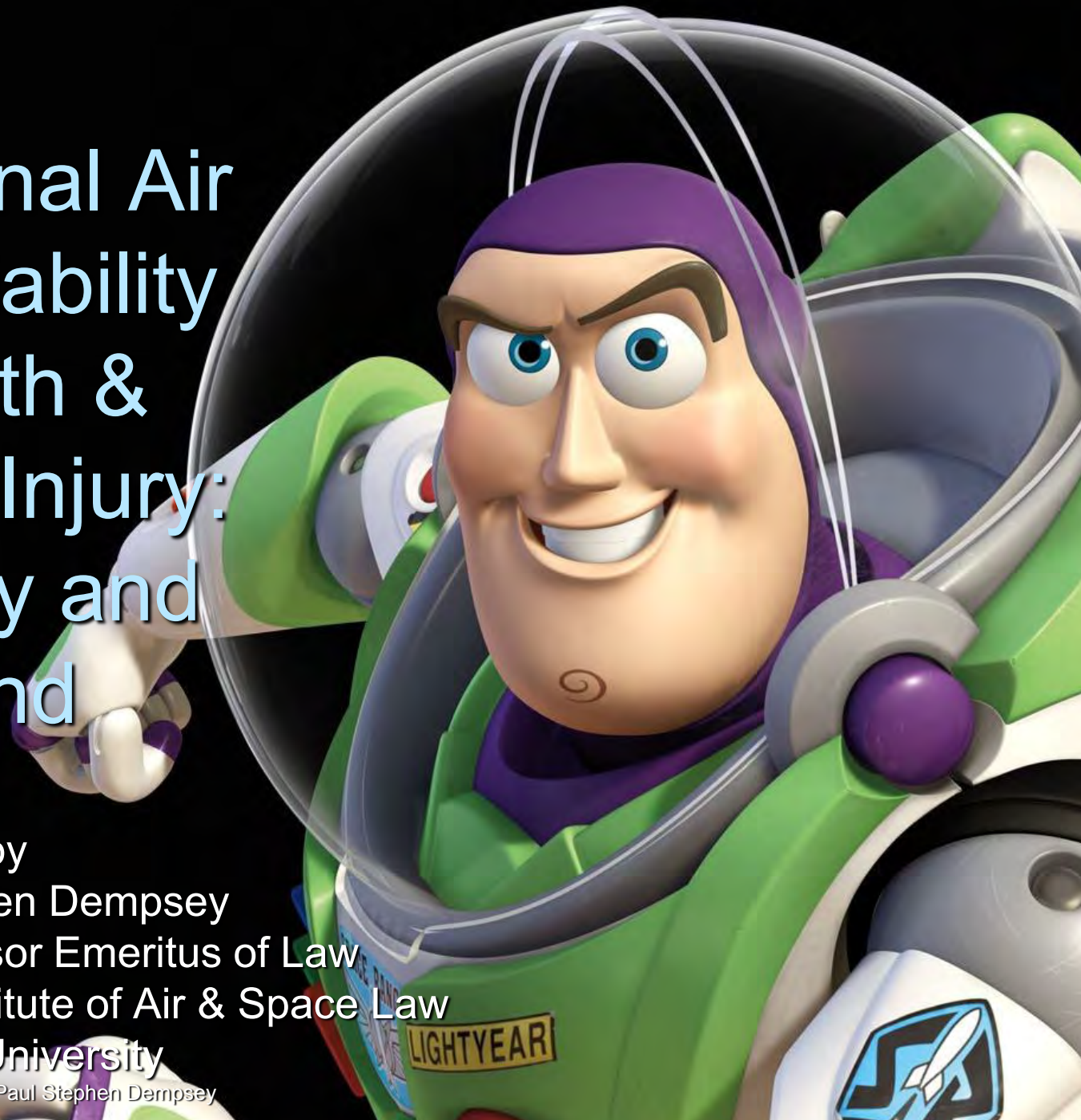
International Air Carrier Liability for Death & Personal Injury: To Infinity and Beyond



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To what damages do the Warsaw regime and the Montreal Convention apply?

Carrier liability for:

- Passenger death, bodily injury or delay;
- Air freight and baggage loss, damage, or delay;
- In international carriage, for compensation.

The Convention does not address liability of the airport, ANSP or aircraft manufacturers, or liability for surface damage.

What is international air carriage?

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.

You look for the “highest common denominator” treaty between the origin and destination State.

In round-trip transportation, the origin and destination State are the same.

Which Legal Regime Applies?

- The original Warsaw Convention of 1929, unamended;
- The Warsaw Convention as amended by Montreal Protocol No. 1 of 1975;
- The Warsaw Convention as amended by the Hague Protocol of 1955;
- The Warsaw Convention as amended by the Hague Protocol and Montreal Protocol No. 2 of 1975;
- The Warsaw Convention as amended by the Hague Protocol and Montreal Protocol No. 4 of 1975;
- The Montreal Convention of 1999, or
- Domestic law, if it is deemed that the transportation falls outside the conventional international law regime, or if the two relevant States have failed to ratify the same liability convention.

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 brought 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.

Purposes of Warsaw

"Convention for the Unification of Certain Rules Relating to International Carriage by Air."

- Unification of Law… uniform procedure, documentation and regime of substantive law applicable worldwide
- Limit carrier liability so as to foster growth of the nascent commercial airline industry.

Which local laws are not harmonized?

Under Montreal 1999:

- Articles 6 and 16 — the consignor must furnish information and documents, including a document indicating the nature of the cargo, as required by local "customs, police and any other public authorities";
- Article 22(6) — in addition to the liability caps for delay, baggage and cargo, the court also may award court costs and other litigation expenses "in accordance with its own law";
- Article 28 — advance payments must be made in death or personal injury actions "if required by its national law";
- Article 29 — an action for damages can only be brought subject to the terms of the Convention "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights";
- Article 33(4) — procedural questions "shall be governed by the law of the court seized of the case";
- Article 35(2) — the two-year period of limitations "shall be determined by the law of the court seized of the case";
- Article 45 — if an action is brought against only the actual carrier or the contracting carrier, that carrier may require the other carrier to be joined in the action, "the procedure and effects being governed by the law of the court seized of the case;" and
- Article 56 — if a State has more than a single territorial unit in which different systems of law are applicable (such as the Peoples Republic of China vis-à-vis Macau and Hong Kong, for example), that State may declare the Convention applicable to all or only some of its territorial units.

