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Case Notes

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WARSAW CONVENTION—CARRIER LIABILITY—Mental Anguish and Distress Are Not Encompassed as a Matter of Law by the Clause "Any Other Bodily Injury" Under Article 17 of the Warsaw Convention. *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972), *rev'd on other grounds*, 40 App.Div.2d 850, 337 N.Y.S.2d 827 (App.Div. 1972).

Infant plaintiff was a passenger on defendant's aircraft enroute to New York from Tel Aviv when the plane was hijacked and forced to land in the Jordanian desert.[1] Plaintiff alleged that she suffered extreme fright, loss of weight and developed a skin rash as a result of being held captive for several days in the desert.[2] A bodily contact injury was not alleged. Plaintiff sought summary judgment against the carrier on the theory that article 17[3] of the Warsaw Convention[4] and, in particular, the clause "or any other bodily injury" included claims for mental anguish and distress. On the basis of the French translation of the Convention, the New York trial court granted summary judgment for plaintiff.[5] Defendant appealed. *Held, reversed:* A court cannot take cognizance of the translation of a foreign language; these determinations are issues of fact for the jury.[6] *Herman v. Trans World Airlines, Inc.*,

[1] Herman v. TWA, 337 N.Y.S.2d 827, 828 (App. Div. 1972).

[2] *Id.* at 829.

[3] Warsaw Convention, article 17, 49 Stat. 3018, T.S. 876 (1934) 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.

[4] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et seq.*, T.S. No. 876 (1934) [hereinafter cited as Warsaw Convention or Convention].

[5] Herman v. TWA, 330 N.Y.S.2d 829 (Sup. Ct. 1972). The trial court noted that the translation of the French text of article 17 connotated a broader meaning in English than simply a physical "hurt" or "injury." The French text included words that when translated meant "damage," "prejudice," "wrong," or "hurt." *Id.* at 832.

[6] Defendant had also contended that plaintiff's injuries, if any, were not sustained while in flight, but while the plane was grounded. The lower court held

69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972), *rev'd on other grounds,* 40 App.Div.2d 850, 337 N.Y.S.2d 827 (App. Div. 1972).

According to article 17 of the Warsaw Convention, a plaintiff may recover from an air carrier if he or she suffers death, wounding, "or any other bodily injury"[7] while on board an aircraft during a Warsaw flight.[8] The Warsaw Convention, however, does not

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that the accident which caused the alleged damage took place "on board the aircraft" within the meaning of Warsaw Convention article 17, 49 Stat. 3018. On appeal, the majority did not discuss this point. The dissent, however, devoted little time in dismissing defendant's argument as not determinative of the question before the court. For purposes of this note, defendant's main contention that article 17 does not encompass mental distress will be dealt with exclusively. *See generally* McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications,* 39 J. AIR L. & COM. 29, 46-7 (1973).

[7] The Warsaw Convention was modified by the Montreal Agreement of 1966. *See* CAB Agreement No. 18990, approved by Order No. E-23680 (May 13, 1966), reprinted in CAB, AERONAUTICAL STATUTES AND RELATED MATERIALS 425 (rev. ed. 1970). The Montreal Agreement of 1966 did not materially alter the wording of article 17 of the Warsaw Convention. For the purposes of this note, it will be considered that either the wording of article 17 from the Warsaw Convention or Montreal Agreement will present the identical questions to the court.

[8] A Warsaw flight is described in the Warsaw Convention, article 1, 49 Stat. 3014-15, T.S. 876 (1934), as follows:

> (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
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> (2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.
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> (3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

resolve the question whether and to what extent mental distress and anguish are within the scope of "any other bodily injury." Therefore, the court in *Herman* was faced with two questions of first impression: (i) whether mental anguish was included within the scope of article 17, and, if so, (ii) does there necessarily have to be physical impact or manifestations accompanying the mental anguish in order for a plaintiff to be able to pursue a remedy against the carrier?

On appeal from the lower court's decision, plaintiff, noting that the official French text of the Convention when translated into English is broad enough to include mental distress and anguish, urged that personal injuries caused by mental anguish are encompassed by article 17.[9] Defendant, however, denied liability contending that since the specific words of the Warsaw Convention's official English translation of article 17 did not mention mental distress, it could not be implied.[10] The majority of the appellate court reasoned that the resolution of the issue of the interpretation of article 17 depended on which translation of the official French text was adopted.[11] The interpretation of a foreign language, however, presents a triable issue of fact; therefore, New York courts are prohibited from taking judicial cognizance of the meaning of foreign languages.[12] Consequently, the appellate court reversed the decision of the lower trial court that had granted summary judgment for plaintiff.[13]

The dissenting opinion in the appellate court, emphasizing the common law duties and obligations that common carriers owe their passengers,[14] urged that the interpretation of the Convention

[9] 337 N.Y.S.2d 827, 828 (App. Div. 1972).

[10] *Id.*

[11] *See* Block v. Compagnie Nationale Air France, 386 F.2d 323, 330 (5th Cir. 1967).

[12] 337 N.Y.S.2d at 828-29. *See* C. MCCORMICK'S, HANDBOOK OF THE LAW OF EVIDENCE § 335 (2d ed. 1972); In re Tomljenovich's Will, 154 N.Y.S.2d 327, 331 (Sup. Ct. 1956). In *Tomljenovich's Will*, the court stated that: "It is not for the court to take judicial cognizance of the meaning of foreign languages, for such is a question of fact to be proved as any other fact." *See also* People v. Yui Kui Chu, 273 N.Y. 191, 197, 7 N.E.2d 96, 98 (Ct. App. 1937); Hossbach v. Behr, 39 App. Div. 793, 795, 124 N.Y.S. 379, 380 (App. Div. 1910).

[13] *Accord*, Rosman v. Trans World Airlines, Inc., 40 App. Div.2d 963, 338 N.Y.S.2d 664 (App. Div. 1972).

[14] 337 N.Y.S.2d at 830-31. *See* W. PROSSER, THE LAW OF TORTS §§ 34, 56 (4th ed. 1971) [hereinafter cited as Prosser]; *See also* McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527 (5th Cir. 1967) (duty owed by carrier to passen-

be consistent with these common law principles. For example, in *Letsos v. Chicago Transit Authority*[15] plaintiff passenger was injured by another passenger. Plaintiff sued defendant bus company alleging negligence on the part of the company for not preserving order on the bus and for failing to take timely action to protect him from harm caused by disorderly passengers.[16] The court in *Letsos* held that the carrier has a duty to transport its passengers safely; this includes "the obligation of using due diligence to protect its passengers from assault, injury and abuse by third persons."[17] Since there is no indication in the provision itself or applicable case law whether an injury caused by fright is within the scope of article 17, the dissent reasoned that applicable common law principles as expressed in *Letsos* and other cases involving common carriers should be adopted. The dissent concluded that the air carrier should be held liable for the injury to plaintiff, and therefore, the meaning of "bodily injury" in the English translation of the Convention does include an action for mental distress and anguish.[18]

The majority in *Herman* left unanswered for the moment the question of whether article 17 of the Warsaw Convention enables a plaintiff to seek recovery for mental anguish. The determination of what "any other bodily injury" in article 17 encompasses, however, can be ascertained by: (i) an examination of the history, purposes and interpretation of the Convention, in particular article 17, as well as (ii) reviewing the development of present day tort law in the area of mental anguish, both with and without accompanying physical manifestations.

The Supreme Court has held that treaties are to receive a fair and liberal interpretation.[19] The courts are also bound to look

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gers requires it to maintain order and prevent personal attacks); Pullman Co. v. Culbreth, 2 F.2d 540 (5th Cir. 1924) (carrier responsible for protection of passengers from injury); Green Bus Lines, Inc. v. Ocean Acc. & Guar. Corp., 287 N.Y. 309, 39 N.E.2d 251 (Ct. App. 1942) (common carrier has legal duty, after due notice, to protect its passengers from assaults by fellow passengers). McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications*, 39 J. AIR L. & COM. 29, 44 nn.63-64 (1973); Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339, 344 nn.30-37 (1972).

[15] 118 Ill. App.2d 26, 254 N.E.2d 645 (1969).

[16] 254 N.E.2d at 646.

[17] *Id.* at 647. *See* Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).

[18] 337 N.Y.S.2d at 831.

[19] 1 KENT'S COMMENTARIES 208 (14th ed. 1896); 5 J. MOORE, DIGEST OF IN-

beyond the form of the treaty to its history, the circumstances attending the negotiation of the agreement and any other pertinent information that might give a clue to the drafters' intentions.[20] The basic function of treaty interpretation is to ascertain the meaning intended by the parties who created the treaty.[21] When formulating article 17, the drafters of the Convention did not reveal whether they intended an injury caused by fright to be within the scope of the provision.[22] At the meeting of the Legal Committee of the International Civil Aviation Organization that was convened in Madrid, Spain in 1951, however, there was a discussion of the type of personal injury that should be covered by article 17 of the Convention. The delegates at the Conference finally determined that they should not make a specific provision for mental injury in the sense of emotional upset or disturbance unassociated with bodily injury.[23] The Conference did not, however, clearly indicate whether article 17 encompassed mental anguish when accompanied with bodily injury.[24] It is interesting to note that Great Britain adopted the Carriage By Air Act of 1932, that with minor changes not here relevant, is identical in its text to the Warsaw Convention. In referring to the term "bodily injury" contained in article 17 of the Carriage By Air Act of 1932, British aviation experts concluded that the term "bodily injury is used to exclude other kinds of injury caused by delay and will be widely construed to include,

TERNATIONAL LAW 249-53 (1906); Hauenstein v. Lynham, 100 U.S. 483 (1879). *See also* Ware v. Hylton, 1 U.S. (3 Dall.) 164, 181 (1796), for the United States Supreme Court's classic position toward treaties.

[20] Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940); Valentine v. United States, 299 U.S. 5 (1936); Santovincenzo v. Egan, 284 U.S. 30 (1931); United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662 (1905).

