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# Notes

## RECOVERY FOR MENTAL ANGUISH UNDER THE WARSAW CONVENTION

*J. Kathryn Lindauer*

Recovery for injuries sustained by airline passengers on international flights is governed by the Warsaw Convention.<sup>1</sup> Article 17 allows damages for "death, wounding or any other bodily injury" suffered on board the aircraft or in the process of embarking or disembarking. The large number of hijackings in the early seventies provoked a great deal of litigation concerning the proper interpretation of "bodily injury" under Article 17, whether the term encompassed mental anguish, and if so, whether physical injury was requisite to recovery.

The courts have reached conflicting conclusions. At this point, the question has only arisen in connection with hijackings; it would, however, be relevant in such varied situations as delayed planes, minor accidents in which the physical injuries sustained were inconsequential or technical engineering problems of which the passengers were aware.<sup>2</sup> Whether the language of Article 17 justifies a broad, rather than a literal interpretation is likely to be central to an increasing amount of litigation.

### THE WARSAW CONVENTION

The Warsaw Convention, as signed in 1929, was intended to unify the laws which would govern recovery in international aviation litigation. Although one of the major considerations of the drafters of the Convention was to limit the liability of the then nascent airline industry and foster its growth,<sup>3</sup> Secretary of State

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter cited as Warsaw Convention].

<sup>2</sup> The problem of recovery for mental anguish has been the subject of litigation in other areas of public transportation. *See, e.g.*, *Denver & R. G. R.R. v. Roller*, 100 F. 738 (9th Cir. 1900) (personal injuries), *Mobile & Ohio R.R. v. Flannagan*, 141 Miss. 7, 105 So. 749 (1925) (delay), *Ferguson v. Missouri Pac. Ry.*, — Mo. App. —, 186 S.W. 1134 (1916) (wrongful ejection).

<sup>3</sup> L. KRIENDLER, *AVIATION ACCIDENT LAW* § 11.01(2) (1973).

Hull's report to the 73rd Congress indicated that the benefit to be obtained by the passenger in having a "more definite basis of recovery" and the "lessening of litigation" was a significant factor in the United States' decision to adhere to the Convention.<sup>4</sup>

The provisions of the Warsaw Convention apply to "all international transportation of persons, baggage or goods performed by aircraft for hire."<sup>5</sup> Article 17 of the Convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>6</sup>

Article 20 enables the airline to overcome this liability by showing that all necessary measures were taken to prevent the accident.<sup>7</sup> Article 22 limits the liability of the airline to 125,000 French francs, approximately 8300 dollars.<sup>8</sup>

Although the Warsaw Convention was highly beneficial in establishing a set of uniform conflict of laws rules at its inception, discontent grew in the United States as a result of the stringent monetary limitation on recovery. This sentiment was based on the outcome of cases such as *Froman v. Pan American Airways*,<sup>9</sup> in which a famous entertainer who suffered severe physical injury in an airplane crash was forced to terminate a highly successful career but recovered less than 8300 dollars. Discussion of possible revision of the Warsaw Convention began only six years after the Convention was adopted, and at conferences in Cairo (1946), Madrid (1951), Paris (1952), and Rio de Janeiro (1953), the United States, Britain, and France, among other countries, argued for higher limits on the liability of the commercial airlines.<sup>10</sup>

The Hague Protocol attempted to correct the deficiencies of the Warsaw Convention while maintaining the same basic framework.

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<sup>4</sup> S. DOC. EXEC. G, 73d Cong., 2d Sess. (1934). Warsaw Convention, 1929, 1934 U.S. Avi. Rep. 239, 242-43.

<sup>5</sup> Warsaw Convention, Art. 1.

<sup>6</sup> Warsaw Convention, Art. 17.

<sup>7</sup> Warsaw Convention, Art. 20.

<sup>8</sup> Warsaw Convention, Art. 22.

<sup>9</sup> 284 App. Div. 935, 135 N.Y.S.2d 619 (1954), *leave to appeal denied*, 308 N.Y. 1050 (1955), *cert. denied*, 349 U.S. 947 (1955).

<sup>10</sup> A. LOWENFELD, AVIATION LAW VI-88 (1973).

