The concepts of "Accident" and "Bodily injury" in private international air law

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Abstract

Article 17 in the Warsaw Convention 1929, the core provision to all liability for passenger injury and death, has been the most litigated Article of the Warsaw Convention. The main reason for this is that the Warsaw Convention, the axis of private international air law, unfortunately did not provide clear definitions regarding "accident" and "bodily injury" in the Article 17. Its amendments, the Hague Protocol 1955 and the Guatemala Protocol 1971, did not succeed in clarifying the meanings. Although the Montreal Conference 1999 witnessed strong debates regarding the amendment of Article17, the Montreal Convention 1999 did not succeed in changing Article 17. Since the Warsaw System did not provide definitions of "accident" and "bodily injury", each State has interpreted the two terms individually. Inconsistency in interpreting "accident" and "bodily injury" has emerged, since every State has a different jurisprudence. This phenomenon has created confusion in the international air transport community. In order to clear up the confusion, the International Civil Aviation Organization should amend Article 17 to specify and clarify the terms: "accident" and "bodily injury", while balancing the interests of all parties in the international air transport community.

Résumé

L'Article 17 de la Convention de Varsovie de 1929, la disposition principale en matière de responsabilité en cas de lésions corporelles ou de mort du passager, a été l'article de la Convention de Varsovie qui a donné lieu au plus grand nombre de litiges. Cela est dû principalement au fait que la Convention de Varsovie, l'instrument central du droit aérien international privé, ne définit malheureusement pas précisément à son Article 17 les notions d' «accident » et de « lésion corporelle ». Ses amendements, le Protocole de la Haye de 1955 et le Protocole de Guatemala de 1971, ne réussirent pas à clarifier la portée de ces termes. Bien que la Conférence de Montréal de 1999 fut le théâtre de vifs débats concernant un éventuel amendement de l'Article 17, la Convention de Montréal de 1999 ne parvint pas à modifier cette disposition. Par conséquent, étant donné que le Système varsovien ne fournit pas de définition des notions d' « accident » et de « lésion corporelle », les Etats les ont interprétées à leur manière. Chaque Etat ayant sa propre jurisprudence, des incohérences dans l'interprétation des notions d' « accident » et de « lésion corporelle » sont apparues. Ce phénomène a été source d'incertitude au sein de la communauté du transport aérien international. Si elle souhaite mettre fin à cette absence de prévisibilité, l'OACI devrait amender l'Article 17 afin de spécifier et de clarifier les termes « accident » et « lésion corporelle » tout en prenant en compte les intérêts des différents membres de la communauté du transport aérien international.

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INTRODUCTION

In 2004, the number of passenger fatalities in scheduled air line operations recorded 203, the lowest number since 1945, when 247 passengers were fatally injured.[1] Although there have been several fatal aircraft accidents during the summer of 2005, it is reasonable to expect that the number of accidents will gradually decrease thanks to the scientific developments and the enforced safety and security requirements. While the decrease of aircraft accident fatalities is extremely encouraging to the international air transport community, when it comes to the number of claims and lawsuits presented against airlines, there has not yet been any noticeable decline.[2]

In particular, Article 17 in the Warsaw Convention, the core provision to all liability for passenger injury and death, has been the most litigated Article of the Warsaw Convention. The main reason for this is that there are still no clear definitions of "accident" and "bodily injury." Article.17, controversial since the Warsaw Convention was implemented in 1929, has been the object of movements to amend it ever since. Although the Guatemala Protocol 1971 did amend Art.17, this amendment has never been put into effect. Thus, in fact, as far as definitions of "accident" and "bodily injury" are concerned, nothing has changed since 1929.

Although the Montreal Conference 1999 witnessed strong debates regarding the

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[1] International Civil Aviation Organization, "Number of passenger fatalities in scheduled airline operations last year was the lowest since 1945"(2005) 60 ICAO Journal. 24.

[2] Condon & Forsyth LLP, *The Liability Reporter 2005,* (Montreal: International Air Transportation Association, 2005) at 2. [Liability Reporter 2005]

amendment of Article17, the Montreal Convention 1999, which was intended to modernize and replace the instruments of the Warsaw System[3], did not succeed in changing Article 17. On November 5, 2003, The Montreal Convention took effect. With the number of ratifying countries accelerating since then, it is clear that The Montreal Convention will become the most universal convention in the Warsaw System in the near future.

Since the Warsaw System did not provide definitions of "accident" and "bodily injury", each State has interpreted the definitions of the two terms individually. Even though each State has tried to interpret "accident" and "bodily injury" within the meaning of Article 17, inconsistency in interpreting "accident" and "bodily injury" has emerged, since every State has a different jurisprudence. This phenomenon has created serious problems. It not only violates the fundamental purpose of treaties since a constant provision of the Warsaw Convention, Article 17, is being interpreted inconstantly, but also results in great confusion among international air transportation actors: passengers, air lines, and governments. Thus, studying and defining the concepts of "accident" and "bodily injury" are indispensable.

This study has three goals: first, attempting to understand the drafters' meanings and purposes of "accident" and "bodily injury": second, analyzing current trends regarding "accident" and "bodily injury": and finally, defining both "accident" and "bodily injury" from today's perspective. In order to accomplish these goals, five Chapters are presented.

