup> *Id.*, at 638.

In *Terrafranca v. Virgin Atlantic Airways*,<sup>65</sup> 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.*<sup>66</sup>

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.”<sup>67</sup> The Third Circuit reiterated *Floyd*’s requirement of

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<sup>65</sup> 151 F.3rd 108 (3rd Cir. 1998) [hereinafter *Terrafranca*].

<sup>66</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

<sup>67</sup> *Terrafranca v. Virgin Atlantic Airways*, 151 F.3rd 108, 111 (3rd Cir. 1998).

bodily injury, concluding that neither purely psychic injuries, nor the physical manifestation of harm, constitutes bodily injury under Article 17.<sup>68</sup>

Efforts to recover for PTSD also did not fare well in the Eighth Circuit. In *Lloyd v. American Airlines*,<sup>69</sup> 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.”<sup>70</sup> “[D]amages for mental injury must proximately flow from physical injuries caused by the accident.”<sup>71</sup> 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 U.S. 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*.<sup>72</sup> 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 Federal Aviation Administration

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<sup>68</sup> *Id.*, at 111.

<sup>69</sup> 291 F.3<sup>rd</sup> 503 (8<sup>th</sup> Cir. 2002).

<sup>70</sup> *Id.*, at 509.

<sup>71</sup> *Id.*, at 510.

<sup>72</sup> 255 F.3<sup>rd</sup> 1044 (9<sup>th</sup> Cir. 2001).



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.”<sup>73</sup> Though the Ninth Circuit held 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.<sup>74</sup>

The issue of recovery for emotional damages has spawned a string of questionable jurisprudence. In *Weaver v. Delta Airlines*,<sup>75</sup> 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.”<sup>76</sup>

Third parties apparently need not suffer bodily injury for recovery; only the passenger must. A lower U.S. 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.<sup>77</sup> 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

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<sup>73</sup> *Id.*, at 1046.

<sup>74</sup> *Id.*, at 1048, 1051. See also *Bloom v. Alaska Airlines*, 36 Fed. Appx. 278 (9<sup>th</sup> Cir. 2002).

<sup>75</sup> 56 F. Supp. 2<sup>nd</sup> 1190 [hereinafter *Weaver*].

<sup>76</sup> See also, *In re Crash at Little Rock, Ark.*, 118 F. Supp. 2<sup>nd</sup> 916 (2000), rev'd 291 F.3<sup>rd</sup> 503 (2<sup>nd</sup> Cir. 2002).

<sup>77</sup> *Diaz Lugo v. American Airlines, Inc.* 686 F. Supp. 373 (D.P.R. 1988).

for damage sustained in the event a passenger suffered bodily injury. The wife sustained bodily injury, so the husband may recover for his emotional damages.

Similarly, in *Kruger v. United Airlines*,<sup>78</sup> the court concluded that damage 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.<sup>79</sup>

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 U.S. Supreme Court in *Zicherman v. Korean Airlines*<sup>80</sup> 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 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.

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<sup>78</sup> 2007 US Dist. Lexis 14747 (N.D. Cal. 2007).

<sup>79</sup> *Id.* at 9.

<sup>80</sup> 515 U.S. 217 (1996).

In contrast to *Lugo* and *Kruger*, the Second Circuit in *Fishman v. Delta Air Lines*,<sup>81</sup> concluded that a mother could not recover for the emotional 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.

Another case arguably beyond the pale is *Air Crash Disaster Near Roselawn, Indiana*,<sup>82</sup> 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.”<sup>83</sup> 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 U.S. 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 accompanied by physical injuries.”<sup>84</sup> In a footnote to *El Al Israel Airlines v. Tseng*,<sup>85</sup> the Supreme

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<sup>81</sup> 132 F. 3<sup>rd</sup> 138 (2<sup>nd</sup> Cir. 1998).

<sup>82</sup> 954 F. Supp. 175 (N.D. Ill. 1997).

<sup>83</sup> *Id.*, at 179.

<sup>84</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

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,’” . . .<sup>86</sup> Albeit in dictum, and in a footnote, *Tseng* appears to read *Floyd* as limiting recovery for emotional injury to a three circumstances: death, physical injury, and physical manifestation of emotional harm. Yet the Supreme Court has decided no case in which damages were sought in the latter case. 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 U.K. House of Lords opinions in *Morris v. KLM Royal Dutch Airlines*<sup>87</sup> 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-Amsterdam. Lord Nicholls wrote, “The expression ‘bodily injury’ or ‘lesion corporelle’, in article 17 means, simply, injury to the passenger’s body.”<sup>88</sup> However, he observed that the brain too, is part of the body, and

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<sup>85</sup> 525 U.S. 155 (1999) [hereinafter *Tseng*].