Venue

- The four *fora* of the Warsaw Convention are:
- (1) the domicile of the actual carrier;
- (2) the principal place of business of the actual carrier;
- (3) a place of the carrier's business through which the contract was made; or
- (4) the place of destination.
- To these four, three additional *fora* have been added by the Montreal Convention (the latter two of these were also included in the Guadalajara Convention):
- (5) in death and personal injury litigation, the place in which the passenger has his principal and permanent residence if the carrier operates passenger services there either on its own aircraft or through another carrier's aircraft through a commercial agreement and in which that carrier conducts its business of carriage from premises leased or owned by it or by another carrier with which it has a commercial agreement;
- (6) the domicile of the contracting carrier; or
- (7) the principal place of business of the contracting carrier.

Forum non conveniens

- Both Article 28(1) of the Warsaw Convention and Article 33(1) of the Montreal Convention provide, *inter alia*, that "[a]n action for damages must be brought, at the option of the plaintiff", in one of four specified *fora*.
- Article 28(2) of Warsaw provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted", while Article 33(4) of the Montreal Convention provides that "[q]uestions of procedure shall be governed by the law of the court seized of the case".

Forum non conveniens

- Is there an adequate alternative forum?
- What deference is due the plaintiff's choice of forum?
- What is the balance between the party's private interests in the choice of forum with the public interest of proceeding in the foreign jurisdiction?

Private Interest Factors

The private interest factors are:

- The relative ease of access to sources of proof;
- The availability of compulsory process to assure the attendance of unwilling witnesses;
- The costs of obtaining attendance of willing witnesses;
- The possibility of viewing the premises;
- Other practical problems that impact the efficiency and cost of the trial; and
- The enforceability of the judgment if one is obtained.

See e.g., Liquidation Comm'n of Banco Intercontinental v. Renta, 530 F.3rd 1339, 1356-57 (11th Cir. 2008); *King v. Cessna Aircraft Co.,* 562 F.3rd 1374, 1383-84 (11th Cir. 2009).

Public Interest Factors

The relevant public interest factors are:

- The administrative difficulties flowing from court congestion;
- Local interests in having localized controversies decided at home;
- The avoidance of unnecessary choice of law problems; and
- The unfairness of burdening citizens in an unrelated forum with jury duty These include the ability to implead other entities, efficiency and translation.

In re Air Crash Near Athens, Greece on August 14, 2008, 2007 U.S. Dist. Lexis 20761 (N.D. Ill. 2007).

Conditions on FNC Dismissal

The Defendant(s) will:

- not contest jurisdiction in the foreign court;
- waive the statute of limitations defence;
- respond to discovery requests;
- provide witnesses and evidence;
- translate documents into the foreign language;
- not argue for a stay;
- abide by all stipulations made in their motions and oral argument; and
- agree to satisfy any final judgment rendered against them in the foreign jurisdiction after appeals are exhausted.

Time Limitations for Filing a Claim

	Warsaw Convention	Hague, Montreal Protocol No. 4, and Montreal Convention of 1999
Loss	None	None
Damage to Baggage	3 days	7 days
Damage to Cargo	7 days	14 days
Delay of Baggage	14 days	21 days
Delay of Cargo	14 days	21 days

Moses v. Air Afrique

Three Air Afrique ground crew in Dakar, Senegal, demanded $58 in "excess luggage charges" from passenger upon arrival at the baggage carousel.
The passenger refused.
The crew beat him, ramsacked his luggage, and took his wallet.
Held: Actual knowledge of the carrier does not obviated the requirement to file a timely claim.

Onyeanusi v. Pan American World Airways

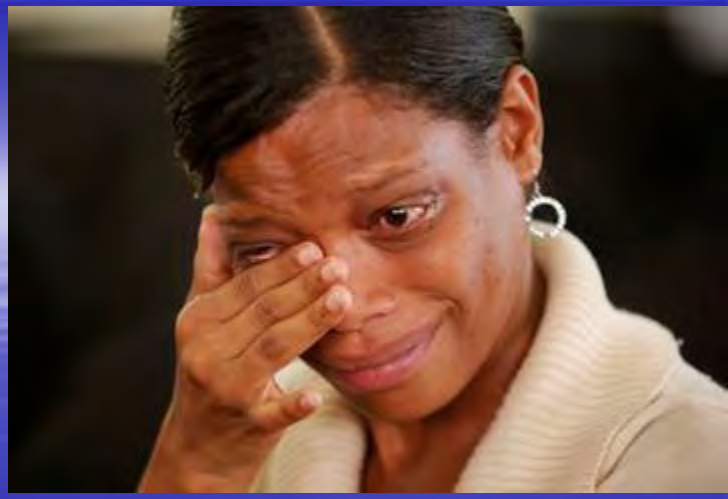
Plaintiff's mother died in Philadelphia.

20,000 members of the Ibo tribe met the aircraft, but her body was not aboard.

Subsequently, Pan Am delivered the remains of a stranger.

Finally, a decomposed body was delivered 10 days after shipment, wrapped in burlap and face down in the casket.

In the Ibo culture, this signaled the deceased had committed suicide and died a dishonorable death.



Held: Failure to file a written claim within 14 days of scheduled delivery extinguished the claim.

COMPEN$ATION HAS ALWAYS BEEN THE PROBLEM

- *The Warsaw Convention of 1929* capped liability for personal injury at $8,300, unless the carrier engaged in willful misconduct or issued improper documentation; the carrier could avoid liability if it had taken "all necessary measures" to avoid the loss, or it was impossible to do so:
- *The Hague Protocol of 1955* doubled liability to $16,600 and clarified what was meant by "willful misconduct" as "intent to cause damage or recklessly and with knowledge that damage would probably result";
- *The Montreal Agreement of 1966* raised liability to $75,000
- *Montreal Protocol No. 1* reset Warsaw liability at 8,300 SDRs
- *Montreal Protocol No. 2* reset Warsaw/Hague liability at 16,600 SDRs
- *IATA Intercarrier Agreement of 1995* waived Warsaw's ceilings on liability up to 100,000 SDRs; and
- *The Montreal Convention of 1999* imposes strict liability up to 100,000 SDRs, and presumptive liability beyond.