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[3] Michael Milde "Liability in international carriage by air: the new Montreal Convention"(1999) 4 Unif. L. Rev. 835. [Milde, "Montreal"]

Chapter One will explore why drafting history should be examined carefully when each State interprets an international treaty based on International Custom Law and the Vienna Convention on the Law of Treaties 1969. Chapter Two will review the drafting history of the Warsaw Convention and trace its developments. The historical background of when CITEJA was held, the manner in which CITEJA approached air law, and what CITEJA meant by "accident" and "bodily injury" will be examined. Then, developments in the working of Article 17 in the Hague Protocol 1955 and the Guatemala City Protocol 1971 will be explored. Chapter Three will deal with the Montreal Convention 1999 in detail; not only written decisions, but negotiations and debates will be fully explored as well. Specifically, changed purposes in the Montreal Convention 1999 and debates concerning "mental injury" will be emphasized. Chapter Four will indicate the current trend regarding "accident". Several landmark cases involved in the definition of "accident" in Common law countries will be analyzed, and legislations and practice in Civil law counties with respect to interpreting "accident" will be examined. Chapter Five will reflect the current trend regarding "bodily injury". With the same structure as Chapter Four, several landmark cases involved in the definition of "bodily injury" in Common law countries will be analyzed. Also, civil code and practice in selected civil law counties with respect to interpreting "bodily injury" and "mental injury" will be examined.

I hope that my study will contribute to fostering international air transportation while balancing the interests of all parties by clarifying the definitions of "accident" and "bodily injury".

CHAPTER I: INTERPRETATION OF TREATIES

A. Introduction

"Air law" is a vast concept encompassing both national and international law and touches upon all branches of law that may govern different aspects of the social relations created by the aeronautical uses of the airspace.[4] Inherently, international air law is regarded as the most "international" law because of the nature of air transport. The Warsaw Convention 1929 has established two goals: to regulate the international air carrier's liability (limited liability); and to regulate the documents of the international air transport (uniformity)[5], is the axis of private international air law. Thus, the Warsaw Convention 1929 and its developments, including Montreal Convention 1999, should be fundamentally examined from the perspective of "international law."

B. Definition of Treaty

The Statute of the International Court of Justice Article 38 (1) provides sources of international law.[6] Sources in the Article 38 (1) are not stated to represent a hierarchy,

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[4] Michael Milde, "Future Perspectives of Air Law" in M.Milde, P.Dempsey and H.Khadjavi ed., *Public International Air Law - Cases and Material* vol. 1 (Montreal: McGill University, 2004) 222 at 222.
[5] Nicolas Mateesco Matte, *Treaties on air-aeronautical law,* (Toronto: Carswell, 1981) at 379.
[6] Article 38
(1)The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a)international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

but the draftsmen intended to give the sources an order, and in one draft the word 'successively' appeared.[7] In practice, the Court may be expected to observe the order in which they appear: international convention and international custom are obviously the important sources, and the priority of international convention is explicable by the fact that this refers to a source of mutual obligations of the parties.[8] In spite of the fact that this provision is for the function of the International Court of Justice concerning dispute settlement, it explicitly provides for the authority of conventions, which is accepted as a common standard in the international community.

It is worth noting that there is no difference between a convention and a treaty. In fact, the definition of "treaty" in a provisional draft of the International Law Commission lists various synonyms for treaty. [9]

"Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other

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(2)This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Article 59
The decision of the Court has no binding force except between the parties and in respect of that particular case.

[7] Ian Brownlie, *Principles of Public International Law,* 5th ed. (Oxford: Clarendon Press, 1998) at 3 [Brownlie]

[8] *Ibid.*

[9] "Report of the International Law Commission covering the work of its fourteenth Session"(UN Doc. A/5209) in *Yearbook of the International Law Commission 1962*, vol. 2 (New York: UN, 1962) at 161.

subjects of international law and governed by international law.

Duration is one of the most important features of treaties. Unlike private contracts, where the average duration is relatively short, treaties may endure for considerable periods and even for centuries[10]; therefore, the historical element must be carefully inspected in interpreting them. For this main reason, the Warsaw Convention, the result of two international conferences held in Paris (1925)[11] and in Warsaw (1929)[12], is and will be important to review.

C. Theories to treaty interpretation

One of the enduring problems that courts, tribunals and lawyers must face, both in the municipal and international law spheres, relates to the question of interpretation.[13] Interpretation is not the mechanical process of drawing dictionary meanings from the words in a text. It is precisely because the words used in an instrument rarely have exact and single meanings and because all possible situations which may arise under it cannot be foreseen that the necessity for interpretation occurs.[14]

From an early period, the International Court of Justice has carefully considered how

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10 Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice vol.2 (Cambridge: Grotius Publications Limited, 1986) at 337. [Fizmourice]

11 It was held from 27th October to 6th November 1925. It was the presentation of a draft convention regarding the documents of carriage and the liability of airline(i.e. the carrier) relating to international air transportation – Giemulla/Schmid (eds.), Warsaw Convention (The Hague: Kluwer Law International, 2000) at Commentary paragraph 1[Giemulla]

12 It was held from 4th October to 12th October 1929.

13 Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 838 [Shaw]