<sup>86</sup> *Id.*, at 166 n. 9.

<sup>87</sup> [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).

<sup>88</sup> *Id.* ¶ 3.

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 U.S. 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.”<sup>89</sup>

In *Morris*, Lord Steyn examined the *travaux préparatoires* of the Warsaw Convention and found no discussion of the issue mental injury or illness. In 1929, it would have been thought that opening the 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.”<sup>90</sup>

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.”<sup>91</sup> In *Morris v. KLM’s* companion case of *King v. Bristow Helicopters*,<sup>92</sup>

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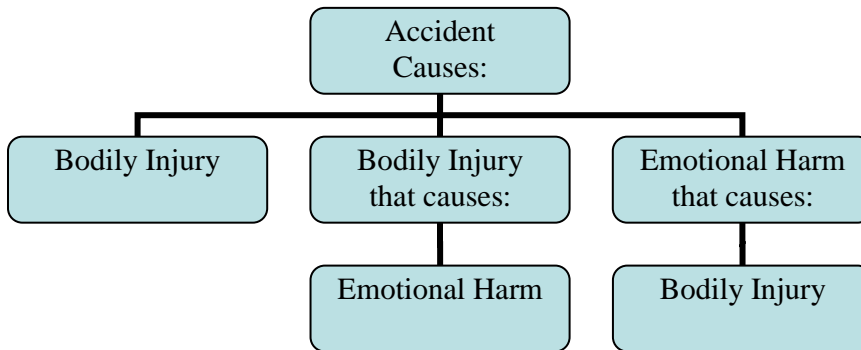
<sup>89</sup> *Weaver v. Delta Air Lines*. 56 F. Supp. 2<sup>nd</sup> 1190 (D. Mont. 1999).

<sup>90</sup> *Morris*, *supra* at ¶ 17.

<sup>91</sup> *Id.* ¶ 20.

<sup>92</sup> [2002] UKHL 7, [2002] 2 AC 628 (U.K. House of Lords 2002).

the House of Lords allowed recovery for physical 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 Table is how we might diagram this approach to recoverable damages:



In negotiating the Montreal Convention of 1999, the Swedish delegation proposed, and the U.K. supported a provision allowing recovery for mental damages. This change was opposed by the airline industry and the U.S. delegation, among others. Finding insufficient support for its inclusion, the proposal was withdrawn.<sup>93</sup> 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 . . . .”<sup>94</sup>

In an exhaustive review of the negotiating history of the question of potential recovery of emotional damages in the Montreal Convention, the U.S. Court of

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<sup>93</sup> Id. ¶ 31.

<sup>94</sup> Thomas Whalen, *The New Warsaw Convention: The Montreal Convention*, XXV Air & Space L. 304, 306 (2000), quoted in *Croteau v. Air Transat*, No. 200-06-000053-051 (Quebec Superior Ct. 2005).

Appeals for the Second Circuit in *Ehrlich v. American Airlines*,<sup>95</sup> concluded that there was no consensus or common understanding among the delegates on the issue of whether, and under what circumstances, recovery should be allowed for mental damages.<sup>96</sup> The U.S. delegate at the conference erroneously asserted that the state of Article 17 jurisprudence in U.S. 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 M99 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.<sup>97</sup> That would make the far right column in Chart 7.1 unrecoverable.<sup>98</sup>

Dr. Kenneth Rattray, who served as President of conference, led the “Friends of the Chairman” working group, a select group of the delegates.<sup>99</sup> 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.”<sup>100</sup> 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

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<sup>95</sup> 360 F.3<sup>rd</sup> 366 (2<sup>nd</sup> Cir. 2004).

<sup>96</sup> 360 F.3<sup>rd</sup> at 393.

<sup>97</sup> 360 F.3<sup>rd</sup> at 400.

<sup>98</sup> 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.

<sup>99</sup> As Solicitor General of Jamaica, Dr. Rattray was an odd choice for such a leadership role in the drafting of the Montreal Convention of 1999, as Jamaica was among the minority of States that had never ratified the Warsaw Convention or any of its Protocols.

<sup>100</sup> 360 F.3<sup>rd</sup> at 384.

working group.”<sup>101</sup> Perhaps more importantly, encouraging an expansive jurisprudence of additional damages runs directly counter to the fundamental purpose of M99 – to achieve uniformity of the law of carrier liability in international civil aviation.

However, as noted above, three U.S. 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 U.K. House of Lords in *Morris v. KLM* concluded that they were. Though the U.S. 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 Law.

## 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 U.S., U.K. 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.

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<sup>101</sup> 360 F.3<sup>rd</sup> at 392.