THE MONTREAL CONVENTION OF 1999

PASSENGERS

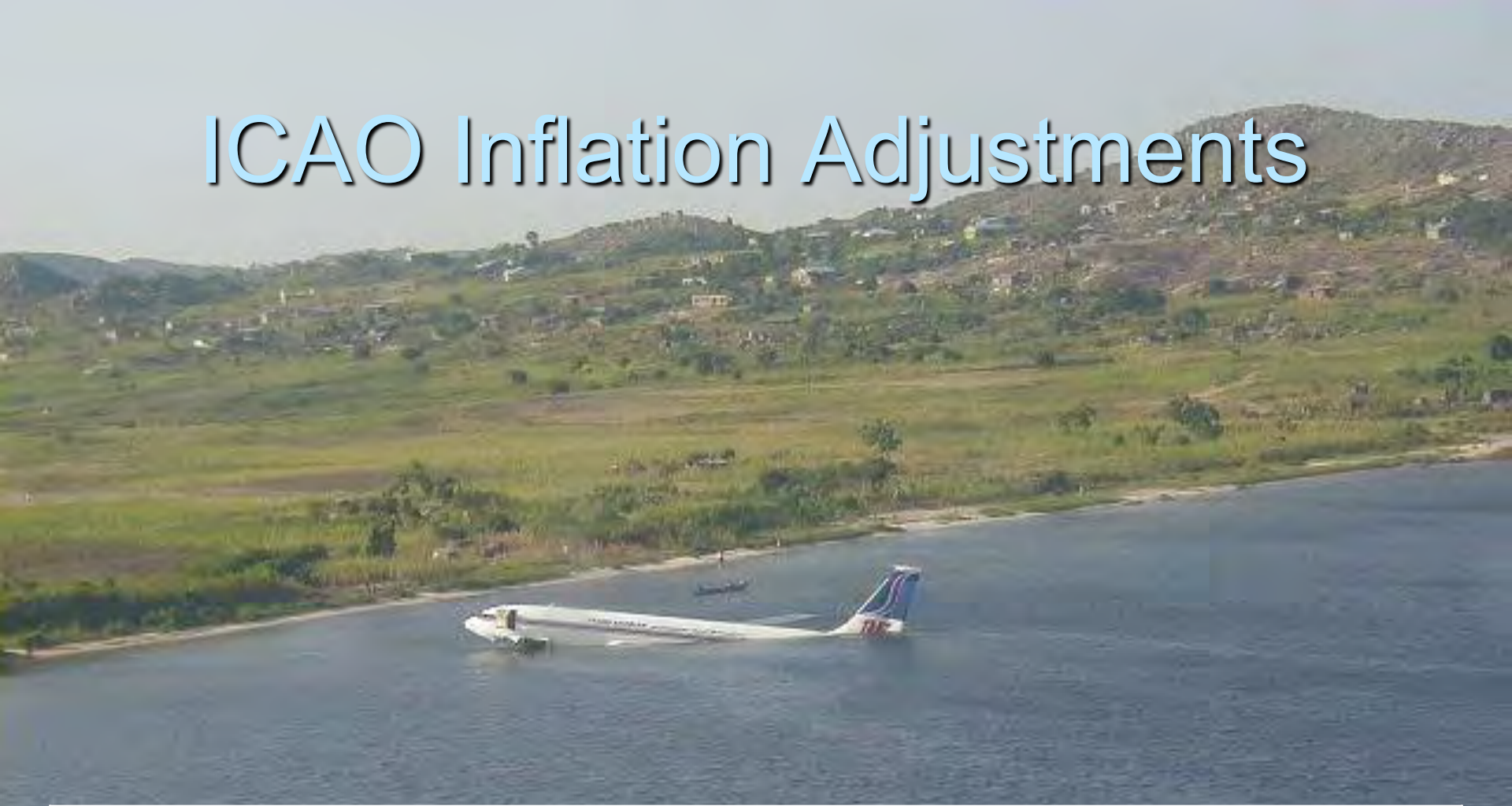
- Incorporating most of the liability provisions of the IATA Intercarrier Agreements, the Convention establishes a two-tier liability system, with strict liability for death or bodily injury up to 100,000 SDRs, and presumptive liability in an unlimited amount;
- The carrier's liability may be discounted by the claimant's negligence or wrongful act;
- If the claimant's damages exceed 100,000 SDRs, the carrier has two defenses: (1) freedom from fault; or (2) the damage was solely caused by a third person;
- "Punitive, exemplary or other non-compensatory damages" are not recoverable;
- No provision was made for recovery of emotional damages;
- Carriers must maintain adequate insurance to cover their liability;
- The Convention's liability limits shall be reviewed every five years and adjusted for inflation;
- 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;
- The Convention establishes a "fifth jurisdiction" (the passenger's principal and permanent residence) for personal injury or death (but, oddly, not cargo and baggage) actions; and
- The Convention incorporates the Guadalajara Convention extending liability to both the actual and contracting carrier.

THE MONTREAL CONVENTION OF 1999

AIR FREIGHT

- The Convention incorporates many of the provisions of MP4 relating to cargo;
- Unless special value is declared, loss and damage and delay of baggage results in maximum liability of 1,000 SDRs; destruction, loss, damage, or delay of cargo results in liability capped at 17 SDRs per kilogram; cargo liability ceilings cannot be broken;
- There is no carrier penalty for noncompliance with the new documentation requirements; and
- Arbitration clauses may be included in cargo air waybills.

ICAO Inflation Adjustments



Inflation Adjustments Effective 2010				
	Convention	*ICAO adjustments*	*US dollar equivalent*	
Passenger death or injury	100,000 SDRs	113,100 SDRs	$175,237	Passenger death or injury
Cargo loss and damage	17 SDRs per kg	19 SDRs per kg	$29.43 per kg	Cargo loss and damage