14 Harvard Law School, "Draft Convention on the Law of Treaties"(1935), 29 A.J.I.L. (Supplement) (1935) at 946.

to interpret treaties and tried to suggest principles of interpretation. The ICJ asserted that there were three main schools of thought on the treaty interpretation, which could conveniently be called the "intentions of the parties" or "founding fathers" school; the "textual" or "ordinary meaning of the words" school; and the "teleological" or "aims and objects" school.[15] These categories are still valid today.[16]

Although the ideas of these three schools are not completely separate concepts and treaty interpretation can be defined by combining two or all three, each school has a different aim and must therefore be approached in a different way. For the "intentions" school, the prime objective is to ascertain and give effect to the intentions of the parties: the approach is therefore to discover what the intentions were, or what they must be taken to have been.[17] For the "meaning of the text" school, the prime objective is to establish what the text means according to the ordinary or apparent signification of its terms: the approach is therefore through the study and analysis of the text.[18] For the "teleological" school, it is the general purpose of the treaty itself that counts an existence of its own, independent of the original intentions of the framers.[19] According to the teleological principle, a treaty must be interpreted-and not only interpreted, but as it were assisted or supplemented-by reference to its objects, principles, and purposes, as declared, known, or to be

15 Fitzmaurice, *supra* note 10 vol.1 at 42.
16 Shaw has the same view. Shaw, *supra* note at 839 "As far as international law is concerned, there are three basic approaches to treaty interpretation. The first centers on the actual text of the agreement and emphasizes the analysis of the words used. The second looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions. . .The third approach ... emphasizes the objects and purpose of treaty ..
17 Fizmaurice, *supra* note 10 vol.1 at 42.
18 *Ibid.*
19 *Ibid.* at 42-3.

presumed.[20]

Although the ICJ has made no pronouncement on the desirability or otherwise of having definite rules of interpretation[21], the jurisprudence of the ICJ supports the textual approach.[22] With respect to the "intentions" approach, the ICJ has neither formally adopted any position on this issue nor seriously denied that the aim of treaty interpretation is to give effect to the intentions of the parties.[23] Nevertheless, the majority in the ICJ and the Commission and the Institute of International Law have determined that only the intention of the parties which are *expressed in the treaty* can be considered.[24] By contrast, the "intentions" school has received general support from many commentators in the United States as well as outside.[25]

However, the concept of "intention" is too ambiguous when it becomes the standard of treaty interpretation. The factors of "intention" which must or may have affected treaties are limitless, including a great number of articles, phrases, words, and the actual text. Additional factors may consist of the historical background, *travaux preparatories,* the time when the treaty was concluded, the atmosphere of the session where the treaty was negotiated and concluded, and even the personal disposition of the person who commented during negotiations for treaty making. Thus, there are too

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20 *Ibid.* at 49.

21 *Ibid.* at 47.

22 See Brownlie, *supra* note 7 at 632; see Fizmaurice, *supra* note 10 at 48,343-344.

23 See Fizmourice *supra* note 10 at 47,338.

24 See Brownlie, *supra* note 7 at 632; *Ibid.* at 48.

25 P.K. Menon, The Law of Treaties Between States And International Organizations, (Lewiston: The Edwin Mellon Press, 1992) at 71 [Menon]; Harvard Law School, Hyde, McDougal, Lasswell, Miller and Sir Hersch Lauterpacht supported the 'intention' approach.- see Menon. at 71-2.

many extraneous sources to figure out what the "intention" behind a particular treaty is. Rather, since the parties, after perhaps several weeks or months of negotiation, drew up a text which was supposed to embody the intentions of the parties as eventually arrived at, it is proper to look to that text as being the final expression of the parties' view.[26]

For the same reasons as in defining "intention", the "teleological" approach should be criticized for the vagueness of defining the objects and purpose of the treaty. This teleological approach is also criticized for the fact that it could involve tribunals in legislative instead of judicial or interpretive functions.[27] In fact, the majority of the ICJ declined to follow it for that reason.[28] However, in advisory opinions concerning powers of the United Nations, the ICJ has freely implied the existence of powers which, in its view, were consistent with the purpose of the U.N. Charter.[29] Also, in order to clear up an ambiguity in a particular article and to enable the treaty to be interpreted as a whole, the objects, purposes, and principles of a treaty, as stated in it, or as clearly evidenced otherwise, can be material for interpretative purposes.[30]

In short, treaties should be interpreted on a textual basis, in principle, and a teleological basis can be used exceptionally as a supplementary approach. The ICJ set out major principles regarding the interpretation of treaties,[31] and the Vienna

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26 Fizmourice, *supra* note 10 at 48.
27 See. Fizmourice *supra* at 49, Shaw *supra* note 13 at 839 and Bwonlie *supra* note 7 at 637.
28 See. Fizmourice, *Ibid.* 49.
29 Brownlie *supra* note 7 at 637.
30 Fizmourice *supra* note 10 at 49.
31 *Ibid*, at 50.

Convention 1969 Article 31 and 32 followed the similar principles.

a. Principle of Actuality: Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts

b. Principle of the Natural Meaning: Particular words and phrases are to be given their normal, natural, and unstrained meaning, in the context in which they occur.

Subject to a and b:

c. Principle of Integration: Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles.

d. Principle of Effectiveness: Particular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text.

e. Principle of Subsequent Practice: The way in which the treaty has actually been interpreted in practice is evidence of what its correct interpretation is.