Concluded in 1955, the Protocol doubled the maximum liability of the air carrier. With the belief that even twice the former amount was insufficient, the United States discussed the Protocol for nearly a year, and spent another year preparing a report for the Senate on the merits of ratification. By 1959, the report had been completed, but the Senate took no steps to ratify the Protocol.<sup>11</sup> In fact, by the late fifties, the arguments in favor of ratification were weak in light of airline growth, low accident rates, access to liability insurance, and the rapid growth of the American airline industry even without the protection of limited liability.<sup>12</sup> Although the United States never ratified the Protocol, the agreement entered into force in 1963 as to the forty-three ratifying nations.<sup>13</sup> The failure of the United States to ratify the treaty resulted in two systems of liability: one for passengers whose route did not include a scheduled stop in the United States and another for passengers whose route did include such a stop.

Its efforts to increase liability having been aborted, the United States deposited its formal Notice of Denunciation of the Convention to the Polish government on November 15, 1965, to become effective on May 15, 1966.<sup>14</sup> Before the Denunciation's effective date, a compromise was reached whereby the air carriers agreed to waive the limitation of liability of Article 22 up to 75,000 dollars, and to waive the defense of due care provided in Article 20.<sup>15</sup> Thus under the Montreal Agreement, airlines in international travel are absolutely liable up to 75,000 dollars per passenger regardless of any fault or negligence. American proponents of the Agreement contended that recovery would be maximized and expedited in many cases by the elimination of long and costly lawsuits.<sup>16</sup> The Warsaw Convention, as modified by the Montreal Agreement, applies when the passenger's ticket includes at least one stop in the United States. Yet the Montreal Agreement is not a treaty; it is a

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<sup>11</sup> U.S. Dep't of State Press Release No. 268, 53 DEP'T STATE BULL. 923, 923-24 (1965).

<sup>12</sup> A. LOWENFELD, *supra* note 10, VI-90 *et seq.*

<sup>13</sup> For a list of countries which have ratified the Hague Protocol, *see* KREINDLER, *supra* note 3, § 12.02.

<sup>14</sup> U.S. Dep't of State Press Release No. 268, 53 DEP'T STATE BULL. 923 (1965).

<sup>15</sup> CAB Order No. 18900 Approving Agreement, 31 FED. REG. 7302 (1966).

<sup>16</sup> U.S. Dep't of State Press Release No. 110, 54 DEP'T STATE BULL. 955, 956 (1966).

contract among international airlines.<sup>17</sup> The requisites of liability—an accident which took place on board the aircraft or in the process of embarking or disembarking—remain the same as they were under the Warsaw Convention but the airline no longer has the defense of due care and the liability limitation is increased over 800 percent.<sup>18</sup> The cases presently arising are governed by this system of liability. Although the language and effect of the agreements seem clear, the courts have encountered great difficulties in interpretation.

#### RECENT LITIGATION

Article 17, which provides recovery for "death, wounding, or any other bodily injury" in case of an accident, recently has been the subject of a great deal of litigation, caused primarily by the high incidence of hijackings in the early seventies. In the majority of cases, passengers seeking recovery for mental anguish under that Article, when they have been neither physically harmed nor directly threatened by the hijacker, have been denied recovery.

In *Herman v. Trans World Airlines*,<sup>19</sup> the plaintiff's plane was hijacked to Amman, Jordan. Plaintiff sued for mental anguish and for physical injuries, such as skin rash and weight loss, claimed to be occasioned by the fright incurred. The lower court concluded, in a summary judgment, that mental anguish was included in the phrase "and other bodily injury," as the nervous system is itself a part of the body.<sup>20</sup> The appellate court reversed on the ground that the meaning of the Convention (the official text was in French) presented a triable issue of fact.<sup>21</sup>

*Rosman v. Trans World Airlines*<sup>22</sup> arose out of the same hijacking. In granting summary judgment, the lower court held defendant liable for both physical and psychic damages. *Rosman* and *Herman* were then consolidated for appeal to the New York Court of Appeals.<sup>23</sup>

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<sup>17</sup> Tompkins, *The Aftermath of a Hijacking*, 39 J. AIR L. & COM. 381, 390 (1973).

<sup>18</sup> Liability under the Warsaw Convention was limited to \$8,300; under the Montreal Agreement, the liability limitation is increased to \$75,000.