LIABLITY CONVENTION RATIFICATIONS

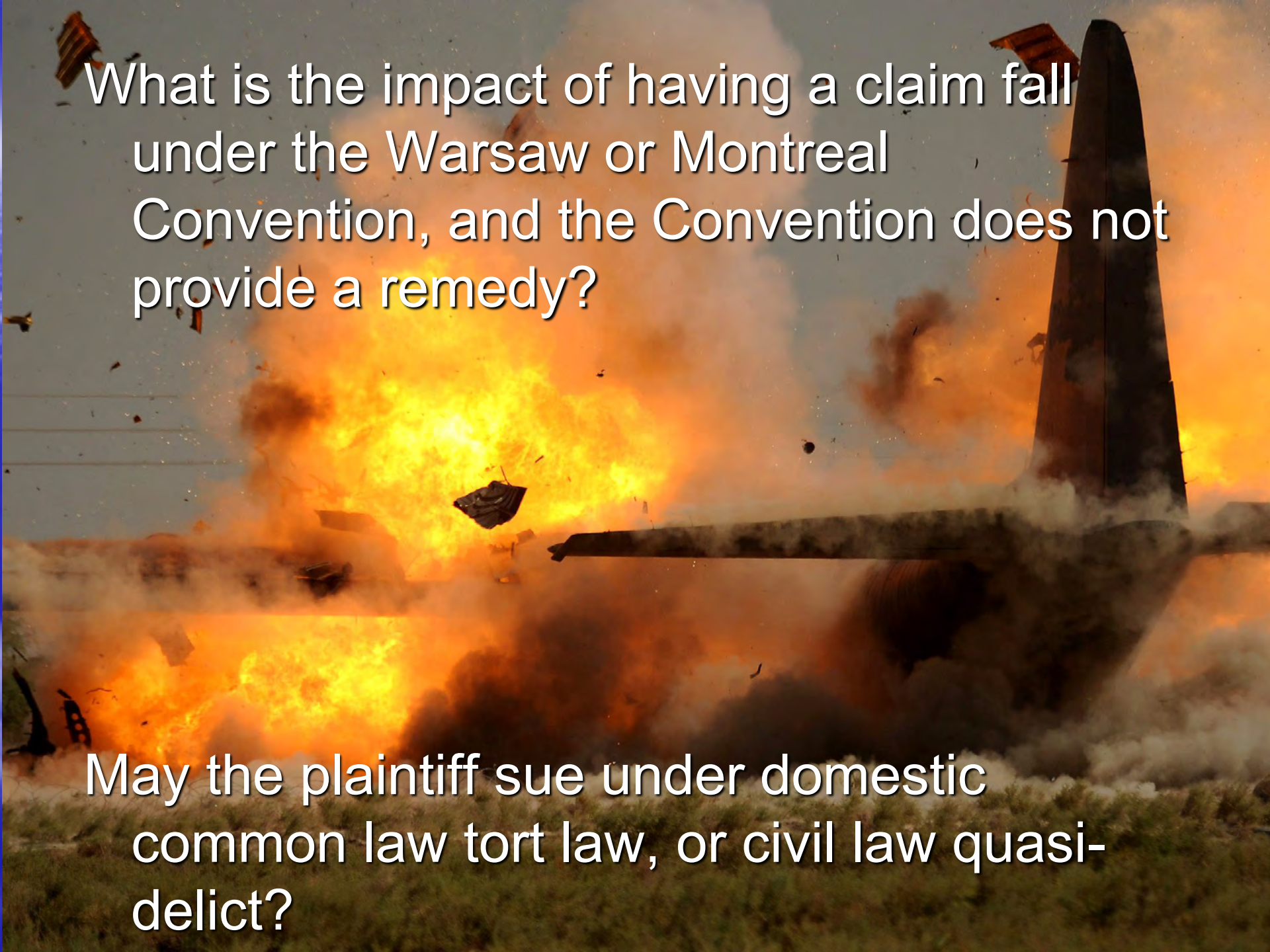
- UN Members – 192 States
- The Chicago Convention – 191 States
- The Warsaw Convention – 152 States
- The Hague Protocol – 137 States
- The Guadalajara Convention – 86 States
- Montreal Protocol No. 1 – 51 States
- Montreal Protocol No.2 – 52 States
- Montreal Protocol No. 4 – 60 States
- The Montreal Convention of 1999 – 125 States

* As of 25 May 2017

See

http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx

for an up-to-date listing of High Contracting Parties.



What is the impact of having a claim fall under the Warsaw or Montreal Convention, and the Convention does not provide a remedy?

May the plaintiff sue under domestic common law tort law, or civil law quasi-delict?

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."
- 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."

Exclusivity of Remedies

Article 24 of the Warsaw Convention provides:

- 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
- 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 29 (Basis of Claims) of the Montreal Convention provides:

- In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Sidhu v. British Airways

- Ms. Sidhu was aboard a British Airways flight from London to Kuala Lumpur via Kuwait. The aircraft made a refuelling stop in Kuwait five hours after Iraq invaded the country, and all passengers and crew were taken prisoner. They were removed to Baghdad, and Sidhu was detained there by Iraqi forces for nearly a month. She suffered psychological injury as the result of being held in captivity, and the stress of being separated from her family, causing her bodily injury in the form of loss of weight, eczema and excessive menstrual bleeding.
- The UK House of Lords noted that the Convention "is designed to set out all the rules relating to the liability of the carrier which are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies". Hence, the rights and remedies provided there are meant to be exclusive.
- In Article 23, "the drafters prohibited the carrier from limiting its liability via contract, in exchange for Article 17 restrictions on the types of claims for which recovery would be allowed. The purpose of Article 17 was "to prescribe the circumstances — that is to say, the only circumstances — in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air". Thus, whether or not a passenger has a claim under Article 17, he is not allowed to maintain any other (common law) claim against the carrier arising out of the same incident.

ACCIDENT, INJURY, CAUSATION & LOCATION

- 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.”

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Issues arising under Article 17

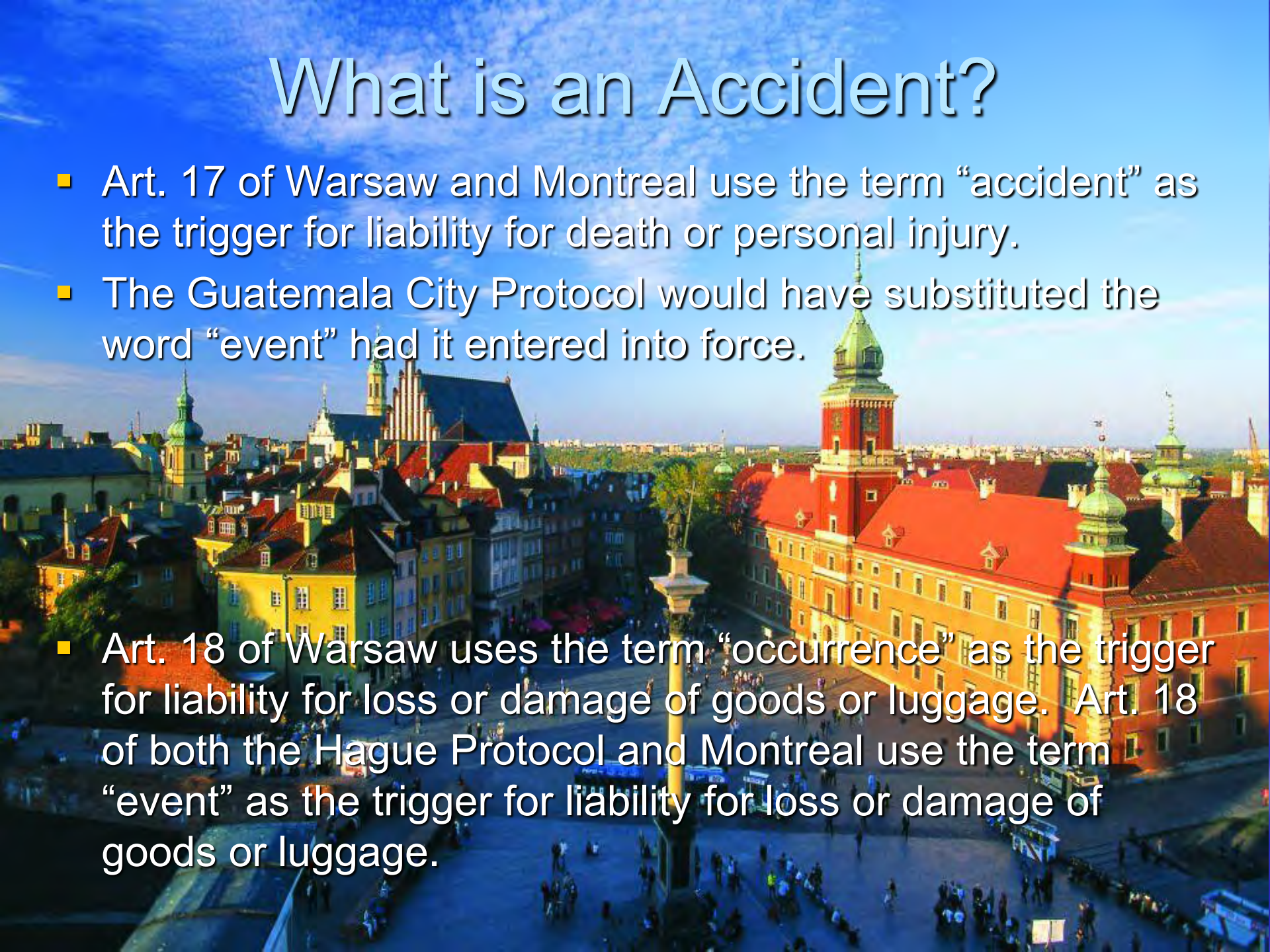
- What kind of "accident" must have occurred?
- What types of injuries are contemplated by the term "damage sustained in the event of death or bodily injury"?
- Where does one draw the line at "embarking or disembarking"?