D. The Vienna Convention 1969[32]

The 1969 Vienna Convention on the Law of Treaties partly reflects customary law and constitutes the basic framework for any discussion of the nature and

[32] The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to General Assembly resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. By unanimous decision of the Conference, the original of the Final Act was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria. Entry into force on 27 January 1980, in accordance with article 84(1) online: The United Nations International Law Commission.- <http://www.un.org/law/ilc/texts/treatfra.htm>.

characteristics of treaties.[33] Specially, The International Court has reaffirmed that Article 31 and 32 of the Vienna Convention reflect customary law.[34]

The Vienna Convention broadly accepted the textual method. This attitude was confirmed by the Commentary of the International Law Commission. It is said that the text must be presumed to be the authentic expression of the intentions of the parties. This was the position taken by almost all the members of the Commission.[35]

Article 31- General Rule of Interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall compromise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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33 Malcolm N. Shaw, International Law, 3th ed. (Cambridge: Grotius Publications Limited, 1986) at 459.
34 Shaw, *supra* note 13 at 839 note 133; see e.g. the Indonesia/Malaysia case,ICJ Reports, 2002,para.37; the Libya/Chad case, ICJ Reports,1994, pp.6,21-2; 100 ILR, pp. 1,20-1, and the Qutar v. Bahrain case, ICJ Reports, 1995, pp.6, 18; 102 ILR, pp.47, 59. In the GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna in 1994, it was emphasized that the Vienna Convention expressed the basic rules with regard to treaty interpretation, 33 ILM,1994, pp.839,892.

35 Menon, *supra* note 25 at 77.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32- Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Paragraph 1 of Article 31 contains three separate principles: (1) Good Faith; (2) Ordinary Meaning; and (3) Context.[36]

36 *Ibid.*

The principle of good faith flows directly from the rule *pacta sunt servanda*.[37] In a broader sense, treaties are to be both interpreted and performed in good faith, because they are transactions of good faith.[38] If a party makes use of an ambiguity in order to put forward an interpretation which was known to the negotiators of the treaty not to be the intention of the parties, it would be a breach of the good faith obligation.[39]

The principle meaning of 'ordinary meaning' is the very essence of the acceptance of the textual approach.[40] Even though the convention specified the boundary of "ordinary meaning", by stating, *to be given to the terms of the treaty in their context and in the light of its object and purpose*, the expression "ordinary meaning" was criticized in the 1968 Vienna Conference[41]. Particularly, the Greek delegation said:

The mere consultation of a dictionary would immediately reveal that a single word could have many meanings. Moreover, the same word was sometimes used to describe more than one thing, and the same thing could be described by two or more words. Language also developed; the word "territory" for example, used to mean terra firma only, but had come to be applied to the territorial sea and perhaps to the continental shelf. The time factor thus influenced the meaning of words.[42]

Nevertheless, the general opinion at the conference was that only a minority of words has

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37 *Ibid.* at 78.
38 *Ibid.*
39 Arnold Duncan McNair, *The law of treaties* (Oxford: Clarendon, 1961), reprinted 1986 at 465.[McNair]
40 Menon, *supra* note 25 at 78.
41 Thirty-second Meeting of the United Nations Conference on the Law of Treaties, First Session on 29th April 1968.
42 See Menon *supra* note 25 at 78-9.

multiple and ambiguous meanings.[43] In addition, those cases have been covered by paragraph 4 of Article 31.

The principle of context is that a treaty must be read as a whole and its meaning is not to be determined as particular phrases. Context in the Article includes the preamble, annexes and any other related instruments.[44]

E. Interpretation of Article 17 in the Warsaw System

Needless to say, the Warsaw Convention is an international treaty. Therefore, when it is interpreted from member states, they must consider the way the Vienna Convention directs – the textual basis. Even though the number of signatories of the Vienna Convention is only 101 parties[45] while the number of signatories of the Warsaw Convention is 151 parties[46], there is no doubt that the Vienna Convention purports to constitute a comprehensive set of principles and rules governing all the most significant aspects of the law of treaties.[47] Article 31 of the convention in particular substantiates the notion of customary modification.[48] Thus, whether or not a State has ratified, accessed or succeeded the Vienna Convention, all States should interpret the Warsaw Convention and its development by textual basis to the maximum possible degree.

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43 *Ibid.* at 79.
44 Article 31, paragraphs 2 and 3
45 online: The United Nations <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>.
46 online: International Civil Aviation Organization <http://www.icao.int/cgi/goto_m.pl?/icao/en/leb/treaty.htm>.
47 Sinclair, I. M, *the Vienna Convention on the law of treaties*,(Manchester: Manchester University, 1973) at 6.
48 Mark E. Villiger, *Customary International Law and Treaties*, (Dordrecht: Martinus Nijhoff, 1985) at 210.