<sup>19</sup> — N.Y.2d —, — N.E.2d —, 330 N.Y.S.2d 829 (1972).

<sup>20</sup> — N.Y.2d at —, — N.E.2d at —, 330 N.Y.S.2d at 832.

<sup>21</sup> 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (1972).

<sup>22</sup> 40 App. Div. 2d 963, 338 N.Y.S.2d 664 (1972).

<sup>23</sup> 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1972).

The court of appeals was faced with several preliminary problems. It first determined that the interpretation of the treaties was a question of law,<sup>24</sup> that the French translation need not be inquired into,<sup>25</sup> and that French law was not relevant in determining the meaning of the treaty.<sup>26</sup> Turning to the merits of the case, the court found that "bodily" connotes "palpable, conspicuous, physical injury,"<sup>27</sup> and that "wounding" was limited by the subsequent phrase "any other bodily injury," negating the possibility that mental wounding was included within the terms of the treaty. Plaintiffs' argument that the phrase "any other bodily injury" should be considered in light of the local law on recovery for psychic injury was dismissed as it would abrogate the Convention's obvious attempt at uniformity.<sup>28</sup> The court concluded that recovery could be had only for the physical results of the mental suffering (skin rash, etc.), and for the pain and suffering ensuing from those physical discomforts. No recovery was allowed for the psychic trauma endured by the passengers in the course of the hijacking or their

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<sup>24</sup> The court based this decision on N.Y. CONSOL. LAWS Rule 4511(a) (McKinney 1954) which states that the New York courts are required to take judicial notice of all treaties.

<sup>25</sup> Since the parties were in complete agreement that the French phrase "mort, de blessure, au de toutes autres lesions corperalles" was correctly translated into English as "death, wounding, or any other bodily injury," such an inquiry was deemed unnecessary. "Where a translation which fairly comprehends the meaning and scope of the foreign terms is agreed upon, the court's inquiry should proceed toward determining the ordinary meaning of those terms and arriving at a reasonable interpretation which will effectuate the treaty's purpose." 34 N.Y.2d at 393, 314 N.E.2d at 853, 358 N.Y.S.2d at 104.

<sup>26</sup> The court further determined that the relevant French law on recovery for mental anguish was not binding on New York courts simply because the Convention was drafted in French, 34 N.Y.2d at 395, 314 N.E.2d at 854, 358 N.Y.S.2d at 105, and that it was useless to inquire into legislative intent as the meaning of bodily injury was never discussed at the drafting of either the Warsaw Convention or the Montreal Agreement. 34 N.Y.2d at 395, 314 N.E.2d at 854, 358 N.Y.S.2d at 105.

<sup>27</sup> 34 N.Y.2d at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107.

<sup>28</sup> The decision in *Rosman* on this point is supported by numerous authorities, not only because of the Convention's goal of international uniformity but because Article VI, Clause 2 of the United States Constitution declares treaties to be the "supreme law of the land." See *Garcia v. Pan Am. Airways*, 269 App. Div. 287, —, 55 N.Y.S.2d 317, 321 (1945) (court held that the Warsaw Convention took precedence, contravening the usual policy that "the right and measure of recovery are governed by the *lex loci*"), H. DRION, *LIMITATIONS OF LIABILITIES IN INTERNATIONAL AIR LAW* 120 (1954): "Whenever the Convention offers a guidance, that guidance should be followed rather than that of any national law in order to safeguard the uniformity aimed at by the convention." See also *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

subsequent mental distress. Two requirements for recovery were set forth: an "objective, identifiable injury to the body," and a casual connection, capable of being established by physical impact, physical circumstances of the confinement, or psychic trauma.<sup>29</sup>

In *Burnett v. Trans World Airlines*,<sup>30</sup> the court reached the same result as that finally achieved in *Rosman* and *Herman* but used entirely different reasoning. The first premise of the *Burnett* court was that the binding meaning of the terms must be found in the French legal meaning, furthering the quest for uniformity of interpretation among nations.<sup>31</sup> Because French scholars have traditionally drawn a sharp distinction between "lesion mentale" (mental wound) and "lesion corporalle" (physical wound), the court determined that the former referred solely to a mental injury and the latter exclusively to physical injury. In addition, the context of the phrase "lesion corporalle" and the "normal import"<sup>32</sup> of that phrase were material factors in the court's holding that mental anguish was not within the purview of "bodily injury."<sup>33</sup> The court thus allowed recovery only for the mental anguish which resulted from physical harm suffered as a result of the hijacking, but not for the general terror and distress caused by the piracy.