[21] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 146 (1965), quoted in W. BISHOP, INTERNATIONAL LAW 174 (3d ed. 1971).

[22] Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. AIR L. & COM. 395, 402 (1949); Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 339-40 (1959).

[23] *Excerpts from Report of the United States Delegation to Eighth Session of the Legal Committee of ICAO, held at Madrid, Spain, Sept. 1951*, 19 J. AIR L. & COM. 70, 79 (1952).

[24] The Committee did, however, vote to adopt the principles of the official French text of article 17 of the existing Convention with one exception. The Committee substituted the words "affection corporelle" for the words "lesions corporelle" where the latter appeared in the official French text. The purpose of this change was to insure that physical injury that was not necessarily associated with a "rupture of bodily tissues" would be covered in the proposed amendments. *Id.* at 79.

for example, mental shock caused by the accident."[25] It has been further suggested that the characterization of an injury as "bodily" by the authors of article 17 does not necessarily eliminate cases caused by fright since there is usually physical disability accompanying acute mental distress.[26] This seems to lend support to a conclusion that acute mental anguish accompanied by bodily injury is within article 17. With the scarcity of available information describing the intentions of the authors of article 17, however, it is necessary to resort to past judicial interpretations of various articles of the Convention to determine the scope of the article.

Although one of the basic objectives of the formulation of the Warsaw Convention was to provide the fledgling air industry with protection against unlimited tort liability by setting limits on the air carriers' liability to passengers,[27] courts have realized that the successful airline industry of today does not need the extensive protections that it once did. With this realization has come a continuous evolvement and broadening of the articles of the Convention through judicial interpretation to permit recovery when it had previously been denied by strict and literal readings of the articles.[28] The New York courts have been in the mainstream of this trend.[29]

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[25] 1 P. KEENAN, A. LESTER, & P. MARTIN, SHAWCROSS AND BEAUMONT ON AIR LAW 441, n.9 (3d ed. 1966). It should be noted that article 17 of the Warsaw Convention is identical to article 17 of the Carriage By Air Act of 1932.

[26] *See* Sullivan, *The Codification of the Air Carrier Liability by International Convention*, 7 J. AIR L. 1, 19 (1936).

[27] *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967). For a more complete description of the history of the Warsaw Convention and subsequent related agreements, *see* D. BILLYOU, AIR LAW (2d ed. 1964); C. SHAWCROSS AND K. BEAUMONT, AIR LAW (3d ed. 1969); Orr, *The Warsaw Convention*, 31 VA. L. REV. 423 (1945).

[28] *Compare* Ross v. Pan American Airways, Inc., 190 Misc. 974, 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd*, 80 N.Y.S.2d 735 (App. Div. 1948), 85 N.E.2d 880 (Ct. App. 1949) where the court strictly interpreted article 3 of the Convention with Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966) where articles 3 and 4 of the Convention were broadly interpreted in order to allow the passenger plaintiff to circumvent the monetary limitations of the Convention.

[29] Boryk v. Aerolineas Argentinas, 332 F. Supp. 405 (S.D.N.Y. 1971) (size of type and form of notice in ticket not adequate); Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966) (inadequate notice of articles 3 and 4 in passenger ticket); Stolk v. Compagnie Nationale Air France, 58 Misc.2d 1008, 299 N.Y.S.2d 58, *aff'd*, 64 Misc.2d 859, 316 N.Y.S.2d 455 (App. T. 1970) (inadequate notice by articles 3 and 4); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968) (non-compliance with article 3).

For example, courts have given liberal interpretations to the words "willful misconduct" found in article 25,[30] "delivery" in article 3(2),[31] "place of business" in article 28(1),[32] and most recently, "accident" in article 17.[33] In *Eck v. United Arab Air Lines, Inc.*,[34] the Second Circuit, in interpreting article 28(1), stated:

> The problem of interpretation . . . should not . . . [be] resolved by a mechanical application of the . . . provision's language. . . . A court faced with this problem of interpretation . . . can well begin with an inquiry into the purpose of the provision. . . . The language of the provision . . . should never become a 'verbal prison.'[35]

The Second Circuit further stated that the courts should "seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion."[36] In the recent case of *Husserl v. Swiss Air Transport Company, Ltd.*,[37] the federal district court held that a hijacking is within the ambit of the term "accident" as it is used in article 17 of the Convention. The federal district court conceded that "hijacking was probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated,"[38] but nevertheless, found sufficient policy reasons underlying the Warsaw Con-

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[30] Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965); Grey v. American Airlines, 227 F.2d 282 (2d Cir. 1955); Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122 (2d Cir. 1951); Wyman v. Pan American World Airways, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd*, 267 App. Div. 947, 293 N.Y. 878, 48 N.Y.S.2d 459 (1944), *cert. denied*, 324 U.S. 882 (1945).

[31] Lisi v. Alitalia-Linee Aerre Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Egan v. Kollsman Instr. Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

[32] Eck v. United Arab Air Lines, Inc., 360 F.2d 804 (2d Cir. 1966).

[33] Husserl v. Swiss Air Transport Co., Ltd., 351 F. Supp. 702 (S.D.N.Y. 1972).

[34] 360 F.2d 804 (2d Cir. 1966).

[35] *Id.* at 812. The Second Circuit also indicated that a court should look to the conditions that existed when the provision was adopted, what the provision was meant to control or remedy and the legislative history available to it when interpreting a provision of the Warsaw Convention.

[36] *Id.*

[37] 351 F. Supp. 702 (S.D.N.Y. 1972). *See* 39 J. AIR L. & COM. 445 (1973).

[38] *Id.* at 706.

vention as well as an analogy between hijacking and sabotage to hold that "hijacking" is within the meaning of "accident" in article 17.[39] Thus, there is precedent that the courts of the United States have interpreted and applied various provisions of the Convention with little more than analogies and policy considerations to lead them to a conclusion in a particular fact situation. All of these cases have public policy overtones that cannot be ignored.

The limits on the amount of compensation a plaintiff may receive in a Warsaw case have been increased due in part to the realization that an injury to a passenger should not be solely a question of who is right or wrong, but rather who can best bear or distribute the loss.[40] Airlines can distribute the loss as a cost of operation and therefore have been recognized as being in a better position to bear the loss for personal injuries to passengers. This assertion was confirmed by the adoption of a standard of near absolute air carrier liability for personal injuries occurring on a Warsaw flight at the Montreal Convention of 1966.[41] The adoption of a near absolute presumption of liability against the air carrier underscores the shift in emphasis from the protection of the air carriers by Warsaw to a position of insuring compensation for passengers on international flights thereby preventing the passengers from having to bear the cost of injury or death. Thus, because of Montreal, the burden of proof is shifted from the passenger and placed on the carrier up to a specified monetary limit since the passenger does not have to prove negligence on the part of the carrier for recovery.[42] This desire to protect the passenger on a Warsaw flight, the recent trends in the relevant case law broadly interpreting articles of the Convention and traditional treaty interpretation guidelines adequately support a conclusion that mental distress and anguish should be considered within the scope of "any other

[39] *Id.* at 707.

[40] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 599 (1967).

[41] By the Montreal Agreement the airlines agreed to increase the limit of liability to $75,000. They further agreed to waive their defense of due care under article 20 of the Warsaw Convention. Thus, the airlines became absolutely liable for an injury under article 17 up to the $75,000 limit.

[42] To invoke the near absolute liability of the air carrier, the passenger must establish that he was on a hijacked plane and that the alleged injury suffered was within the scope of article 17. *See* Ambramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339 (1972).

bodily injury" of article 17.[43] Assuming that article 17 includes mental distress, a secondary determination that must be made is: does article 17 encompass only mental distress when accompanied by physical impact and manifestations or are damages manifested only by mental anguish also within its scope?

The trend in New York and a majority of other jurisdictions[44] has been to permit recovery for mental anguish and distress without impact, especially when accompanied by physical manifestations. It is logical that those cases of alleged mental distress that result in physical manifestations, *e.g.*, loss of weight and skin rash, should be interpreted by the courts as being within the scope of article 17. For example, in *American Airlines, Inc. v. Ulen*,[45] the Court of Appeals for the District of Columbia indicated that the Warsaw Convention permits recovery for mental anguish when accompanied by physical manifestations.[46] The court in *Herman* did not refer to the *Ulen* decision; instead the appellate court emphasized the non-Warsaw case of *Battalla v. State*.[47] In *Battalla*,

[43] It is interesting to note that the 1971 Protocol of Guatemala City to amend the Warsaw Convention has changed the wording of article 17 from "or any other bodily injury" to "personal injury." This would tend to indicate a realization on the part of the delegates to the conference that this wording in article 17 needed to be clarified and that the proposed change would disspell any argument against the proposition that article 17 does include an action for mental anguish. ICAO Doc. No. 8932 (1971). *See also* Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972); 5 N.Y.U. J. INT'L L. & POLITICS 313 (1972).

[44] McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 16 n.43 (1949) [hereinafter cited as McNiece]; Comment, *Bystander Recovery for Mental Distress*, 37 FORDHAM L. REV. 429 (1969); *see* Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 176 N.Y.S.2d 996, 152 N.E.2d 249, 252 (Ct. App. 1958) (where it was stated that "freedom from mental disturbance is . . . a protected interest. . . ."); Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); *see also* Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961); Prosser § 54.

[45] 186 F.2d 529 (D.C. Cir. 1949).

[46] The Court of Appeals in *Ulen* stated:

> Plaintiff is entitled to recover such sum of money as . . . will fairly and reasonably and adequately compensate her for the physical injuries and the disabilities which she sustained by reason of this accident, together with pain and suffering and anguish which she has endured, as well as the mental and nervous shock and any and all permanent injuries which you might find either physically or to her mental and nervous system.

This extract does not appear in the reported opinion of the court, but in the version reproduced in ICAO Cases on the Warsaw Convention (1929-1955), ICAO Doc. 36, § 2, at 87 (1955).