What constitutes an “accident”?

Fumbling for his recline button,
Ted unwittingly instigates a disaster.

What is an Accident?

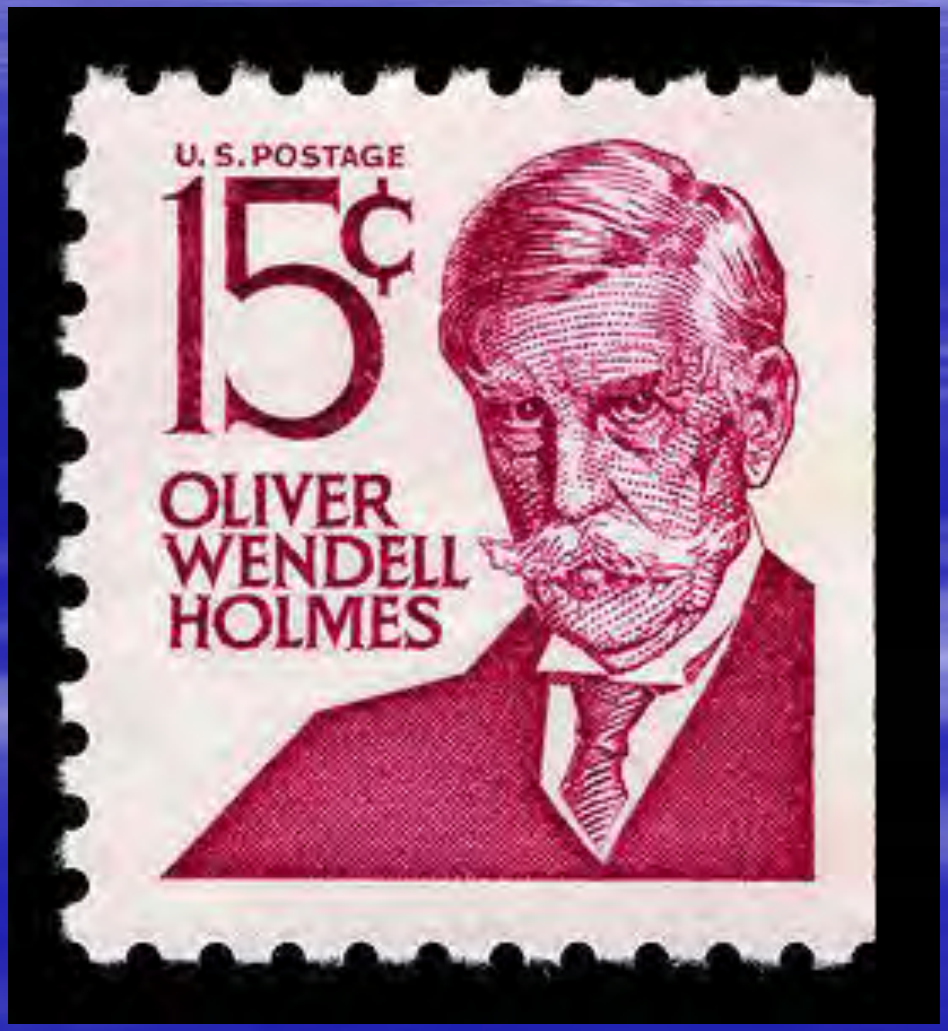
- Art. 17 of Warsaw and Montreal use the term “accident” as the trigger for liability for death or personal injury.
- The Guatemala City Protocol would have substituted the word “event” had it entered into force.



- Art. 18 of Warsaw uses the term “occurrence” as the trigger for liability for loss or damage of goods or luggage. Art. 18 of both the Hague Protocol and Montreal use the term “event” as the trigger for liability for loss or damage of goods or luggage.