The most recent case arising under Article 17 is *Husserl v. Swiss Air Transport Company*.<sup>34</sup> In a carefully considered opinion, a federal district court in New York allowed recovery for mental anguish under Article 17. The court first determined that types of injuries not mentioned in Articles 17, 18 and 19 should be recoverable in accordance with local substantive law which would apply if there were no treaty.<sup>35</sup> The silence on the part of the drafters was interpreted as a failure to deal with an unforeseen problem, and filling the vacuum, the court found it most appropriate to construe the remedies available under the Convention broadly to include as many types of injuries as possible.<sup>36</sup> Realizing that the draftsmen

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<sup>29</sup> 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1972).

<sup>30</sup> 368 F. Supp. 1152 (N.M. 1973).

<sup>31</sup> *Id.* at 1152.

<sup>32</sup> *Id.* at 1155.

<sup>33</sup> *Id.* at 1157.

<sup>34</sup> 388 F. Supp. 1238 (S.D.N.Y. 1975).

<sup>35</sup> *Id.* at 1246.

<sup>36</sup> *Id.* at 1247.

probably had entertained no intention at all regarding recovery for mental anguish, the general intent of the Convention to provide a comprehensive source of relief for injuries sustained in international aviation should be upheld. Reading Article 17 expansively to include psychosomatic injury accomplishes this purpose, as well as providing uniform relief.<sup>37</sup>

As the *Husserl* court pointed out, *Husserl* differs from *Rosman*, *Herman*, and *Burnett* only in its holding that mental anguish standing alone, is recoverable. All the courts have agreed that mental anguish, resulting from a physical injury which was the result of some emotional upset, is recoverable. The variance in the amount of damages recoverable under the two theories, however, is great. In an effort to determine which measure of recovery is more valid, an inquiry into some basic principles of treaty construction is necessary.

#### THE INTERPRETATION OF TREATIES

One of the primary aids to treaty interpretation is the course of treaty negotiations. The legislative history of the Warsaw Convention yields little aid to its interpretation. At the time of the negotiations, recovery for mental anguish was virtually unheard of as a legal cause of action and recovery for mental anguish was not discussed at the Convention negotiations.<sup>38</sup> As *Husserl* points out, it is likely that the drafters had no intention at all regarding recovery in this area. The Legal Committee of the International Civil Aviation Organization discussed recovery for mental anguish in Madrid in 1941, but the result, however, was a decision not to make any specific provision for mental injury.<sup>39</sup>

One of the drafters of the Montreal Agreement feels that it does not support a cause of action for mental anguish.<sup>40</sup> Other commentators have felt that the use of the word "bodily" does not ex-

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<sup>37</sup> *Id.* at 1250-51.

<sup>38</sup> *Id.* at 1249.

<sup>39</sup> *Excerpts from Report of United States Delegation to Eighth Session of the Legal Committee of ICAO held at Madrid, Spain, September, 1941*, 19 J. AIR L. & COM. 70, 79 (1952).

<sup>40</sup> See N.Y. Times, Sept. 30, 1970, at 42, col. 1, (city ed.) where Andreas F. Lowenfeld states, "The Montreal Agreement applies only to death wounding or other bodily injury suffered by a passenger. Thus, mere delay or anguish will not support a suit under the Agreement."

clude mental anguish since mental anguish is usually accompanied by a physical disability, such as extreme nervousness.<sup>41</sup> The lack of any evidence of the intent of the drafters and the differing views of legal commentators compel a resort to some general principles of treaty interpretation.