[47] 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (Ct. App. 1961).

infant plaintiff alleged severe emotional and neurological disturbances because an employee of the State of New York failed to properly secure a belt around plaintiff that was intended to protect passengers from falling out of a chair lift.[48] As a result of the alleged negligent action, plaintiff became frightened and hysterical upon descent of the lift and suffered "severe emotional and neurological disturbances with residual physical manifestations."[49] In its decision, the New York Court of Appeals abandoned the impact doctrine[50] that had required a physical touching of a person before an action could be brought alleging mental anguish.[51] Therefore, according to the *Battalla* rationale, the absence of physical contact does not foreclose the possibility of recovery for mental distress in the State of New York.[52]

The majority in *Herman* distinguished *Battalla* and refused to apply its reasoning in a situation controlled by the Warsaw Convention.[53] The dissent in *Herman,* however, recognizing the strong trend in American case law toward allowing recovery for emotional and mental anguish when accompanied by physical manifestations of the disturbance,[54] analogized plaintiff's loss of weight

[48] 176 N.E.2d at 729.

[49] *Id.*

[50] *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) that was overruled by *Battalla.* The court in *Battalla* worried about a great number of spurious actions being initiated; however, it suggested that the courts and juries would be able to distinguish between a spurious claim and an honest one. Also, the court indicated that the possibility of a successful spurious action does not outweigh the injustice that would occur if the passenger who, through no fault of his own, incurred serious physical damage, yet was not permitted to recover. 176 N.E.2d at 730-32.

[51] The bodily contact requirement was originally designed to guarantee that plaintiff had a good reason to suffer mental anguish and shock. It has been called a child of administrative expediency rather than a product of logical deduction from principles of tort law. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 232 (1944). *See also* Comment, *Bystander Recovery for Mental Distress,* 37 FORDHAM L. REV. 429, 432-33 (1969).

[52] With this decision, New York joined the majority of states, England and Scotland in allowing damages for emotional disturbances without impact. McNiece at 16 n.43. For a list of those jurisdictions that still require impact before recovery can be considered for emotional disturbances *see* McNiece at 14 n.40. England rejected the impact rule with the case of Dulieu v. White & Sons, [1901] 2 K.B. 699, while Scotland disposed of the impact doctrine with the case of Gilligan v. Robb, Sess. Cas. 856, 47 Scot. L.R. 733 (1910).

[53] 337 N.Y.S.2d at 829.

[54] *See* note 44 *supra. See also* Prosser § 54.

and skin rash to *Battalla*.[55] Therefore, the dissent urged a liberal interpretation of article 17 in order to accomodate the rationale of *Battalla* that in turn would keep the Convention relevant and in tune with present day tort law. It is further noted that the impact doctrine is quickly losing favor and is destined for extinction.[56] Thus, those courts that still deny a remedy in cases involving mental disturbances accompanied by physical injuries are in the minority.[57] The same is not true, however, in cases that involve mental disturbances with no physical manifestations.

It is still generally agreed that mental disturbance alone, without accompanying physical injury or consequences, will not qualify a person to recover for an alleged mental injury.[58] This has been explained by the fact that the ordinary case of temporary emotion or fright that does not cause physical harm is too trivial and can easily be fabricated.[59] Therefore, most courts do not protect the person from mental anguish without accompanying physical manifestation unless there is an element of extreme outrage and/or moral blame present that guarantees the genuineness and seriousness of the distress and thus guards against spurious actions.[60] In *Battalla,* for example, the court reasoned that the possible spurious actions for alleged mental distress with or without physical manifestations could be controlled by looking at the quality and genuineness of proof, the sophistication of the expert medical testi-

[55] 337 N.Y.S.2d at 831.

[56] Prosser at 332-33. Professor Prosser notes the vast majority of jurisdictions are following the trend of allowing actions for mental distress without the impact requirement and observes that the impact rule may never be applied again. *Id.* at 332.

[57] *See* note 44 *supra.*

[58] Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339, 347 n.64 (1963) [hereinafter cited as Amdursky]; McNiece at 16-17, and n.45 for representative cases. It has, however, been stated that the physical manifestation test should be rejected since it is a medical fact that all severe emotional disturbances have physical consequences. Neurological, enzymatic, and hormonal changes occur in the body which are clinically measurable. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 213 (1944).

[59] *See* McNiece at 30-31; Prosser at 329.

[60] Amdursky at 345. *See also* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44-45 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 878 (1939). *See* McNiece at 16-17, and n.46 for representative cases. *See also* Note, 18 S.D. L. REV. 251 (1973); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970); Prosser at 330.

mony and the ability of the court and jury to recognize dishonest claims.[61] The court in *Herman* did not specifically deal with the problem of potential spurious claims if article 17 was interpreted broadly. It appears, however, that when the circumstances are such that a claim is not likely spurious and the mental distress is real and serious, there is no substantial reason to deny recovery.[62] Cases that allow recovery for mental anguish alone will nevertheless be rare and totally dependent on circumstances that unmistakingly indicate that a wrong has been committed.

The New York courts have not been hesitant to interpret and apply the various articles of the Warsaw Convention when a question has arisen concerning the scope of a particular provision.[63] Even without the French translation[64] of the text of article 17, the appellate court had sufficient case law precedent to decide that "any other bodily injury" encompasses a complaint for mental distress and anguish, especially when accompanied by physical manifestations. In *Herman,* however, the court forestalled this determination. The majority's decision ignores the recent trend giving liberal interpretations to the Convention's provisions as well as the common law trend of allowing plaintiffs to recover for

[61] 176 N.E.2d at 731-32. The dissent in *Battalla,* however, disagreed with the majority's faith in juries and courts eliminating spurious actions. The dissent cited a recent Pennsylvania Supreme Court case that said to allow mental distress actions would "open a Pandora's box." Bosley v. Andrews, 393 Pa. 161, 168, 142 A.2d 263, 266 (1958). *See also* Husserl v. Swiss Air Transport Co., Ltd., 351 F. Supp. 702 (S.D.N.Y. 1972) where the district court in dicta stated that it had "difficulty reading the Warsaw Convention to permit recovery for mental anguish and suffering alone." *Id.* at 708. *But see* McNiece at 31, where the author notes that the "flood of litigation argument" is not valid since the reverse has thus far proven to be true.

[62] Amdursky at 352-53; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases,* 35 U. CHI. L. REV. 512 (1968). One expert in legal medicine has concluded that at one time the possibility and danger of a plaintiff faking an emotional injury was real, but today, with increased medical knowledge and methods of testing a plaintiff, this phenomenon is most unlikely. Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and the Law,* 6 CLEV. MAR. L. REV. 428, 435 (1957). *See also* Smith and Hubbard, *Doing Scientific Justice: Psychological Reactions to Traumatic Stimuli,* 1962 ILL. L. F. 190, 199, where the authors state that acute mental "anxiety can actually kill."

[63] *See* cases cited notes 29-33 *supra. See also* Molitch v. Irish Int. Airlines, 436 F.2d 42 (2d Cir. 1970) (interpreting article 29); Parke, Davis and Co. v. British Overseas Airways Corp., 11 Misc.2d 811, 170 N.Y.S.2d 385 (N.Y. City Ct. 1958) (interpreting article 26).

[64] *See* note 5 *supra.*

mental distress and anguish when physical manifestations are present. If a court does interpret article 17 as excluding all claims for mental distress, then an action readily cognizable in the majority of American jurisdictions would be denied under Warsaw. This would result in plaintiffs having no forum to present claims and seek remedies for mental anguish suffered on board an aircraft during a Warsaw flight. Therefore, a strict and narrow reading of article 17 should be avoided; instead, a more rational and functional approach recognizing the passenger's need to be compensated for mental injuries and the carrier's ability to compensate should be adopted.

Edward O. Coultas

WARSAW CONVENTION—CARRIER LIABILITY—A Hijacking Is Within the Ambit of the Term "Accident", and Is Sufficient to Raise the Presumption of Liability Under Article 17 of the Warsaw Convention. *Husserl* v. *Swiss Air Transport Company, LTD.*, 351 F. Supp. 702 (S.D.N.Y. 1972).

Plaintiff was a passenger aboard defendant's aircraft scheduled for a direct flight from Zurich, Switzerland to New York. The aircraft was hijacked by members of the Popular Front for the Liberation of Palestine and was forced to land on an airstrip in the Jordanian desert. Plaintiff was detained by the hijackers for five days. Plaintiff's complaint against the defendant-airline alleged two causes of action based on breach of contract by defendant and the negligence of defendant or its agents in causing her bodily injury and mental anguish, and raised the presumption of negligence created by the Warsaw Convention[1] as modified by the Montreal Agreement.[2] Defendant-airline moved for summary

[1] Warsaw Convention, Oct. 29, 1934, 49 Stat. 3000 (1934), T.S. No. 876 (effective date Oct. 12, 1929). For a thorough discussion of the Convention, *see* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). Note that the Warsaw Convention does not create a cause of action; rather, it creates a presumption of liability. Local law must grant the cause of action. *See, e.g.*, Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

[2] Special Meeting on Limits for Passengers Under the Warsaw Convention

judgment, maintaining that its liability was governed exclusively by the Warsaw Convention as modified by the Montreal Agreement and that its liability could arise only upon proof of an "accident" within the intendment of the Convention, hijacking not being included in the term "accident." *Held, dismissed:* A hijacking is within the ambit of the term "accident" and is sufficient to raise the presumption of liability under article 17 of the Warsaw Convention as modified by the Montreal Agreement. *Husserl* v. *Swiss Air Transport Company, LTD.*, 351 F. Supp. 702 (S.D.N.Y. 1972).