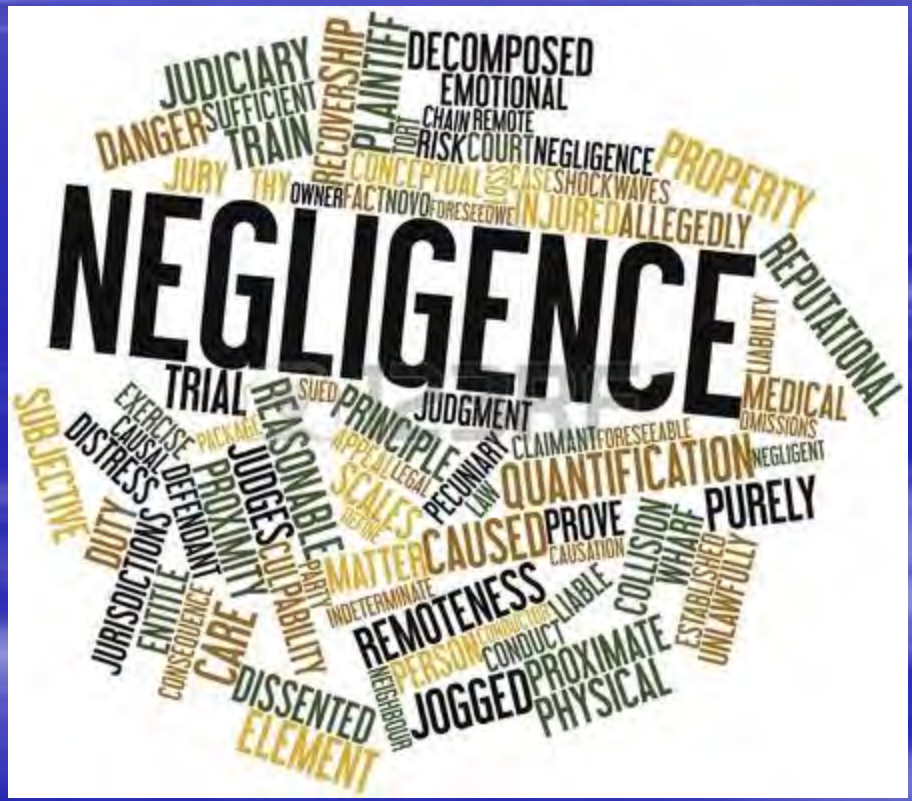
What is an accident?

"Even a dog distinguishes between being stumbled over and being kicked."



Must the passenger prove negligence in order to establish the existence of an accident?

- No.
- Negligence exists as a defense under Article 20 of Warsaw where it can prove that it took “all necessary measures” to avoid the loss or that it was impossible to do so. Proof of contributory negligence of the injured person may result in whole or partial exoneration of the carrier.
- The “all necessary measures” defense was waived in the Montreal Agreement.
- The Montreal Convention of 1999 allows a defense above 113,100 SDRs if the carrier proves “damage was not caused bo the negligence or other wrongful act or omission of the carrier . . . .”



Annex 13 of the Chicago Convention

An accident is “an occurrence associated with the operation of an aircraft … in which a person is fatally or seriously injured as a result of being in the aircraft … or direct ezposure to jet blast, except when the injuries are from natural causes, self inflicted or inflicted by other persons . . . .”

What is an accident?

French legal definition:

- "a fortuitous, unexpected, unusual or unintended event."

Air France v. Saks

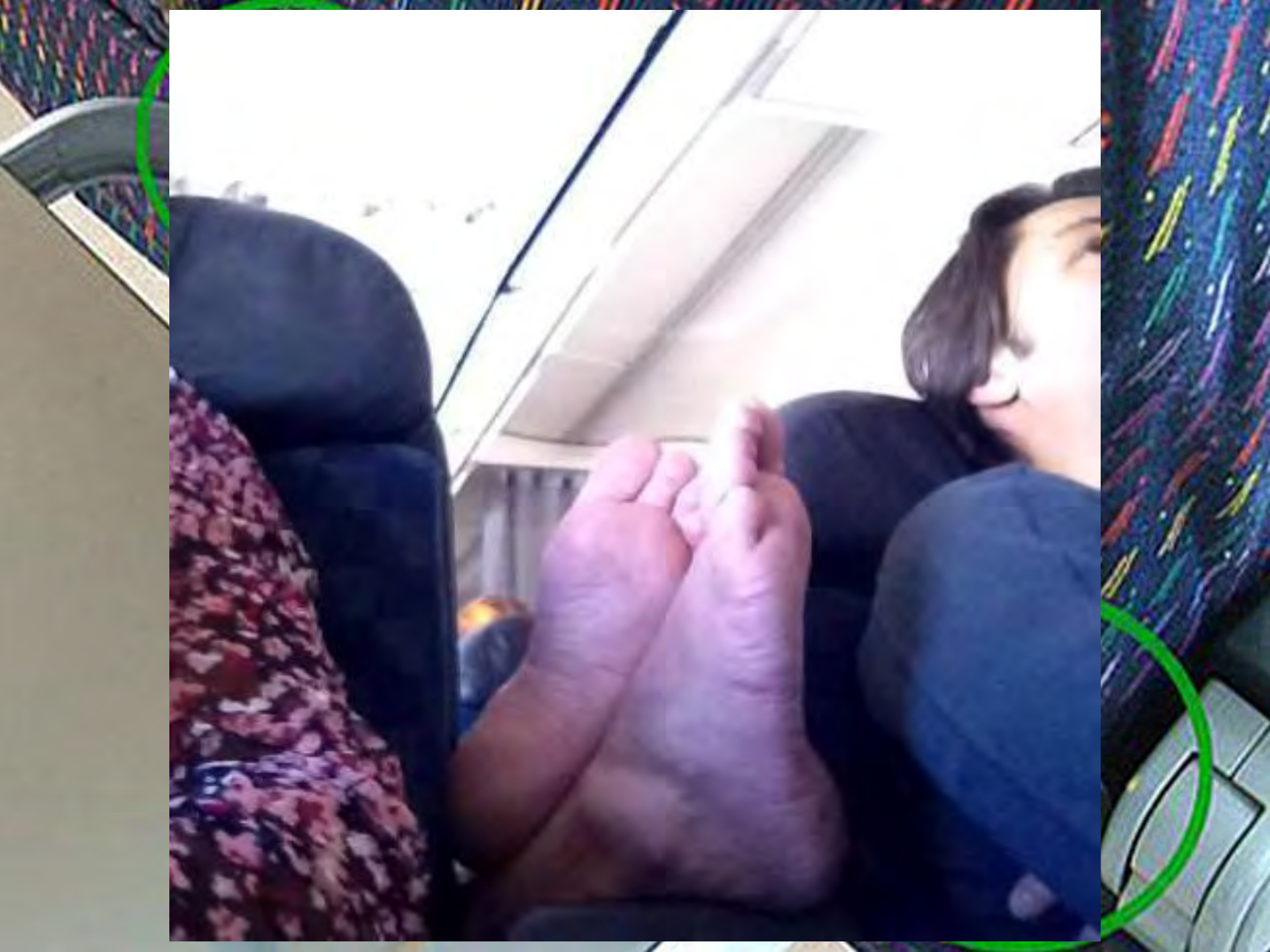
- Facts: a passenger lost her hearing in one ear after a routine depressurization of an
- Air France aircraft landing normally at Los Angeles.
- The definition of an accident under Article 17 should be flexibly applied after assessing all the circumstances surrounding the passenger's injuries;
- The “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 the “usual, normal and expected operation of the aircraft”; 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*. . ."

What is an accident?

According to the US Supreme Court, an accident is “an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied."

Must an accident arise from a risk that is characteristic of air travel?