The problem is that "accident" in the Article 17 in the Warsaw Convention can be given "ordinary meaning", whereas "bodily injury" in the Article 17 is relatively specific. As the critics of the textual approach argue[49], the words have no fixed or natural meanings which the parties to an agreement can rely on permanently and the meanings of words are multiple and ambiguous.[50] The word "meaning" itself has at least sixteen different meanings.[51]

According to Black Law Dictionary, "accident" means; [52]

a) An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated
b) An unforeseen and injurious occurrence not attributable to mistake, negligence, neglect, or misconduct

According to The New shorter Oxford English dictionary, 'accident' means;[53]

1. A thing that happens: a) An event that is without apparent cause or unexpected; and unfortunate event, especially one causing injury or damage, b) Chance, fortune, c) An unfavorable symptom, d) A causal appearance or effect, e) An irregularity in the landscape; 2. Something present but not necessarily so, and therefore non-essential: f) A property or quality not essential to a substance or object, g) A change of form to which words are subject, as to express number, case, gender, etc., h) A non-essential

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49 See Menon *supra* note 25 at 10.
50 *Ibid.* at 75.
51 Schwarzenberger, "Myths and Realities of Treaty Interpretation"(1969) 22 Curr. Legal Probs. 205.
52 *Black's Law Dictionary* 8th ed., s.v. "accident".
53 *The Oxford Shorter English Dictionary*, s.v. "accident".

accompaniment; a mere accessory.

On the contrary, "bodily injury" has a literally clear meaning: physical damage to a person's body – also termed physical injury.[54] However, the meaning: "bodily injury" can not be independent of the meaning "accident" within the interpretation of the Article 17. Rather, those terms are intertwined with each other.

Thus, in order to interpret "accident" and "bodily injury" properly, the teleological approach should be used as a supplementary material, so that studying the drafting history and purposes of Conventions is inevitable.

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[54] *Black's Law Dictionary* 8th ed., s.v. "bodily injury".

Chapter II: ARTICLE 17 IN THE WARSAW CONVENTION 1929 AND ITS AMENDMENTS

A. Article 17 in the Warsaw Convention

1. Before the Warsaw Conference in 1929

On the 17th August 1923:

M. Poincaré addressed a letter to the diplomatic representatives accredited in France to propose to convene in Paris, in November, an International conference on private air law which should:

a. draw up a Convention on the liability of the air carrier;

b. decide whether it was desirable to study of the international unification of private law with regard to aeronautics.[55]

On the 30th June 1925

The French government addressed another letter to the diplomatic representatives, submitting a draft international Convention relating to the liability of the air carrier, which the French Government had been led to studying. In this letter, the date of the first International Conference on Private Air Law was fixed for 26th October 1925.[56]

From the 26th October to November 1925

The first International Conference on Private Air Law was held in which Seventy-six delegates representing forty-one States took part.[57] It was decided that "Draft Convention

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55 D.Goedhuis, "*National Airlegislations and the Warsaw Convention*", (Hague: Martinus Nijhoff, 1937) at 4.[Goedhuis]
56 *Ibid.*
57 *Ibid.*

relating to the liability of the carrier in international carriage by aircraft" would be submitted for the approval of the Governments represented at the Conference. The Conference expressed the wish that a Special Committee of Experts should very shortly be appointed to prepare the continuation of the works of the Conference.[58]

January 1926

The French Government asked each of the States represented at the Conference whether they wished to appoint an expert in the proposed Committee[59] in order to examine the following questions: Damages caused by aircraft to goods and to persons on the ground; Compulsory insurance; Establishment of aeronautical registries – ownership of the aircraft, property law, mortgage; Attachment; Rental of aircraft; Air collision; Legal status of the commander of the aircraft; Waybill; Uniform rules for the determination of the nationality of the aircraft.[60]

On 17th May 1926

Thirty States appointed experts and decided to name the Committee thus constituted in Paris "Comité International Technique d'Experts Jurisdiques Aériens (CITEJA)."[61] The CITEJA studied two main subjects: a draft consignment note for the regulation of international carriage of goods by aircraft, and the draft Convention of the 1925 Conference relating to the liability of the air carrier.[62] The CITEJA had been a permanent committee of air law experts until it was dissolved in 1947.[63]

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[58] *Ibid.* 4-5.
[59] *Ibid.* 5.
[60] Letter from the CITEJA to the Government of the French Republic – see Robert C. Horner/Didier Legrez, *Second International Conference on Private Aeronautical Law Minutes Warsaw 1929* (South Hackensack, New Jersey: Fred B. Rothman & Co., 1975) at 241-2.[Horner]
[61] *Ibid,* in English, the International Technical Committee of Aeronautical Legal Experts
[62] Goedhuis, *supra* note 55 at 5.
[63] Giemulla/Schmid (eds.), *Warsaw Convention* (The Hague: Kluwer Law International, 2000) at

During the years 1926, 1927 and 1928

During the course of this investigation, it seemed necessary to unite questions related to liability of the carrier in international carriage by aircraft, and to the air waybill into one single text.[64]

From 24th May to 29th May 1928

The CITEJA adopted a text of a convention on which unanimous agreement was achieved.[65] Before being submitted to the second International Conference on Private Air Law, the draft was addressed to all the Governments who participated in the 1925 Conference.[66]

From the 4th to the 12th October 1929

The second International Conference on Private Air Law took place at Warsaw on the initiative of the Polish Government. This Conference adopted the Convention for the unification of certain rules relating to international carriage by air, also known as the Warsaw Convention.[67]

2. Minutes at the Warsaw conference regarding "accident" and "bodily injury"

Even though there was an approximate four-year gap between the first conference in Paris 1925 and the second conference in Warsaw 1929, CITEJA filled the gap very successfully. What the Warsaw conference basically did was discuss, examine, and decide about what the CITEJA studied, followed by the 1925 Paris conference. In the second session of the

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Commentary paragraph 2[Giemulla].