The purpose of the Warsaw Convention was to create uniformity in dealing with passengers and airlines engaged in international air travel and to limit the liability of international air carriers for accidental injuries sustained by passengers.[3] Article 17 of the Warsaw Convention created a presumption of liability on the part of an international carrier "in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger." The terms of article 22, however, expressly limited the carrier's liability to 125,000 francs, or about eighty-three hundred dollars. Only by proving that the carrier's "wilful misconduct" caused the damage complained of could a passenger or his personal representative recover more than the limit imposed by article 22.[4] Dissatisfaction by the United States with the low limits of recovery under the Warsaw Convention prompted its refusal to ratify the Hague Protocol that increased maximum carrier liability to $16,600, and ultimately, to give notice of its denunciation of the Convention.[5] The United States withdrew notice of denunciation, however, following the formulation of the Montreal Agreement.[6] Montreal modified the Warsaw Convention by providing for abso-

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and the Hague Protocol, Feb. 1-15, 1966, Montreal, Canada, ICAO Doc. 8584-LC/154-1 & ICAO Doc. 8584-LC/154-2. [hereinafter cited as Montreal Agreement].

[3] Lowenfeld and Mendelsohn, 80 HARV. L. REV. at 498-99. For the contrary view, that the Convention benefits only commercial airlines, *see* Kennelly, *Problems Regarding Aviation Litigation*, 20 DEPAUL L. REV. 436 (1971); and Kennelly, *Response to Comments on Burdell v. Canadian Pacific Airways*, 58 ILL. BAR J. 454 (1970).

[4] Warsaw Convention, article 25(1).

[5] 53 Dep't State Bull. 924 (1965).

[6] CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966).

lute liability[7] on the part of the carrier in case of death or injury to a passenger and by increasing the maximum limit of recovery to seventy-five thousand dollars for international flights originating, terminating or stopping in the United States.[8]

The issue of whether the Warsaw Convention as modified by the Montreal Agreement applied in a hijacking situation was a question of first impression for the federal district court in *Husserl.* In *Husserl* the court noted that the Convention did not "exclusively regulate" the passenger-carrier relationship on international flights,[9] but that it did create a presumption of liability "in the event of the death or wounding of a passenger, or any other bodily injury suffered by a passenger."[10] Plaintiff has the burden to establish that there was an "accident" within the meaning of article 17 before the Convention can be invoked.[11] Lacking case law precedent, the federal district court construed the term "accident" to include hijacking, a seemingly intentional act.

Although conceding that "hijacking was probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated,"[12] the federal district court, looking to the subsequent conduct of the parties for guidance in interpretation,[13] found that the Montreal Agreement resolved any doubts about construction of the word "accident." This construction is based on an analogy between sabotage (as contemplated by the Montreal Agreement) and hijacking. The foundation of the analogy is threefold: first, the Agreement imposes a system of absolute liability upon the carrier; second, the tariff filed pursuant to the Agreement, as interpreted by the Civil Aeronautics Board,[14] con-

[7] *See* note 24 *infra* and text accompanying.

[8] 31 Fed. Reg. 7302 (1966).

[9] Husserl v. Swiss Air Transport Company, LTD., 351 F. Supp. 702, 706 (S.D.N.Y. 1972).

[10] Article 17 of the Warsaw 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. (emphasis added)

[11] MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971).

[12] 351 F. Supp. at 706.

[13] *Id.* at 707.

[14] 31 Fed. Reg. 7302 (1966); 54 Dep't State Bull. 955 (1966). For the efficacy of public statements in this regard by the CAB and the Department of State, *see*

tains a proviso to the effect that saboteurs cannot recover under the Agreement from carriers; and third, by inference, "innocent victims of willful acts of others are able to recover from the carrier, even in respect to acts of sabotage to the aircraft."[15] Hence, by analogy, if innocent victims of sabotage can recover, so can innocent victims of a hijacking, it being the intent of the parties at Montreal to render carriers liable to innocent victims of these intentional acts.[16] The court in *Husserl* bolsters its construction of the word "accident," with the "policy underpinnings of the Warsaw Convention"[17] as modified; *i.e.* the carrier is best qualified to detect hijackers and avoid these incidents; the carrier can better assess and insure against the risk; and the carrier can efficiently distribute the costs of hijacking detection, prevention and insurance.

That a hijacking can be characterized as an accident seems to be a contradiction. An accident is generally thought of as an occurrence without design,[18] the very antithesis of a volitional criminal act like hijacking.[19] Despite the attractive logic of the proposition that a hijacking is an intentional act and cannot be an accident, the district court's finding that hijacking is "within the ambit of the term 'accident' "[20] may be justified on several grounds.

First, the analogy drawn by the court in *Husserl* between sabotage and hijacking is sound. Notwithstanding the "paucity" of reported cases on liability problems arising from bombings on board aircraft,[21] sabotage has come to be defined in general terms as "willful, malicious, and intentional acts of force and violence or unlawful methods of terrorism . . . calculated to endanger physical property and the lives of persons who are in or upon such property."[22] Substantially the same language has been applied to hijacking.[23] That an airline may not be responsible in fact for the actions

L. KREINDLER, AVIATION ACCIDENT LAW § 12A.02 (1971) at 3 [hereinafter cited as KREINDLER], cited approvingly by the court. 351 F. Supp. at 706 n.3.

[15] 351 F. Supp. at 707.

[16] *Id.*

[17] *Id.*

[18] THE RANDOM HOUSE AMERICAN DICTIONARY (1967).

[19] 351 F. Supp. at 707.

[20] *Id.*

[21] KREINDLER, § 3.12[5].

[22] 47 AM. JUR. SEDITION, SABOTAGE § 3 (1963).

[23] The Federal Aviation Act of 1958 § 902(i), 49 U.S.C. § 1472(i)(2) (Supp.

of a saboteur or hijacker, is of course not an issue in *Husserl* since under ordinary circumstances an airline cannot be held liable, absent fault, for acts of sabotage.[24] Swiss Air is held absolutely liable to passengers who have suffered "death or wounding . . . or any other bodily injury"[25] by virtue of the Montreal Agreement, subject to the $75,000 recovery limitation of article 22(1).[26] Moreover, the United States was greatly concerned that the Montreal Agreement inure to the benefit of innocent victims of international aircraft mishaps. Opposition in the United States to the Montreal Agreement centered around the possibility that saboteurs would be encouraged by the absolute liability provisions of Montreal. A Swedish proposal to provide for absolute liability, except in case of sabotage, was ultimately rejected, however, on the ground that innocent victims of sabotage should be compensated for their losses.[27] The CAB and the Department of State sought to make it clear that saboteurs, or those claiming on their behalf, could not profit under the Montreal modification of the Warsaw Convention.[28]

Secondly, the definition of an "accident" in legal terms may not coincide with the meaning of that word in common usage. The Federal Aviation Act's Economic Regulations define an aircraft accident as

> . . . an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which any person suffers death or serious injury as a result of being in or upon the aircraft or by direct contact with the aircraft or anything attached thereto, or the aircraft receives substantial damage.[29]

1971) defines "air piracy," or hijacking as ". . . any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of any aircraft within the special aircraft jurisdiction of the United States."

[24] KREINDLER, § 3.12[5].

[25] *See* note 10 *supra.*

[26] If ratified, the Guatemala Protocol would increase the liability to one hundred thousand dollars and provide for additional future increases. *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriers by Air*, March 8, 1971, Guatemala City, Guatemala. ICAO Doc. 8932. *See generally* Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339 (1972).

[27] Lowenfeld and Mendelsohn, 80 HARV. L. REV. at 593-96.

[28] 31 Fed. Reg. 7302 (1966); 54 Dep't State Bull. at 956.

[29] 32 Fed. Reg. 20771 (1968).

This definition of "accident" is sufficiently broad to encompass that envisioned by the court in *Husserl,* since hijacking may be included as an "occurrence associated with the operation of an aircraft." The only reported case purporting to deal with the definition of an accident within the meaning of the Warsaw Convention, *MacDonald* v. *Air Canada,*[30] involved a plaintiff who was injured by a fall while awaiting her suitcase in the baggage area of the airport after disembarking from an international flight. The First Circuit Court of Appeals found that plaintiff failed to sustain the burden of proof that there was an accident, since on the facts it was as reasonable to suppose that some internal condition caused plaintiff's fall as that the fall was a result of an accident. Noting that the Warsaw Convention is not applicable to mishaps that are far removed from the operation of the aircraft, the Court of Appeals failed to limit the parameters of the term "accident." It concluded that "without determining where the exact line occurs, it had been crossed in the case at bar."[31] In *Herman* v. *Trans World Airlines, Inc.,*[32] the argument was made, and rejected by the New York trial court,[33] that the infant plaintiff's injuries were not sustained during an in-flight accident, but while the plane was grounded and detained in the desert by hijackers. The New York court viewed the detention after flight, not as an occurrence far removed from the flight, but as one continuing hijacking within the meaning of article 17 of the Warsaw Convention.[34]

Finally, dictum in *Herman* supports the *Husserl* ruling that hijacking is within the ambit of the term "accident" under the modified Warsaw Convention. The precise issue in *Herman* was whether the article 17 use of the phrase "bodily injury" included mental anguish. Defendant-airline conceded that it would have been liable under the Montreal modification if the hijackers had physically injured the plaintiff.[35] The New York trial court equated hijacking and accident by noting "that the *accident* (hijacking)"

[30] 439 F.2d 1402 (1st Cir. 1971).

[31] *Id.* at 1405.

[32] 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972), *rev'd on other grounds,* 40 App.2d 850, 337 N.Y.S.2d 827 (1972).

[33] Herman v. Trans World Airlines, Inc., 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972).