Courts have divided into two camps. If the event need not be aviation-related, is the carrier an insurer for all injuries suffered by passengers, including passenger-on-passenger assaults?



The District court in Wallace v. Korean Airlines wrote:

- On August 17, 1997, plaintiff was a passenger on Korean Air Flight 61 from Seoul, Korea to Los Angeles, . . . Plaintiff was seated in seat 43K, a window seat, and slept during the flight. Plaintiff awoke to find that Kwang–Yong Park ("Park"), the passenger in seat 43J had unbuckled plaintiff's belt, unbuttoned and unzipped her shorts, and placed his hand in plaintiff's underwear to fondle her genitals. . . . Park subsequently pleaded guilty to the crime of engaging in sexual conduct with another person without that person's permission, in violation of 18 U.S.C. § 2244(b), and he was sentenced to two years probation. . . .
- In this case, there was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of a flight.. . . There is no evidence that defendant had served Park sufficient alcohol to make him drunk. . . . After plaintiff was molested, she complained to a Korean Air crew member and he immediately reassigned her to a new seat. The record reveals no act or omission by defendant which had any connection to plaintiff's injuries and which might lead to a finding that plaintiff's injuries were the result of an "accident" within the meaning of Article 17. . . .
- Moreover, sexual molestation such as that alleged by plaintiff is not a risk characteristic of air travel or related to the operation of an airplane, and air carriers are not in a special position to develop defensive measures or insure against such incidents. . . .
- Plaintiff's misfortune may have occurred on defendant's airplane, but an assessment of the circumstances surrounding her injuries shows that they did not result from an "accident" within the meaning of Article 17 of the Warsaw Convention.

WALLACE v. KOREAN AIRLINES (2nd Circuit 2000)

Three hours into a flight from Seoul to Los Angeles, Ms. 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.”

“[T]he 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. It was then that the attack occurred.

“Equally important was the manner in which Mr. Park was able to carry out his assault. While Ms. Wallace lay sleeping, Mr. Park: (1) unbuckled her belt; (2) unbuttoned her shorts; (3) unzipped her shorts; and (4) squeezed his hands into her underpants. These could not have been five-second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous. Yet it 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.”

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.

KOREAN AIR

Deep Vein Thrombosis and Air Travel Group Litigation,

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

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 v. 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.

The Australian High Court in *Povey v. Qantas Airways*

- *McHugh: "With great respect for the U.S. Supreme Court . . . 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.*
- *"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."*
- *"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."*
- *Kirby: "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'."*
- *Callihan: "mere inaction could not constitute an event or an accident."*

U.K. House of Lords in *In re Deep Vein Thrombosis and Air Travel Group Litigation*

- Scott: "*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.*
- *"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."*

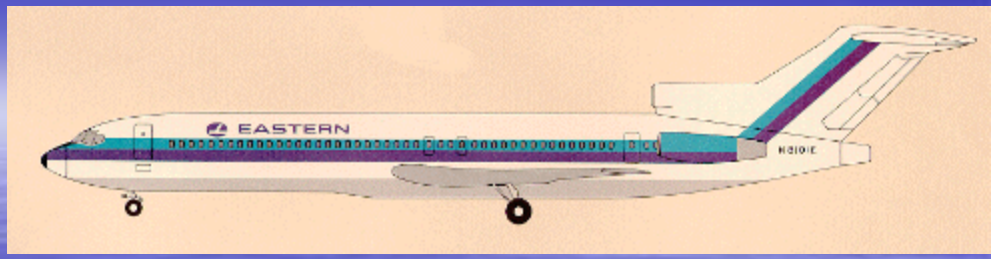
- Hence, the U.S. Supreme Court's reliance on the *Saks'* definition of "accident" in *Husain* constituted flawed jurisprudential methodology. Instead of asking whether the inaction of a flight attendant was an "unusual or unexpected event of happening external to the passenger", the Court instead should have asked whether the flight attendant's inaction was an "accident."
- 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.

DVT and PTSD

- Neither DVT nor PTSD 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.
- 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. and Australian 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.

What constitutes “bodily injury”?