[64] Horner, *supra* note 60 at 242.

[65] *Ibid.*

[66] Goedhuis, *supra* note 55 at 4.

[67] *Ibid.*

Warsaw conference[68], Mr. De Vos, the reporter of the conference as well as Belgium delegate, insisted that[69]:

"For four years the important question of international transportation by air, as much from the point of view of the liability of the carrier, was discussed, worked and reworked, polished and repolished, with a care, with an ardor, with an untiring enthusiasm, and where the youth of legal imagination was given free rein. This is to tell you that the draft that is submitted to you today is not a hasty work"

Moreover, since the text had been adopted in May 1928 and transmitted to the Governments one year before the Conference, all delegates who took part in the Conference had the opportunity to examine the text. Therefore, the Warsaw conference was very well-prepared and in optimum condition to establish the principles of private international air law.

As far as "Accident" and "Bodily injury" were concerned, the Preliminary Draft of the convention adopted by the CITEJA was stipulated in Article 21.

Article 21

The carrier shall be liable for damage sustained during carriage:

(a) in the case of death, wounding or any other bodily injury suffered by a passenger;

(b) in the case of destruction, loss, or damage to goods or baggage;

(c) in the case of delay suffered by a passenger, goods, or baggage.

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[68] It was held on 5th October 1929.
[69] Honer, *supra* note 60 at 19.

In fact, Article 21 was not a controversial issue in the conference, so it did not attract much of the attention of the delegates.[70] In the fourth session[71], the period of carriage was thoroughly discussed. Under the influence of the discussion, Mr Ambrosini, the delegate of Italy, advocated the change of Article 21 in order to differentiate between passengers and goods. In the sixth session, the words: "during carriage" was eliminated because the delegates reached an agreement that the carrier is liable for damage in the case of death or accident, even if the period of carriage has already ended.[72] In the seventh session[73], Article 21 of the draft convention by the CITEJA changed to Article 17 of the Warsaw Convention and it was finally adopted.

Article 17 -

The carrier is 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.

3. Purposes of Article17 in the Warsaw Convention

Surprisingly, although Article 17 has been the most litigated article of the Warsaw Convention since that convention was implemented mainly because of lack of clear

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[70] In the sixth session, the reporter , Mr.De Vos said, "For article 21 we have had no substantive observation"; see Horner, *supra* note 60 at 166.
[71] It was held on 7th October 1929.
[72] See speech of Mr. Ambrosini in the sixth session, see Honer, *supra* note 60 at 167.
[73] It was held on 10th October 1929.

definitions regarding "accident" and "bodily injury", it was not the object to be discussed in detail during the Warsaw Conference. The minutes prove that the French terms: *'l'accident'* and *'lésion corporell'* were never discussed.

However, compared to Article 21 of the draft convention by the CITEJA, the boundary of Article 17 in the Warsaw Convention was narrowed significantly by using the word: *'l'accident'*. In Article 21 of the draft convention by the CITEJA, no matter what happens during carriage, if a passenger suffers death, wounding or any other bodily injury, the carrier shall be liable for damage. On the contrary, in Article17 of the Warsaw convention, the carrier is liable for damage if an "accident" takes place. Even though there is no definition of accident, the very important fact is that the Warsaw conference added the filter: "Accident". Also, Article 17 in the Warsaw Convention elucidated that only death, wounding, and any other "bodily injury" could be the damage sustained which the carrier is liable.

From a "teleological" point of view, one of the main purposes of the Warsaw Convention 1929 was to give special protection to a new industry. Chapter III of the Convention: *liability of the carrier*, specifically Article 22: *the limit of liability* directly reflected this purpose. With the exception of the USA, all airlines of the world at that time were Government-owned and Government-operated and by accepting the limit of liability, Governments were in fact protecting their own interests.[74] Regardless of today's trend

[74] Milde "Montreal", *supra* note 3 at 838.

towards the increased commercialization of air transport[75], if Art.17 is interpreted from the purely historic standpoint of 1929, Article 17 should be strictly interpreted from the perspective of advocates of airline integration.

B. Article17 in the Hague Protocol 1955

The Hague Protocol 1955 did not change Article17. Nonetheless, the ICAO (International Civil Aviation Organization) Legal Committee had continually discussed changing the terms: "accident" and "bodily injury" before the Hague Protocol was implemented.

In the 4th Session of ICAO Legal Committee in 1949, they confirmed the difference between "accident" dealing with carriage of passengers, and "occurrence" only in the case of carriage of cargo or baggage. It was agreed that the term "occurrence" would be too broad, applying to damage sustained in the event of the death of a passenger or any bodily injury suffered by him.[76] Specifically, an attack by one passenger upon another was mentioned as an example which "occurrence" would cover and "accident" would not cover. Regarding the issue of whether or not "bodily injury" would cover cases of madness, mental illness and nervous shock, there was no complete agreement. However, it was suggested that if the bodily injury was the direct result of an accident, it might cover cases of madness, mental illness and nervous shock.[77]

In the 8th Session of ICAO Legal Committee in 1951, a Belgium delegate proposed,

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[75] See *Ibid.*
[76] ICAO, *Legal Commission Minutes and Documents*, ICAO Doc.6027-LC/124(1949) at 270.
[77] *Ibid.*

seconded by several Delegates, to replace the word "accident" in Article 17 with the word "occurrence." Belgium delegate, Mr Golstein explained that the word "occurrence" was broader and would give rise to less ambiguity than the word "accident".[78] Although Mr. Cooper, a representative of IATA, reemphasized the debate in 1949 and insisted that the text of Article 17 should be retained and that no reference should be made to mental injury, the Committee agreed to adopt the Belgium proposal.