[34] *Id.*

[35] *Id.* at 830.

caused the damage sustained by plaintiff.[36]

The federal district court in *Husserl* did, however, miss a rare opportunity to bolster its decision with more convincing authority. Defendant argued vigorously that an intentional act could not be an accident and that the proposed amendment to the Warsaw Convention, known as the Guatemala City Protocol, would bear out this logic by substituting the word "event" for "accident" in article 17.[37] If there is any doubt that hijacking or sabotage was contemplated by the Montreal Agreement, there can be no misunderstanding of the position of the United States Government on that subject as it concerns the Guatemala City Protocol:

> The United States believes that the only exception to the rule of absolute liability should be in case of contributory negligence (including deliberate wilful acts). This exception would relieve the carrier of liability only to the person responsible or those claiming through him. The United States would oppose relieving carriers of liability in situations of war risk, hijacking, or sabotage.[38]

Ratification by the United States of the Guatemala City Protocol would render the construction of "accident" in *Husserl* moot.

The impact that *Husserl* will have on actions brought pursuant to article 17 of the Warsaw Convention will be far-reaching. The construction of the word "accident" by the court in *Husserl* presents the innocent victim of a hijacked aircraft, governed by the modified Warsaw Convention, with several alternatives. He can prove that his injuries are the result of the hijacking and recover the maximum seventy-five thousand dollar limit, or he can attempt to prove that the carrier's willful misconduct caused his injury and

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[36] *Id.* at 832-33.

[37] 351 F. Supp. at 706. The Guatemala City Protocol would amend article 17 of the Warsaw Convention to provide, in part, as follows:

> 1. The carrier is liable for damage sustained in 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

[38] Subcommittee on Revision of the Warsaw Convention as Amended by the Hague Protocol, September 2-22, 1969, Montreal, Canada, ICAO Doc. 8839-LC/158-1, at 293. *See also* Boyle, *The Warsaw Convention*, VIII FORUM 268, 269-72; and Fitzgerald, *The Guatemala City Protocol to Amend the Warsaw Convention*, IX CANADIAN YEARBOOK OF INTERNATIONAL LAW 217 (1971).

possibly recover in excess of seventy-five thousand dollars.[39] The more resolute passenger-victim will plead alternatively for recovery under both theories.[40] There should be no dearth of cases to arise out of hijackings of international flights covered by the modified Warsaw Convention,[41] particularly if recovery for mental distress is eventually allowed by the courts.[42] Prior to the Montreal modification of the Warsaw Convention, a defendant carrier was allowed to rebut the presumption of liability by proof that it and its agents had taken all necessary measures to avoid damage or that it was impossible to have taken these measures,[43] or by proof that the plaintiff was contributorily negligent.[44] It was at least theoretically possible to argue that the airlines had, by use of sophisticated and expensive screening and detection devices, done all that was humanly possible to prevent hijacking. But the Warsaw Convention defenses, except for that of contributory negligence, are waived by the terms of the Montreal Agreement and the carrier is presumed to be absolutely liable for aircraft accidents.[45] The argument has been made that the threat of awards of substantial damages may provide an incentive for airlines to protect the lives of their passengers[46]— *Husserl* may be the impetus for testing that hypothesis.

William D. Wiles, III

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[39] *See* note 4 *supra* and text accompanying.

[40] Abraham Harari-Raful v. Trans World Airlines, Inc., ___ Misc. 2d ___, ___ N.Y.S.2d ___, 12 CCH Avi. L. Rep. 17,803 (Sup. Ct. 1973).

[41] *See* Note, 36 MODERN LAW REVIEW 303, 306 at n.20.

[42] Although the Appellate Division in *Herman* reversed the decision of the New York Supreme Court to allow a plaintiff to recover for mental distress under the Warsaw Convention as modified, the issue has not yet been laid to rest, as is evidenced by the dictum in *Husserl*. 351 F. Supp. at 708. *Herman* was reversed on a technical point of construction; the trial court was held to have impermissibly taken judicial cognizance of the meaning of "bodily injury" in a foreign language, this being a triable issue of fact. *See* Note, 39 J. AIR L. & COM. 433 (1973).

[43] Warsaw Convention, article 20(1).

[44] Warsaw Convention, article 21. This defense was not waived under the Montreal Agreement. *See* note 7 *supra*.

[45] *Id.*

[46] *See* Abramovsky, 21 BUFFALO L. REV. at 359.

AIR CARRIERS—ANTI-TRUST IMMUNITY—The Power of the Civil Aeronautics Board to Immunize from Anti-trust Liability is Limited by the Definition of "Air Carrier" in the Federal Aviation Act of 1958. *Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

Air Cargo, Inc. (ACI)[1] and Ryder System, Inc. executed an agreement creating a new corporation, Ryd-Air Inc.,[2] to furnish air freight cartage and terminal services in metropolitan New York City.[3] Simultaneously, ACI and Ryd-Air executed a contract whereby Ryd-Air obtained the exclusive right to provide these services for ACI in New York City.[4] Prior to the Ryd-Air contract, Breen Air Freight, Ltd. and Mercury Air Freight, Inc. had provided cartage services under contracts with ACI.[5] When ACI refused to renew these contracts, awarding instead the exclusive contract to Ryd-Air, Breen and Mercury instituted an action in the Southern District of New York alleging antitrust violations and seeking treble damages. Defendants moved to stay the antitrust proceeding pending administrative action by the Civil Aeronautics

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[1] ACI was created in 1941 as a joint research venture by seventeen certified airlines, but became inactive upon completion of its research in 1944. In 1947, the airlines reactivated ACI to provide, either directly or by contract, air freight terminal and cartage services for the airlines in New York and other cities. The reactivation agreement, known as CAB Agreement No. 1041, was submitted to and approved by the CAB. *See* CAB Order No. E-1083 (Dec. 31, 1947).

[2] Ryd-Air was nominally a subsidiary of Ryder System, although ACI took a twenty per cent stock interest and retained the right to appoint two of five directors. Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[3] At the time of this lawsuit in 1973, ACI was also operating in Boston, Chicago, Los Angeles, and Cleveland. WORLD AVIATION DIRECTORY 892 (Summer 1972). This suit, however, only concerned ACI's New York operations.

[4] Neither the contract nor the agreement was filed with or explicitly approved by the CAB, although defendants argued that the Board's approval of the 1947 reactivation agreement extended to the Ryd-Air agreement. This contention was rejected by the Second Circuit. As a condition to its approval of the 1947 agreement, the CAB stipulated that ACI file with the Board any of its contracts and agreements that the CAB's Economic Bureau should declare were subject to CAB approval. The filing requirement was removed prior to the making of the Ryd-Air agreement in 1970. It appeared from the evidence, however, that some 200 ACI cartage contracts had been filed and approved by the time the filing requirement was removed in March of 1962. 470 F.2d at 770.

[5] Breen had provided contract cartage services for ACI since 1967 and Mercury had done so since 1948. *Id.*

Board (CAB), contending that primary jurisdiction was vested in the administrative agency. The motion was denied, the doctrine of primary jurisdiction being inapplicable.[6] *Held, affirmed:* The agreements in question were not executed by "air carriers" within the meaning of the Federal Aviation Act of 1958.[7] Consequently, the CAB lacked authority to immunize the contracting parties from anti-trust liability.[8] *Breen Air Freight, Ltd. v. Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

The CAB has the power to relieve "air carriers" and other persons from the operation of the anti-trust laws when the actions of these persons or "air carriers"[9] are found to be in the public interest with respect to air transportation. Section 412 of the Federal Aviation Act of 1958[10] provides that every "air carrier" shall file with the Board for approval a copy of any agreement affecting "air transportation."[11] Section 414 of the Act gives the CAB power to relieve any person affected by an order made pursuant to section

[6] The denial of the motion was certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1951) on the ground that a controlling question of law was involved and an immediate appeal might materially advance the ultimate termination of the litigation. *Id.* at 769.

[7] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. [hereinafter sometimes cited in text as "the Act"].

[8] The Second Circuit held, alternatively, that even if the contracting parties were "air carriers", primary jurisdiction was not in the CAB, since the activities complained of were not even "arguably lawful" under the regulatory statute. This alternative holding, essentially a reiteration of traditional reasons courts have given for rejecting the doctrine of primary jurisdiction in these circumstances, rests ultimately on a finding that the agreements in question had never been passed on by the CAB and were therefore not even "arguably approved." 470 F.2d at 773-74. *Cf.* note 4 *supra.*

[9] *See* note 15 *infra*, and corresponding text, for the definition of "air carrier."

[10] 49 U.S.C. § 1382(a) (1970):

> Every air carrier shall file with the Board a true copy . . . of every contract or agreement . . . affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, . . . or for other cooperative working arrangements.

[11] 49 U.S.C. § 1301(10) (1970):

> "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

412 from the operation of the anti-trust laws "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."[12] The Second Circuit in *Breen* considered the relationship between these two sections of the Act to be that section 414 does not become operative unless an agreement executed by an actual "air carrier" has been submitted and approved as required by section 412.[13] Therefore, the power of the CAB to immunize from anti-trust liability was strictly limited to instances when the underlying agreement is in fact executed by a person falling within the statutory definition of "air carrier." According to the Second Circuit, it follows that these provisions did not apply to the Ryd-Air agreement or contract because none of the parties were within the statutory definition.[14]

Section 101(3) of the Federal Aviation Act defines "air carrier" as "any citizen of the United States who undertakes, whether directly or indirectly . . . to engage in air transportation."[15] The court in *Breen* conceded that this definition was too vague to be of much assistance.[16] There was, however, nothing in the activities of the contracting parties to indicate that they were undertaking to engage in air transportation; ACI was formed for the ". . . limited purpose of acting as [the airlines'] agent in providing terminal and cartage services. . . ."[17] Similarly, Ryder System's business was ground trans-

[12] 49 U.S.C. § 1384 (1970):

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

[13] 470 F.2d at 771 n.2: "It is clear under Section 412 of the Act . . . that the Board can only approve and thereby immunize agreements to which 'air carriers' are parties."

[14] *Id.* at 771.

[15] 49 U.S.C. § 1301(3):

> "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

[16] 470 F.2d at 771.