Essentially, two lines of cases exist regarding the interpretation of treaties. One of these holds that when the words of the treaty are clear, no construction is necessary;<sup>42</sup> the second holds that when two different constructions of a treaty are possible, the one which is least restrictive of the rights claimed under it is preferred.<sup>43</sup> The problem thus becomes one of whether the terms, "death, wounding or bodily injury" are clear, making judicial construction unnecessary, or whether they are sufficiently ambiguous to justify interpretation. In *Burnett* and in *Rosman* and *Herman*, the courts found that they were clear and should be applied as commonly understood. In *Husserl*, however, the court found that the terms were *not* unambiguous. In view of the amount of litigation which has ensued from the terms, not only under Article 17 of the Warsaw Convention but in other areas as well,<sup>44</sup> the words are certainly not clear. This

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<sup>41</sup> Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 19 (1936).

<sup>42</sup> In *S.S. Wimbledon*, P.C.I.J., ser. A/B, No. 5 at 23-4, the Permanent Court of International Justice in dealing with Article Four of the Treaty of Minorities, stated that "having before it a clause which leaves little to be desired in the way of clearness, it is bound to apply this clause as it stands." See also *United States v. Choctaw Nation*, 179 U.S. 494 (1900); *Hidalgo Water Control and Imp. Dist. #7 v. Hedrick*, 226 F.2d 1 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956); *Savelis v. Vladeros*, 137 F. Supp. 389 (E.D. Va. 1955), *aff'd*, 248 F.2d 729 (4th Cir. 1957); *Watson v. Holy*, 59 F. Supp. 197 (S.D.N.Y. 1943); *King Features Syndicate v. Valley Broadcasting Co.*, 43 F. Supp. 137 (N.D. Tex. 1942), *aff'd*, 133 F.2d 127 (5th Cir. 1943).

<sup>43</sup> *Hauenstein v. Lynham*, 100 U.S. 483, 483-87 (1880). See also *Todak v. Union States Bank*, 281 U.S. 449 (1930); *Jordan v. Tashiro*, 278 U.S. 123 (1928); *In re Ross*, 140 U.S. 453 (1891); *Geofray v. Riggs*, 133 U.S. 258, 271 (1890); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830).

<sup>44</sup> Particularly in the insurance field, there has been a plethora of cases dealing with interpreting the term bodily injury. See *Chase v. Business Men's Assurance Co. of America*, 41 F.2d 34 (10th Cir. 1931); *United Fidelity & Guaranty Co. v. Shrigley*, 26 F. Supp. 625 (W. D. Ark. 1939); *Pope v. Business Men's Assurance Co. of America*, 131 S.W.2d 887 (Mo. Ct. App. 1939); *Jacobson v. Mutual Beneficial Health & Accident Ass'n*, 69 N.D. 632, 289 N.W. 591 (1940); *Provident Life & Accident Ins. Co. v. Campbell*, 79 S.W.2d 292 (Tenn. App. 1934); *Pan Am. Life Ins. Co. v. Andrews*, 340 S.W.2d 787 (Tex. 1960).

being so, the view taken in *Husserl* that judicial construction of the terms is permissible appears to be the better view.

Further support for the *Husserl* analysis is found in the frequent recognition by courts that an unduly strict interpretation of a treaty will cause great injustice when applied to changing conditions. As one scholar has summarized, "[I]nterpretation is ever necessary because of the inherent imperfections of human language as well as of the inevitable working of time and circumstances."<sup>45</sup> Inquiry into the change which has taken place in the common law status of recovery for mental anguish and in the aviation industry is helpful to a determination of whether "time and circumstances" justify a broader reading of Article 17 of the Warsaw Convention.

#### COMMON LAW RECOVERY FOR MENTAL ANGUISH

Since the drafting of the Warsaw Convention, the common law has taken tremendous strides toward allowing recovery for mental anguish. Today, American courts recognize emotional stress as a recoverable element of damage in several situations, whereas it was non-existent as an element of tort recovery in 1929. Although no precise definition of mental anguish has been formulated, it has been held to include, among other things, embarrassment, anxiety, stress, grief, and fright.<sup>46</sup> Plaintiffs have recovered for fright at the time of the accident, reasonable fear as to the possible effects of the injury upon their health or ability to make a living, and fear of death or insanity as a consequence of the injury.<sup>47</sup>

Recovery is allowed when mental distress is (i) intentionally inflicted, (ii) concurrent with another tort, or (iii) accompanied by physical harm. The *intentional* infliction of mental distress was recognized as a valid cause of action as early as 1939.<sup>48</sup> It is normally limited to cases in which the flagrant character of the defendant's action insures that emotional distress was actually suffered.<sup>49</sup> Phys-

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<sup>45</sup> I. YU, *THE INTERPRETATION OF TREATIES* 76 (1968).