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

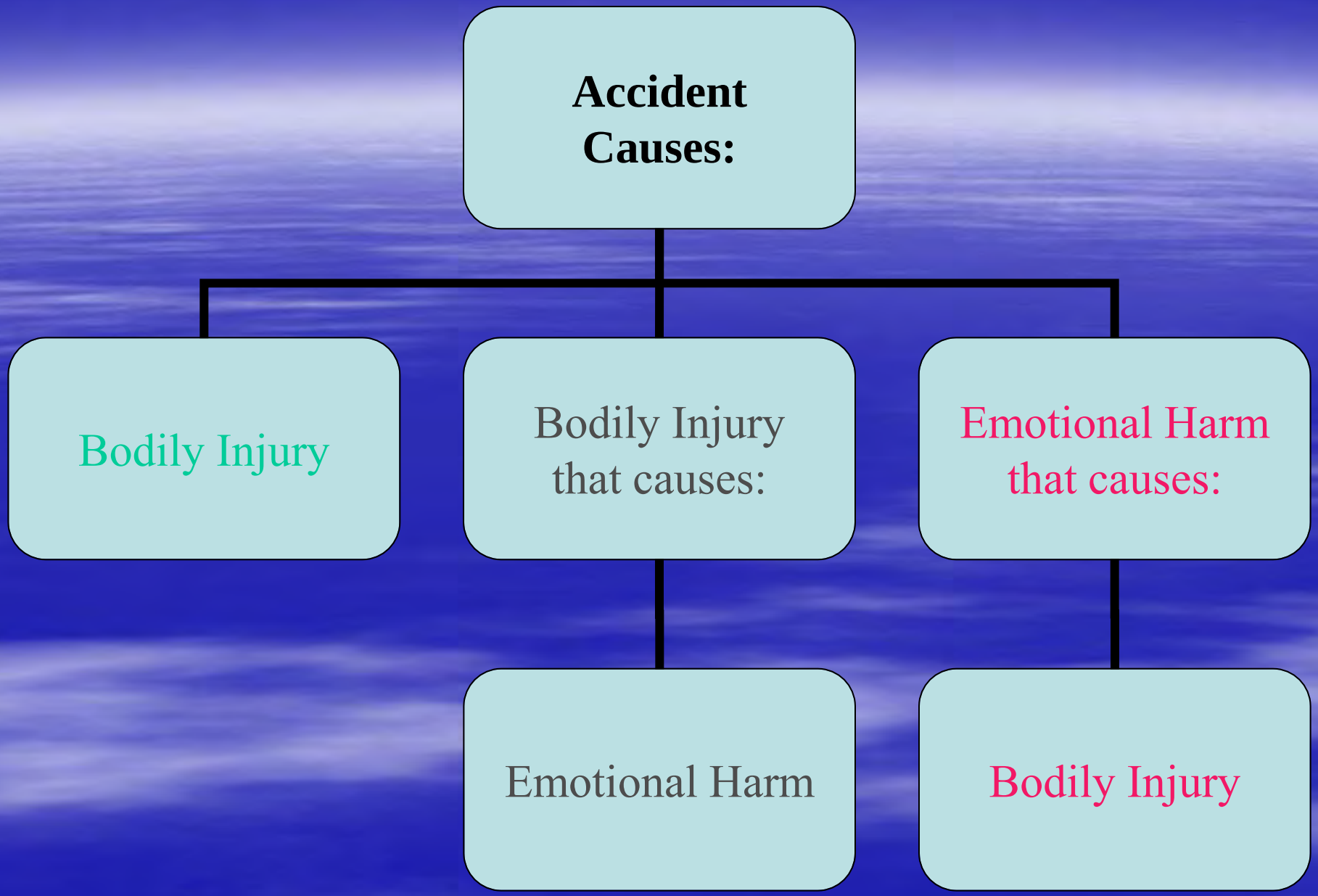
Emotional Damages

- 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.
- Turning now to Private International Air Law, courts that have examined the *travaux preparatiores* 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.

- 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" -- left the door ajar for all sorts of litigation.
- 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?

The House of Lords in Morris v. KLM

- While agreeing that pain caused by physical injury is recoverable, also Lord Steyn, "would hold that if a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms. . . ."
- The issue was 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." However, he observed that the brain too, is part 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 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.
- Though Lord Steyn concluded that Article 17 does not allow one to recovery for emotional damages absent 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: "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."


Accident Causes:
Bodily Injury
Bodily Injury that causes:
Emotional Harm that causes:
Emotional Harm
Bodily Injury

US Court of Appeals in

Ehrlich v. American Airlines

- In an exhaustive review of the negotiating history of the question of potential recovery of emotional damages in the Montreal Convention, the court 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.
- 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.
- Several U.S. Circuit Courts of Appeals have held that physical manifestations 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 jurisdictions have disagreed so fundamentally, 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”*.

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 113,000 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 [113,000] 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.

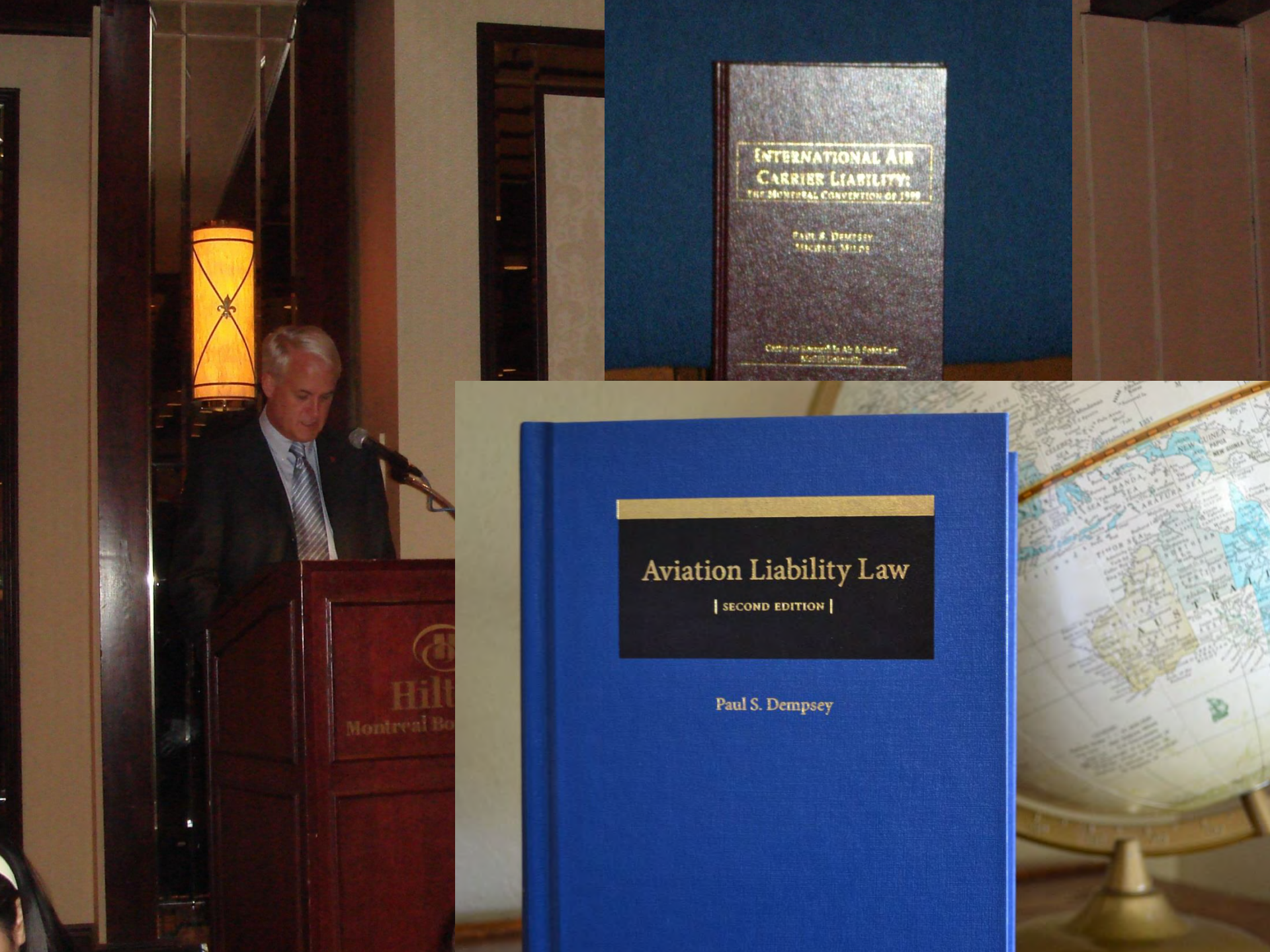
Hence, there is much fertile soil for lawyers to plough.

Plaintiff Advantages of M99

- No proof required of carrier negligence … need only prove the injury resulted from an "accident"
- Strict liability up to 113,000 SDRs for 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 damages were emotional, and no recovery of punitive damages.

Carrier Defenses

- The transportation was not "international carriage" (in which case, domestic law applies)
- The event occurred before embarkation or after disembarkation (domestic law applies)
- The event was not an "accident"
- 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.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