[17] *Id.* at 771-72. ACI, incorporated as a joint venture by its member airlines, was to act as the agent of those airlines in providing the specified services. ACI

portation and ACI's contract with Ryd-Air simply stated that Ryd-Air would provide ground transportation for freight that ACI's member airlines had undertaken to carry by air.[18]

The statutory definition of "air carrier" has been frequently considered in both administrative[19] and judicial[20] proceedings. The trend in these decisions has been toward the development of a broad and flexible interpretation of the statutory language. This is supported by the congressional intent to give the CAB broad powers over the air transportation industry, which intent would have been frustrated if the courts and the CAB were inclined to view the statutory provisions narrowly.[21] The House Report on the Civil Aeronautics Act of 1938[22] suggests that a narrow construction of the Act's terms was not contemplated:

> It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air transportation industry in the United States.[23]

Additionally, the Civil Aeronautics Board has in practice asserted

was created to provide pick-up and delivery (cartage) and terminal services directly, or could by contract engage other parties to perform those services. The airlines apparently relied wholly on ACI to make these arrangements for their air freight trade, and did not deal directly with the other parties with whom ACI contracted. *See* Air Freight Forwarder Case, 9 C.A.B. 473, 484-85 (1948).

[18] 440 F.2d at 772.

[19] *See, e.g.*, Railway Express Agency, Certificate of Public Convenience and Necessity, 2 C.A.B. 531, 536 (1941); Air Freight Forwarder Case, 9 C.A.B. 473 (1948).

[20] *See, e.g.*, Railway Express Agency, Inc. v. CAB, 345 F.2d 445 (D.C. Cir.), *cert. denied*, 382 U.S. 879 (1965).

[21] *See, e.g.*, 86 CONG. REC. 6028-29 (1940). *See also Hearings on S.3880 Before the Subcomm. on Aviation of the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958); *Hearings on H.R. 12616 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958) (companion bill to S.3880).

[22] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, *re-enacted as* Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970). On the extent to which the Civil Aeronautics Act of 1938 was re-enacted in the Federal Aviation Act of 1958, *see* 2 U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess., at 3752 (1958) (legislative history).

[23] H.R. REP. No. 2254, 75th Cong., 3d Sess. 1 (1938); *see also* Pan American World Airways v. United States, 371 U.S. 296, 300-04 (1963); *cf.* Hughes Tool Co. v. TWA, 409 U.S. 363, 385 (1973).

its control over all activities that might affect the stability of air carriers and the ability of air carriers to provide air transportation.[24] In response to recent pressure from the airlines to allow subsidiarization and diversification, the Board has repeatedly emphasized that it has power to place strict controls on all activities of air carriers and their affiliates, including activities not directly related to air transportation.[25] The CAB takes the position that its power extends to any arrangement or relationship that affects air commerce and persons involved therein, whether directly or indirectly, and is by no means limited to activities closely related to the actual operation of aircraft.[26]

In numerous instances the CAB and the courts have interpreted the term "air carrier" to include various classes of persons engaged in many different phases of air commerce other than the scheduled or "direct" carriers and have coined appropriate terms, generally based on the statutory designation, to describe these persons. These amplifications of the statutory definition fall generally into two categories: (i) those that are applied to persons who actually operate aircraft, *e.g.*, the "supplemental" or "irregular" air carriers;[27] and (ii) those applied to persons who, though not directly engaged in the operation of aircraft, hold themselves out to the public as providing air transportation by arrangement with a scheduled or charter carrier. Persons in this latter category are generally classified as "indirect air carriers" or "air freight forwarders."[28]

[24] *Cf.* Initial Decision of Administrative Law Judge, Air Carrier Reorganization Investigation, CAB Docket 24283 *et al.* (Aug. 27, 1973). [hereinafter referred to as "Initial Decision"].

[25] *Id.*

[26] Initial Decision at 6-10. *Cf.* Pan American World Airways v. United States, 371 U.S. 296 (1963). The Antitrust Division of the Department of Justice takes the position, however, that while the doctrine of Pan American World Airways v. United States, *supra*, recognizes that CAB economic jurisdiction

> ". . . extends beyond those areas specifically enumerated in the Federal Aviation Act to include those activities and relationships of an air carrier that directly affect its ability to provide air transportation, . . ."

this jurisdiction does not include air carrier activities incidental or unrelated to air transportation. The Justice Department insists that control over such areas rests with it and the Federal Trade Commission. Initial Decision at 11. At least one air carrier agrees. *Id.* at 18 (statement of position of Flying Tiger Line).

[27] *See, e.g.*, American Air Lines, Inc. v. CAB, 365 F.2d 939, 940 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

[28] *See, e.g.*, Railway Express Agency, Certificate of Public Convenience and Necessity, 2 C.A.B. 531, 536 (1941).

The "irregular" or "supplemental"[29] carriers are distinguished from the scheduled carriers for convenience and administrative purposes. Their traditional function has been to supplement, largely through charters, services provided by the scheduled airlines.[30] There is no doubt, however, that they are "air carriers" and subject to the CAB's regulatory powers since they do in fact operate aircraft and thereby engage directly in air transportation.

The second category, that of the so-called "indirect" air carriers, is not as clearly defined; it encompasses at present two groups. This designation was originally applied to "air freight forwarders,"[31] who hold themselves out to the public as providing air carriage for freight; the actual carriage, however, is accomplished by aircraft operated by the scheduled airlines. For many years, the terms "air freight forwarder" and "indirect air carrier" were essentially synonymous. More recently, the latter term has been perceived to be broader and has been applied to other persons having the same type of indirect relationship to air transportation as the freight forwarders. These persons are for the most part travel agents and travel clubs that do not act exclusively as the agents of any particular airline, but whose customers or members "are well aware that transportation which is being offered will subsequently be provided by an airline pursuant to agreements with such [travel agent]. . . ."[32]

The determination that a person, whether travel agent or freight forwarder, is an "indirect air carrier" and therefore an "air carrier" within the meaning of the Federal Aviation Act rests upon the fact of that person's representation to the public that air trans-

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[29] The terms "irregular air carrier" and "supplemental air carrier" are generally used interchangeably. A 1972 amendment to the Federal Aviation Act added a definition of "supplemental air carrier," 49 U.S.C. § 1301(33) (Supp. 1972):

> "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

[30] American Air Lines, Inc. v. CAB, 365 F.2d 939, 940 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

[31] *See* cases cited note 19 *supra*. The term seems to have been first applied to Railway Express Agency, Inc.

[32] Travel Agents Malpractice Action Corps. v. Royal Cultural Society, Inc., 118 N.J. Super. 184, 287 A.2d 4, 10 (1972). *See also* Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9th Cir. 1972), *noted in* 39 J. AIR L. & COM. 463 (1973).

portation can or will be provided, although the actual transportation will be on aircraft operated by a scheduled or supplemental carrier.[33] Implicit in this determination is the conclusion that the indirect carrier, though not engaged in the actual operation of aircraft, nonetheless has a sufficient relationship to air transportation to warrant subjecting that person to the regulatory power of the CAB. Although it is arguably the degree of relationship to air commerce and the effect thereon which should be determinative, in practice, the question of public representation is the standard that has been applied, possibly because it is more susceptible of proof and therefore more judicially manageable.

In light of this, it is difficult to place ACI and Ryd-Air into the category of "indirect" carriers insofar as the "public representation" standard is considered to be controlling. Even conceding that their activities had some effect on air transportation, the court in *Breen* could not embark upon an inquiry into whether that effect was great enough to require CAB regulation without applying a new standard. The Second Circuit did not explicitly consider the question, but implicit in the finding that the parties to the agreement and contract were not "air carriers" is the conclusion that at least they did not fall within one of the accepted versions of the statutory definition. The holding in *Breen* thus serves to emphasize a line drawn between "indirect air carriers" and persons who merely provide ancillary services incidental to carriage by air, notwithstanding the extent to which those services might affect air commerce. The case also indicates an unwillingness on the part of the Second Circuit to extend the "air carrier" definition beyond already broad limits; in fact, *Breen* may be viewed as a retreat from the proposition that CAB regulatory power under the Federal Aviation Act of 1958 is sufficiently broad to encompass any and all activities of air carriers, even when conducted by agents and affiliates like ACI. This proposition has been accepted,[34] but the Second Circuit refused to give its imprimatur to a further broadening of the definition, at least under these circumstances, since ACI and Ryd-Air were only involved in providing pick-up and delivery services for the airlines' own air freight trade. Neither

[33] *Id. Cf.* Railway Express Agency, Certificate of Public Convenience and Necessity, 2 C.A.B. 531, 536 (1941).

[34] *See* note 26 *supra.*

party operated any aircraft and public representation that defendants would provide air transportation was lacking; therefore, there was no compelling reason to commit the parties to a regulatory scheme predicated on one or the other of these two factors insofar as the "air carrier" definition is determinative.[35]

In reaching its conclusion, however, the Second Circuit also had to consider defendants' contention that the airlines[36] that formed ACI had, as disclosed principals, become parties to the agreements made by ACI acting as their agent.[37] Relying on common-law agency principles,[38] the court in *Breen* pointed out that the airlines, as principals, could only become parties by ratification of the agreements and that ratification could occur only when the principal, having full knowledge of all material facts, manifests an intention to ratify. On this point, the Second Circuit held flatly that the ACI-airline relationship and the mere fact that the airlines had dealt with Ryd-Air were "insufficient as a matter of law to constitute a ratification of the creation . . . of Ryd-Air or of the contract . . . with Ryd-Air."[39] Additionally, the circuit court emphasized that the agreement creating Ryd-Air did not contain any

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[35] Perhaps the broadest view that any court has taken with respect to the statutory definition of "air carrier" is that of a federal district court in United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962), where a city operating an airport was found to be an "air carrier" for purposes of applying the nondiscrimination provision of the Act, 49 U.S.C. § 1374(b) (1970):

> No air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any unreasonable prejudice or disadvantage in any respect whatsoever.