<sup>46</sup> Comment, *Mental Distress in Psychological Research*, 21 *BAYLOR L. REV.* 520, 522 (1969).

<sup>47</sup> C. McCORMICK, *HANDBOOK ON DAMAGES* § 88, at 316 (1935).

<sup>48</sup> Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 *MICH. L. REV.* 879 (1937).

<sup>49</sup> W. PROSSER, *HANDBOOK OF LAW OF TORTS* § 12 (4th ed. 1971).

ical harm is not necessarily requisite,<sup>50</sup> but is naturally helpful to plaintiff's cause of action.

Recovery for mental anguish in the second category has been termed "parasitic damages," i.e., an "element of harm to be considered in assessing the recoverable damage, which cannot be taken into account in determining the primary question of liability."<sup>51</sup> Consonant with the trend to allow recovery for mental distress, courts often strain to find the necessary collateral tort.<sup>52</sup> Sometimes recovery will be premised upon a special duty owed by defendant to plaintiff, such as an innkeeper-guest relationship,<sup>53</sup> when no independent tort can be found.

When mental distress was inflicted negligently, courts have required either impact with the plaintiff<sup>54</sup> or physical injury.<sup>55</sup> Traditionally, when neither concurred, recovery was disallowed.<sup>56</sup> The impact rule has been justified by its helpfulness in determining the genuineness of the plaintiff's claim.<sup>57</sup> Today, however, the impact rule has been overruled in almost every jurisdiction.<sup>58</sup> Moreover, the necessary physical injury is satisfied no matter how slight the

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<sup>50</sup> See *Wilkins v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930) and *State Rubbish Collectors v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). In *Wilkins*, plaintiff recovered for mental distress against defendants who threatened to lynch him if he did not leave town in ten days. In *Siliznoff*, plaintiff was awarded damages for mental anguish caused by defendants' threats of physical harm if he did not join their association.

<sup>51</sup> T. STREET, *THE FOUNDATION OF LEGAL LIABILITY* 461 (1906).

<sup>52</sup> *E.g.*, *Wiggins v. Maskins Credit Clothing Store*, 137 F. Supp. 764 (S.D.S.C. 1956) (court held repeated telephone calls to be a nuisance thus allowed recovery for emotional distress).

<sup>53</sup> See 28 AM. JUR. *Innkeepers* § 147 (1938).

<sup>54</sup> The leading case denying recovery without impact is *Victorian R. Comrs. v. Coultas* (1888 Eng.) L.R., 13 App. Cas. 222, 8 E.R.C. 405 (PO). In *Spade v. Lynn & B.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897), the mere presence of an inebriated man in a streetcar was held insufficient to permit recovery where there was no impact between plaintiff and the man.

<sup>55</sup> See *Miller v. Baltimore*, 78 Ohio 309, 85 N.E. 499 (1908) (court rejected the notion that liability should be imposed where mental injury was unaccompanied by contemporaneous physical injury).

<sup>56</sup> See *Connell v. Western Union*, 116 Mo. 34, 22 S.W. 345 (1893).

<sup>57</sup> *Reed v. Maley*, 115 Ky. 816, 74 S.W. 1079 (1903).

<sup>58</sup> *Abramovsky, Compensation for Passengers of Hijacked Aircraft*, 21 *BUFFALO L. REV.* 339, 443 (1972). The abolition of the impact rule began with *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890), which held that where harm was foreseeable, impact *vel non* was immaterial. See also *Dillon v. Legy*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973).

injury is.<sup>59</sup> The rationale upon which recovery is premised when there is physical injury is that the mental injury "attaches to the original physical injury, and the whole may be considered in the allowance of damages."<sup>60</sup> At least one court has now dismissed the requirement for physical injury.<sup>61</sup> It is as yet too early to determine whether this is exemplary of a trend to abolish that requirement altogether.