In the 9th Session of the ICAO Legal Committee in 1953, just before the Hague Convention 1955, the word "accident" was discussed again.[79] The danger in using the word "occurrence" was brought up by the U.S. delegate, Mr. Calkins. He said using the word "occurrence" might extend the liability of the carrier to cases for which liability did not presently exist.[80] Mr Golstein, the delegate of Belgium, who initially proposed to substitute the word "occurrence" for the word "accident", changed his opinion: "In practice, the present text of the Warsaw Convention had not given rise to too many difficulties on the point under discussion and the victims had all normally received damages in aviation accidents". Another important factor as to why they were reluctant to change Article 17 was the desire not to make too many amendments to the Convention, and to include, in the proposed Protocol, only those items that were essential.[81] The Committee finally rejected the proposal to substitute the word "occurrence" for the word "accident". As a result, the Hague Protocol brought no changes to Article 17, demonstrating an intent that liability should not arise for claims unrelated to aircraft

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[78] ICAO. *Legal Commission Minutes and Documents*, ICAO Doc.7229-LC/133(1951) at 136.
[79] ICAO, *Legal Commission Minutes and Documents*, ICAO Doc.7450-LC/136-1(1954) at 71.
[80] See *Ibid.*
[81] *Ibid.*

operation or to an aviation event.[82]

C. Article17 in the Guatemala City Protocol 1971

Before the Guatemala City Conference was held, the Legal Committee of ICAO had prepared the draft text at its Seventeenth Session.[83]

Article 17 in draft text prepared by the Legal Committee[84]:

The carrier is liable for damage sustained in case of death or personal injury of a passenger upon proof 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 infirmity of the passenger.

At the beginning of the second meeting of the whole sessions, the delegate of New Zealand recalled the drafting point of the second sentence of Article 17 in the draft text. He explained that the Legal Committee's intention was that if a passenger died because of causes over which the carrier had no control whatsoever, if the death occurred irrespective of any event which took place on board the aircraft, then the carrier would not be liable.[85]

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[82] T.A.Weigand, "Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention"(2001) AM.U. INT'l L.Rev. 916.[Weigand]

[83] ICAO, *International Conference On Air Law –Guatemala City 1971,* Vol.2 Document, ICAO Doc.9040-LC/167-2(1972) at 12.

[84] See *Ibid.* at 13; It is proposed that the following articles of the "Warsaw Convention as Amended at The Hague, 1955" be deleted and replaced by those articles which appear on the following pages with corresponding numbers: Article 3, 17, 20, 21, 22, paragraphs(a), (b), (c), and paragraph 4, subparagraphs (a), (b), (c), 24, paragraph 2, 25(delete), 25A, paragraph 3(delete), 28

[85] ICAO, *International Conference On Air Law –Guatemala City 1971,* Vol.1 Minutes, ICAO Doc.9040-

However, despite the Legal Committee's intention, the changed word of the first sentence in the Article 17: *event,* induced serious doubt: the carrier would be liable for events completely outside its own sphere of operations.[86]

In the third meeting, the delegate of Italy strongly insisted that the liability of the carrier should not be engaged when it had no direct responsibility for certain operations.[87] He proposed two alternatives: first, replacing "event" in the second line by "accident"; and second, redrafting the second sentence – "However, the carrier is not liable if the death or injury resulted from an event unrelated to air transport operations".[88] In response to the question of the delegate of the United Kingdom concerning whether or not it was intended to exclude war risks, hijacking or sabotage from the carrier's liability, the delegate of Italy replied that both hijacking and sabotage were matters related to the operations of the airline services; therefore, it was certainly not intended to exclude them.[89] In the process of explaining the second proposal, he maintained that neither the infirmity of the passenger nor injury as a result of a dispute between passengers were possible reasons for death or injury for which the carrier would be held responsible. Notwithstanding the effort of the delegate of Italy, both proposals were lost in the fourth meeting. During the Conference, they only changed the words from "proof" to "condition" and from "infirmity" to "the state of health", respectively.

LC/167-1(1972) at 31.

[86] See, *Ibid.* at 31-2.

[87] *Ibid.* at 44.

[88] *Ibid.*

[89] *Ibid.* 45.

Surprisingly, the minutes of the Guatemala City Conference proves that there was no discussion regarding "personal injury"[90] which opened the possibility of compensation for mental injury. In the working draft of the legal committee in the seventeenth session[91], the term "personal injury" was originally introduced. Then, it officially became the draft text prepared by the Legal Committee.

Article 17 in the Guatemala City Protocol 1971

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.

The Guatemala Protocol introduced the concept of strict liability irrespective of fault in the case of death or "personal" injury, arguably including mental or emotional injury, so long as the "event" (instead of the narrower Warsaw term "accident") which caused the death or injury took place on board the aircraft or in the course of embarking or disembarking.[92] However, the Guatemala Protocol was never ratified.