The case involved racial discrimination in terminal facilities at an airport in Montgomery, Alabama. The district court held flatly that the City of Montgomery was an "air carrier" within the meaning of the Act so as to bring the city within the provisions of Section 1374(b). The decision, which was not appealed, is probably only explicable in the light of the civil-rights fervor of the early Sixties; to the extent it construes the "air carrier" definition of section 1301(3) it should be considered an aberration.

[36] Defendants' position was that even if ACI and Ryd-Air were found to be outside the statutory definition, section 414 should nevertheless apply, since ACI's principals were, beyond question, "air carriers" by any definition. 470 F.2d at 772.

[37] *Id.*

[38] *See* RESTATEMENT (SECOND) OF AGENCY §§ 91, 93-100 (1957), cited by the Second Circuit in *Breen*, 470 F.2d at 773. *Cf.* 2A C.J.S. *Agency* §§ 56, 63, 73 (1972).

[39] 470 F.2d at 773.

indication that ACI was acting on behalf of the airlines[40] and there was nothing in the airlines' 1947 agreement concerning ACI indicating that they had authorizd ACI to form a new corporation.[41] This finding stresses form over substance, however, since nine of the eleven ACI directors were in fact officers of member airlines[42] and ACI's operations seem to have been an integral part of the airlines' air freight business.[43] Furthermore, by dealing with Ryd-Air and accepting the benefits of the arrangement, the airlines, under equally familiar principles of agency law, might have been estopped to deny their approval of the agreements had they been made parties to the suit.[44] The Second Circuit nevertheless found nothing in the record to indicate "that the airlines knew the material facts involved in the formation of Ryd-Air or that they communicated a desire to ratify its formation."[45] This apparent refusal to look beyond appearances to reality can only be explained as a judicial reluctance to extend the CAB's antitrust immunity power to carriers' agents and affiliates like ACI whose direct involvement in air commerce is slight. The implication of *Breen* is that despite the previous broad application of the regulatory statute, there is nonetheless a line of demarcation beyond which the relationship to air transportation becomes sufficiently attenuated, even if only in form, that the persons involved cannot properly be considered even "indirect air carriers" and are therefore neither subject to nor sheltered by the powers of the CAB. This is true despite the fact that in substance the persons in question may be created by and agents of "air carriers" within the meaning of the Federal

[40] *Id.* at 772. The cartage contract with Ryd-Air did contain the words "as agent for and on behalf of the Air Carriers," as had all prior ACI cartage contracts.

[41] *Id.* at 774 n.6. In fact, the order approving the 1947 agreement stipulated that ACI was not to sign any agreement without disclosing its relationship with the airlines. *See* CAB Order No. E-1086 (Dec. 31, 1947).

[42] *See* WORLD AVIATION DIRECTORY 892 (Summer 1972).

[43] The relationship between the airlines and ACI is discussed in the Air Freight Forwarder Case, 9 C.A.B. 473, 484-85 (1948). It is interesting to note that ACI had authority to revoke or terminate any airline contract or agreement with Railway Express Agency, itself a creation of the airlines, without prior airline approval. *Id.* at 484.

[44] *See* 2A C.J.S. *Agency* § 60 (1972); *cf.* RESTATEMENT (SECOND) OF AGENCY § 103 (1957).

[45] 470 F.2d at 773.

Aviation Act and despite enjoyment by the air carriers of the benefits of the particular arrangement.

Conceding that the public interest may require that regulation of air carrier competition be entrusted to the Civil Aeronautics Board, the standards of competition enjoyed by the airlines may not be desirable in all areas in which the airlines have an interest. Nor is it clear that the standards applicable to the air transportation activities of air carriers with respect to economic regulation could be appropriately imposed on more diversified aspects of the airline companies' business. With increasing participation by the airlines in the provision of terminal facilities and, for example, other diverse services like airport parking, ground transportation for passengers and freight, and both in-flight and terminal food service, the questions posed in *Breen* may continue to arise. When air carriers begin to take on a broader role, whether on their own behalf or through affiliates created for that purpose, in providing services that are ancillary but incidental to air transportation, it becomes necessary to determine when and to what extent this involvement will be sheltered by CAB power to regulate competition and immunize from antitrust liability. The Second Circuit's decision in *Breen* has drawn a line beyond which the CAB lacks power to immunize the airlines or their affiliates from liability for interference with competitive patterns established for non-aviation industries. Whether the CAB will recognize this limitation in its own proceedings, however, has not been determined, since the Board has taken the position that its regulatory authority extends to all air carrier activities that have an effect on air commerce, whether direct or indirect.[46] Insofar as *Breen* represents a judicial refusal to broaden the statutory definition of "air carrier" beyond already wide limits, there is at least a starting point from which

[46] *See* note 26 *supra*. This is not to say that the CAB might have approved the Ryd-Air agreement. In fact, ACI and its member airlines had already run afoul of the Board's anti-trust policies. One of the conditions imposed by the order approving the 1947 reactivation agreement was that other certified air carriers, besides those which formed ACI, be allowed to participate as a matter of right. *See* CAB Order No. E-1086, *supra* notes 1, 39. Two of the member airlines, Eastern and United, filed petitions asking that the condition be removed. The Board denied the petitions, stating that it could not ignore the policy of the anti-trust laws in considering these matters even though it was not bound by them, and section 412 notwithstanding. Agreement Establishing Air Cargo, Inc., Petitions of Eastern Air Lines, Inc., and United Air Lines, Inc., for Reconsideration, 9 C.A.B. 468, 470-72 (1948).

to make a distinction between pure air carrier activites, which properly are subject to CAB control, and airline activities in other areas outside the ambit of CAB expertise which are not fit for the exercise of CAB regulatory and immunization powers.

Merrick C. Walton

AIR TRANSPORTATION—CHARTER TRAVEL—An Organization Functioning as an Air Carrier Should be Treated as One Regardless of the Label it Applies to its Activities. *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973).

Monarch Travel Services brought suit in federal court seeking to enjoin Associated Cultural Clubs (ACCI) from arranging charter flights between Southern California and Europe. Monarch, who lost commissions from clients who were diverted by ACCI's competition, alleged that ACCI was violating section 1371(a) of the Federal Aviation Act by engaging in "air transportation" without a certificate or exemption from the Civil Aeronautics Board.[1] The district court found that since ACCI solicited members of the general public to purchase tickets on the flights it arranged, it was only nominally a social club; the organization's real purpose was the selling of tours and air transportation. Therefore, ACCI was found to be operating as an "indirect air carrier" without a certificate or exemption from the CAB.[2] *Held, affirmed:* An organi-

[1] 49 U.S.C. § 1371(a) (1970) provides:

> No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

[2] Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552-54 (9th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973). Defendants raised two theories on appeal that will not be discussed. First, Monarch Travel Services, Inc. did not have standing to maintain the suit. The court in *Monarch* ruled that plaintiffs had standing to sue as "any party in interest" within the meaning of 49 U.S.C. § 1487(a) (1970) which provides:

> . . . [I]n the case of a violation of section 1371(a) of this title, *any party in interest* may apply to the district court of the United States . . . and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process . . . restraining such person . . . from further violation of such provision of

zation functioning as an air carrier should be treated as one regardless of the label it applies to its business. *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973).

The Ninth Circuit in *Monarch* reasoned that ACCI had acted in violation of section 1371(a) because it was an "indirect air carrier" without a certificate or exemption from the Civil Aeronautics Board. An "air carrier" is defined within the Federal Aviation Act as "any citizen who undertakes, whether directly or indirectly, or by lease or any other arrangement, to engage in air transportation. . . ."[3] The Ninth Circuit concluded that regardless of the label ACCI applied to its activities, the organization was in the transportation business and thus was an "indirect air carrier."[4]

The holding in *Monarch* is supported by previous interpretations of the term "indirect air carrier" made by the courts and the CAB. The term was defined as early as 1941 by the CAB in the *Railway Express Agency, Grandfather Certificate* case[5] when the CAB specifically recognized that "indirect air carriers" were a distinct class of carriers under the Federal Aviation Act. The Board defined "indirect air carriage" as those activities undertaken indirectly, by lease or through some other arrangement, that result in the transportation of persons, property or mail. The Railway Express Agency was found to be within this classification and was required to have a certificate or exemption before conducting its air freight forwarding operations.[6] Additionally, the CAB stated that it viewed the use of the term "indirectly" in the definition of "air carrier" as a studied effort to make the scope of the definition extremely broad.[7]

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this chapter . . . (emphasis added).

Plaintiffs having suffered economic loss because of the diversion of clients to ACCI were "any party in interest." 466 F.2d at 552, 554; Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 413 F.2d 335 (1st Cir. 1969). *Cf.* Sierra Club v. Morton, 405 U.S. 727 (1972); Arnold Tours, Inc. v. United States, 400 U.S. 45, 46 (1970); Association of Data Processing Services Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). Secondly, defendants argued that the charter regulations were unconstitutional restrictions on the right to travel. The Ninth Circuit summarily dismissed this argument.

[3] 49 U.S.C. § 1301(3) (1970).

[4] 466 F.2d at 554.

[5] Railroad Express Agency, Grandfather Certificate, 2 C.A.B. 531, 536 (1941).

[6] *Id.*

[7] *Id.* at 536-37.

A Ninth Circuit decision, *Las Vegas Hacienda, Inc. v. CAB*,[8] which was relied on by the court in *Monarch*, illustrates the broad interpretation the courts have given to the term "indirect air carrier." In *Las Vegas Hacienda*, the term was held to encompass a resort hotel selling package tours that included "free" flights to Las Vegas. The tours were sold at a price less than the cost of air fare for flights sold by certified air carriers. It was also found that many people purchased the tours merely to obtain low-cost transportation to Las Vegas.[9] In affirming the decision of the CAB that the hotel was acting as an "indirect air carrier," the court in *Las Vegas Hacienda* approved the objective test applied by the Board that relied "upon what the carrier *actually* [*did*] rather than upon the *label* which the carrier attache[d] to its activity or the purpose which motivate[d] it."[10]

In addition to *Las Vegas Hacienda*, the Ninth Circuit relied heavily on two CAB orders with fact situations similar to those in the *Monarch* case in which the Board concluded that the "social clubs" involved were engaged in "indirect air carriage" without CAB approval.[11] The number of members in the clubs involved in the CAB decisions illustrates the extent to which these organizations were engaged in "indirect air transportation." In one of the CAB's enforcement proceedings,[12] the Board found there to be a network of organizations with reciprocal membership lists that, combined, contained the names of over 50,000 members. In the other enforcement proceeding,[13] the association of clubs listed approximately 30,000 members. This massive non-compliance with CAB regulations emphasizes the need for the strict analysis used in *Monarch*.[14]

[8] 298 F.2d 430 (9th Cir. 1962).