In each of the areas in which mental anguish is recoverable, the common law has become increasingly permissive. Legal scholars as well as courts are beginning to accept the view that emotions are accompanied by definitely ascertainable physical reactions,<sup>62</sup> and thus the distinction traditionally drawn now seems specious. Moreover, reasons once given for denying recovery are now being rebutted. For instance, the argument that allowance of recovery for mental anguish would result in a flood of fictitious claims and vexatious litigation is now seen as a poor reason for denying re-

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<sup>59</sup> In *Linn v. Duquesne Borough*, 204 Pa. 551, —, 54 A. 341, 346 (1903), the court stated: "Where a claim is for mental suffering that grows out of or is connected with a physical injury, however slight, there is some basis for determining its genuineness, and the extent to which it affects the claimant."

<sup>60</sup> *McCardle v. George B. Peck Dry Goods*, 191 Mo. App. 263, 177 S.W. 1095 (1915); *Accord McGee v. Vanover*, 148 Ky. 737, 147 S.W. 742 (1912); *Kennell v. Gershonovitz*, 84 N.J. 577, 87 A. 130 (1913); *Porter v. R.R.*, 73 N.J. 405, 63 A. 860 (1906). See also 15 AM. JUR. DAMAGES § 175 (1938), and Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

<sup>61</sup> *Battalla v. New York*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1972). See generally *Sindell, The Terror Neurosis*, 15 CLEV.-MAR. L. REV. 41 (1966).

<sup>62</sup> *Sullivan, The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1 (1936); PROSSER, *supra* note 49, § 12 (4th ed. 1971): "Medical science has recognized . . . that not only fright and shock, but also grief, anxiety, rage and shame are, in themselves, physical injuries in the sense that they produce well marked changes in the body and symptoms that are readily visible to the professional eye." Annot., 64 A.L.R.2d 101 (1959): ". . . [t]here seems to be little doubt, in the light of modern psychosomatic discoveries, that emotions are accompanied and followed by definite and readily observable physical reactions." As for the recognition of the same by courts, see *Mason v. Grey*, Case No. 22544, Kootenai County Ct., Idaho, 1967: "The orderly and normal functions of man's mind and emotions are as vital to his efficient operation as his legs, hands, eyes or ears . . . . Indeed, protection of the mind may be of greater importance than protection of the mechanical functioning of the body." See also *Klimas v. Trans Caribbean Airways, Inc.*, 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961); *Halio v. Lurie*, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (1941). For a table of clinical disorders which can arise from emotional stimulation, see Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 217 (1944).

covery when serious wrongs would otherwise go unredressed.<sup>63</sup> The difficulty in computing damages, once an obstacle, is viewed today as no greater consequence in the area of mental distress than in other areas of the law.<sup>64</sup> Want of legal precedent, another ground frequently given, should not be sufficient justification for a complete denial of relief.

Clearly, the law has changed tremendously since the Warsaw Convention was written. At that time, mental anguish was not recoverable at all. It has since been allowed where certain requirements have been fulfilled; today, even those requirements are beginning to lose force. In view of this, a broader interpretation of Article 17 of the Warsaw Convention is justified given the considerations of policy which support it.

#### THE POLICY CONSIDERATIONS

Undoubtedly, one of the primary purposes of the Warsaw Convention was the protection of the aviation industry. Although this purpose would best be served by a strict construction of Article 17, several countervailing factors should be considered. In the last forty-five years, the airlines have grown tremendously. Liability insurance is now available to protect the airline against what would otherwise be economic catastrophes.<sup>65</sup> By virtue of its physical control of the airplane, the airline is best able to avert hijackings and other accidents which might result in mental distress.<sup>66</sup> It is also best able to distribute the risk among all of its users.<sup>67</sup>

On the other hand, tort liability is traditionally a matter of fault and not one of risk bearing. The ability of the airline to pay injured passengers should therefore not be the only criterion. It is also questionable whether, even in view of the vast changes in the common law since 1929, it is advisable to subject the airlines to

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<sup>63</sup> Compare *Mitchell v. Rochester*, 151 N.Y. 107, 45 N.E. 354 (1896); with *Prosser*, *supra* note 42 § 12.

<sup>64</sup> *Harvis v. Knoxville Power Co.*, 175 N.C. 31, 94 S.E. 703 (1917).

<sup>65</sup> KRIENDLER, *supra* note 3, § 11.01(5).

<sup>66</sup> *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972): The airline is "the best qualified initially to develop defensive mechanisms to avoid such incidents since it physically controls the aircraft and access to it."

<sup>67</sup> DRION, *supra* note 28, at 11: "As a matter of social economics the damages caused by such activities should be considered as general costs of the activity concerned. . . ."

strict liability for a tort which has, since its inception, required a showing of outrageous conduct, physical harm, or other extenuating circumstances.

In view of the conflicting policy considerations, it is of particular interest that the Guatemala Protocol,<sup>68</sup> the latest attempted revision of the Warsaw Convention, would allow recovery for mental anguish. As amended, Article 17 of that Protocol reads:

The carrier is liable for damage sustained in the case of death *or personal injury* of a passenger upon condition only that the event 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. . . .<sup>69</sup>

Despite the fact that the Protocol has not been ratified by the necessary number of nations to make it effective, it does evidence the conviction of the drafters that "bodily injuries" is too narrow a realm of recovery. The requirements for ratification are strict, however,<sup>70</sup> and it is thus unlikely that the Protocol will be ratified in the near future. Resolution of the problem within the context of

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<sup>68</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Guatemala City, March 8, 1971. International Conference on Air Law, Documents at 189, 9040—LC/167-2 [hereinafter cited as Guatemala Protocol].

<sup>69</sup> Guatemala Protocol, Article IV amending Article 17 of the Warsaw Convention. (Italics added.)

The Guatemala Protocol made numerous other changes in the Warsaw-Montreal scheme. Under Article 22 of the Protocol, the liability of the airlines is to be increased to \$100,000. This amount is to be increased by \$2500 for five and ten years after the Protocol's initiation into operation, pursuant to Article 42. In exchange for the increase in liability demanded by the more developed countries, the limitation was made "unbreakable." Article 24 provides that the limit ". . . may not be exceeded, whatever the circumstances which gave rise to the liability" and Article 22, paragraph 1 states that the limit applies to "the aggregate of the claims, however founded, in respect to damage suffered as a result of the death or personal injury of each passenger." To compensate for this strict limit, Article 35-A permits individual countries to establish supplemental plans under which their citizens would be entitled to greater compensation. Under these plans the carriers are to be relieved from further financial responsibility, the money to come from other means, such as additional fees charged to passengers, from which a special fund would be set up.

<sup>70</sup> Article 20 of the Protocol requires that it be ratified by thirty nations, and that those nations comprise "forty per cent of the total international scheduled air traffic of the airlines of the member states of the International Civil Aviation Organization in 1970." This requirement was included to avoid the situation which ensued from the small number of states signing the Hague Protocol, resulting in two different sets of rules operating concurrently in the governance of liability in international air transportation.

the Warsaw Convention as currently worded therefore will remain important.

#### CONCLUSION

The competing policies behind the Warsaw Convention and related agreements have created a most difficult problem of interpretation. Uniformity of the law relating to passenger recovery and the fostering of airline growth would be facilitated by a literal interpretation of the terms of the Convention; aiding passenger recovery could best be served by a liberal construction. One should also consider that each revision of the Warsaw Convention has created conditions increasingly favorable to passenger recovery. The original Convention's provision for the defense of due care was modified by the later agreements which provided for strict liability. The limit on passenger recovery has increased with each revision. Whereas uniformity and airline growth may have once been primary, the trend is toward greater passenger recovery. Thus the major policies underlying the Convention now favor a liberal interpretation.

The development of the common law toward allowance of recovery for mental anguish is undeniable. Although it is questionable whether a tort which has traditionally required a high showing of proof (i.e., intent, physical injury, etc.) should be the subject of strict liability under the Warsaw Convention, the airlines were purposely subjected to strict liability because of difficulties in proving negligence or intent against them. Thus an examination into the nature of the tort to determine whether strict liability is warranted seems unnecessary. Fault, the traditional determinant of tort liability need not be inquired into. Moreover, airline growth since the drafting of the Warsaw Convention and the availability of liability insurance are further support for the imposition of strict liability.

Certainly, the courts have been faced with a difficult problem. The conclusion of the *Husserl* court that the terms are ambiguous and are susceptible to a liberal interpretation seems most correct. It is consonant not only with the growth of the law since the writing of the Warsaw Convention, but also with the conflicting policies which surround the issue.