[9] *Id.* at 434-35.

[10] *Id.* at 434 (emphasis added). *See* M & R Investment Co. v. CAB, 308 F.2d 49 (9th Cir. 1962), where "free" flights were included in package tours sold by a hotel. *Accord* Alaska Air Transport, Inc. v. Alaska Airplane Charter Co., 72 F. Supp. 609, 611 (D. Alas. 1947). *See also* United States v. California, 297 U.S. 175, 181 (1936).

[11] Educational Student Exchange Program, Inc. Enforcement Proceeding, CAB Order 71-5-39 (May 10, 1971); United European American Club Enforcement Proceeding, CAB Order 71-2-33 (Feb. 5, 1971).

[12] CAB Order 71-2-33 (Feb. 5, 1971).

[13] CAB Order 71-5-39 (May 10, 1971).

[14] The New York Times has noted that the rules regarding six months membership in the organization are openly flouted and that a huge illegal travel

In determining an organization's status as an "indirect carrier," two principal factors have guided the courts and the CAB in their decisions: (i) whether the organization is "holding out to the public" the availability of air transportation and (ii) whether the organization has respected the CAB regulations requiring that passengers on a club charter flight have some "prior affinity."

The first factor, whether the organization is "holding out" to the public the availability of air transportation, is exemplified in *Las Vegas Hacienda,* in which the court concluded:

> [T]he illegality of the uncertified flights arose from the holding out (primarily through advertising, ticket sales, and similar activities) that the flights were available to the general public for compensation or hire.[15]

Defendant "social clubs" in the *Monarch* case and the CAB enforcement proceedings also solicited members of the public for the flights they arranged.[16] According to CAB rules regarding authorized club charters, solicitation of the general public is prohibited.[17] Furthermore, the Board has stated that a cardinal principle of the 1956 charter policy is the prohibition of solicitation of the general public.[18] Therefore, it is apparent that whether an organization is "holding out to the public" the availability of air transportation is an important consideration in determining whether its activities constitute "indirect air carriage."

The second factor given important consideration in determining whether an organization's activities are within the realm of "indirect air carriage" is whether the organization has respected the CAB regulations requiring that passengers on a club charter flight have some "prior affinity." As defined by the Board, "prior affinity"

industry has sprung up. N.Y. Times, Aug. 31, 1971, at 66, col. 1 (city ed.). An example of the abuses of the charter rules and the problems that can result from these abuses was apparent in August, 1971, when 300 young Americans, who had joined a fictitious social club, were stranded in Europe when their return flight tickets were not honored because the airlines had not been paid for the return flight. N. Y. Times, Aug. 28, 1971, at 1, col. 3.

[15] *See* Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430, 440 (9th Cir. 1962); Joiner Investment Case, 12 C.A.B. 879 (1951); Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592 (D. Alas. 1948); Southeast Aviation, Inc. Enforcement Proceeding, 32 C.A.B. 1281, 1282 (1961).

[16] 466 F.2d at 553; CAB Order 71-5-39 at 3 (May 10, 1971); CAB Order 71-2-33 at 2 (Feb. 5, 1971).

[17] 14 C.F.R. § 207.40(b) (1973).

[18] Slick Airways, Exemption, 25 C.A.B. 763, 764 (1957).

means that the passengers on the charter flight must be bona fide members of the organization, club or other entity for at least six months prior to the flight and that the members must not join "merely to participate in the charter as the result of solicitation of the general public. . . ."[19] This rule was not observed by defendant ACCI nor was it heeded by the organizations involved in the CAB enforcement proceedings.[20] Principally as a result of ACCI's solicitation of the general public and its failure to follow the "prior affinity" requirement, the Ninth Circuit in *Monarch* held that ACCI was an "indirect air carrier."[21]

Although the decision in *Monarch* does not expand the interpretation of "indirect air carrier" beyond the bounds set in cases like *Las Vegas Hacienda,* it is significant when analyzed in light of other recent developments in the charter area. In September of 1972, the CAB announced a new alternative charter classification called "Travel Group Charters" (TGC)[22] that will allow members of the public with no "prior affinity" to charter flights. While preserving the old "prior affinity" charter regulations for social clubs, the CAB enacted the TGC class for the general public on an experimental basis.[23] Under this new classification, members of the public with no prior association may engage in a joint undertaking to charter an aircraft for their own transportation on a round-trip basis, sharing equally in the cost of the flight.[24] The charters are to be formed by "travel group charter organizers" who will be classified as "indirect air carriers" and, as such, subject to CAB

[19] *See* note 17 *supra.*

[20] *See* note 16 *supra.*

[21] 466 F.2d at 554.

[22] 37 Fed. Reg. 20808 (1972); 14 C.F.R. § 372(a) (1972). Several important provisions of the "Travel Group Charter" classification are: (i) the charter must be for forty or more seats; (ii) the charter flight must be on a round trip basis; (iii) a minimum duration time of seven days is required for North American Charters; (iv) the transportation must be by a direct air carrier, either scheduled or supplemental, domestic or foreign; (v) a minimum three month lead time for filing charter contracts and a list of passengers is required and; (vi) there is no prohibition against advertising.

[23] 14 C.F.R. § 372a.5 (1973). The Board provided that the regulations authorizing TGC would terminate on December 31, 1975. The success of the new classification will be determined at that point. 37 Fed. Reg. 20809 (1972). In a later ruling, the Board announced that it would not suspend the prior affinity charter rules for social clubs during the TGC experiment. 38 Fed. Reg. 16917 (1973).

[24] 14 C.F.R. § 372a.5 (1973).

regulation.[25] Any "citizen of the United States" as defined by section 101(13) of the Federal Aviation Act[26] may organize a TGC as long as he complies with certain regulations prescribed for the public's safety. While these regulations do not require the charter organizer to receive certification from the CAB, the organizer must furnish and file with the Board a surety bond, a copy of the proposed contract with the charter participants, samples of the promotional material, a post-flight accounting report and other documents that will assure the Board that the charter will be financially sound.[27]

The CAB gave two reasons for adopting the TGC classification. The Board was concerned that the "prior affinity" rules discriminated against members of the public not belonging to qualified organizations, and in addition, that the "prior affinity" rules had proven extremely difficult to enforce. The Board stated that the desire for low-cost charter transportation was being satisfied by illegal charters and that the consumers' needs should be met in a lawful manner.[28] Thus, as a result of the CAB's inability to adequately enforce the "prior affinity" requirement, the TGC class was created to legalize the actions of those persons who violated the "prior affinity" rules by participation in illegal charters. The validity of the TGC class was upheld in a District of Columbia Circuit decision, *Saturn Airways, Inc. v. CAB*,[29] in which the court noted the tremendous difficulties experienced in enforcing the "prior affinity" rules and approved the CAB's efforts to ease the restrictions on charter travel. The circuit court stated in support of the new classification that the actions of the Board in the area of charter air travel had provided for the steady growth of the air transportation system and that the public was the primary benefactor.[30]

While the Board has liberalized its rules on charter travel, the decision in *Monarch* should help to insure that the new TGC rules

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[25] 37 Fed. Reg. 20815 (1972).

[26] "Citizen of the United States" is defined by the Federal Aviation Act, 49 U.S.C. § 1301(13) (1970), as "an individual who is a citizen of the United States . . . or (b) a partnership . . . or (c) a corporation or association created or organized under the laws of the United States or of any state . . . ."

[27] *See* 14 C.F.R. § 372a.20-.31 (1973).

[28] 37 Fed. Reg. 20808 (1972).

[29] 12 Av. L. Rep. 17,985 (D.C. Cir. 1973).

[30] *Id.* at 17990.

will be respected. In *Monarch,* the United States filed a brief *amicus curiae* in support of the district court's finding that ACCI was an "indirect air carrier."[31] This action, coupled with the fact that the *Monarch* decision and the new TGC class were announced only twelve days apart,[32] may be interpreted as a warning that while the charter rules may have changed, strict adherence to these rules is still required.

When viewed in conjunction, *Monarch* and the TGC class provide the CAB with tools for more effective charter regulation. By removing the "prior affinity" requirements, the Board has made it easier for charters to operate legally; this will reduce the public appeal for illegal charters. The analysis used by the Ninth Circuit in *Monarch* in the context of the "prior affinity" charters will now be applied in the new context of the TGC classification. According to the decision in *Monarch,* anyone who arranges charter flights will be classified as an "indirect air carrier" and will be subject to the operational requirements of the TGC rules which are designed for the public's protection. The success of the TGC will depend upon how well the new classification can provide safe, efficient, and low-cost charter travel. Effective regulation as exemplified by the Ninth Circuit in *Monarch* will aid the tremendous expansion in charter travel[33] by insuring that the growth is regulated for the public's benefit.

Paul W. Gertz

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[31] 466 F.2d at 553.

[32] *Monarch* was decided on September 15, 1972 and TGC was announced on September 27, 1972. 466 F.2d 552; 37 Fed. Reg. 10808.

[33] *See* CAB UNITED STATES INTERNATIONAL AIR CHARTER PASSENGER MOVEMENTS, 1968-1970 (October 1971); *see generally* 38 J. AIR L. & COM. 441, 447 (1972).

Current Literature