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[90] ICAO, *International Conference On Air Law –Guatemala City 1971,* Vol.1 Minutes, ICAO Doc.9040-LC/167-1(1972)

[91] ICAO, *Legal Committee Seventeenth Session 1970,* ICAO Doc.8878-LC/162(1970)

[91] *Ibid*, at 370 LC/Working Draft No.745-18.

[92] Paul Steven Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* McGill University Air and Space Law [forthcoming 2005 October] at Chapter II at 31 [Dempsey & Milde]

D. Criticism

The rules of the Warsaw Convention 1929 are being applied all over the world and have demonstrated their reliability and usefulness.[93] No one can deny the impact of the Warsaw Convention on private international air law. It is the axis of the unification of private international air law. However, in terms of "accident" and "bodily injury", drafters did not provide sufficient criteria and this brought considerable confusion. The drafters could not have anticipated that air transportation would develop at such a surprising pace and raise such a wide range of cases.

Following new trends and updating provisions were the roles of amendments. Nevertheless, both the Hague Protocol 1955 and the Guatemala Protocol 1971 did not succeed in modernizing of Article 17 in the Warsaw Convention. Although the Guatemala Protocol 1971 significantly expanded the circumstances under which recovery could be held,[94] it became a historical document that will never enter into force.[95] If it had entered into force, a struggle to interpret the Article 17 properly would have reduced to some degree.

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[93] I.H.PH. Diederiks-Verchoor, *An Introduction To Air Law*, 6th ed. (Hague: Kluwer Law International, 1997) at 57.
[94] Demsey & Milde *supra* note 92 at Chapter II at 31.
[95] *Ibid.* Chapter II at 34.

CHAPTER III: ARTICLE 17 (1) IN MONREAL CONVENTION 1999

A. Introduction

From 11 to 28 May 1999, the ICAO Headquarters in Montreal hosted a Diplomatic Conference convened to consider, with a view to adopt, a draft Convention intended to modernize and replace the instruments of the "Warsaw" system.[96] By all standards, it was a major international law-making Conference[97] – 121 Contracting States of ICAO, one non-contracting State, and eleven observer delegations from international organizations[98] attended; a total of 544 registered participants.[99] Interestingly enough, although the organizations comprised governmental, airline, insurance, and commerce associations, not one single consumer group was present to voice the concerns of the passenger.[100] Overall, the international Conference on Air Law was a success, since it adopted a new Convention for the Unification of Certain Rules for International Carriage by Air.[101]

The Montreal Convention is a new convention neither amending nor supplementing the Warsaw Convention 1929.[102] The following treaties are all amendments of, or

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[96] Milde, "Montreal" *supra* note 3 at 835.
[97] *Ibid.*
[98] African Civil Aviation Commission (AFCAC), Arab Civil Aviation Commission(ACAC), European Civil Aviation Conference (ECAC), European Community (EC), Inter-State Aviation Committee(IAC), International Air Transport Association (IATA), International Chamber of Commerce (ICC), International Law Association (ILA), International Union of Aviation Insurers (IUAI), Latin American Association of Air and Space Law (ALADA), and Latin American Civil Aviation Commission(LASCAC)- See ICAO, *International Conference on Air Law –Vol.1 Minutes*, ICAO Doc.9775-DC/2 (1999) at 32-4.
[99] *Ibid.* at 35.
[100] Jacqueline Etil Serrao, *The Montreal Convention of 1999: a "Well-Worn" Restructuring of Liability and Jurisdiction* (LL.M Thesis, McGill University Institute of Air and Space Law 1999) at 32-3 [unpublished] [Serrao]
[101] Milde, "Montreal", *supra* note 3 at 835.
[102] Suvongse Yodmani , *The Warsaw System: A case for Thailand to Ratify the Montreal Convention 1999 or not*, (LL.M McGill University Institute of Air and Space Law 2003) at 46 [unpublished] [Yodmani]

supplements to, the Warsaw Convention 1929:

The Hague Protocol of 1955

The Guadalajara Supplementary Convention of 1961

The Guatemala City Protocol of 1971

Montreal Protocols 1,2 and 3 of 1975, and

Montreal Protocol 4 of 1975, modernizing the cargo provisions of the Warsaw Convention.

These treaties did not meet the requirements of a modern air transport system in which airlines were offering and operating their services more independently from governments.[103] Due to several patchworks from both inside and outside of ICAO, treaty relationships between States became very complicated. Therefore, the Governments, airlines, international organizations, insurance companies, judges, lawyers, and the other relevant actors were keen to establish a new convention that could solve this considerable complexity. This highly desirable "single" convention is the Montreal Convention.

B. Purposes of the Montreal Convention 1999

The preamble represents the spirit and aim of a treaty. The preamble of the Warsaw convention states:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such

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[103] Pablo Mendes De Leon & Werner Eyskens, "The Montreal Convention: Analysis of some aspects of the attempted modernization and consolidation of the Warsaw system"(2001) 66 J. Air L.&Com. 1155 at 1156 [Leon]

transportation and of the liability of the carrier,

Professor Michael Milde identified four major areas in which Warsaw achieved uniformity that are now "recognized" in the Preamble of the Montreal Convention 1999: 1) the format and legal significance of the document of carriage, 2) the region of liability, 3) the limit of liability, and 4) jurisdiction.[104]

Apart from the common purpose of the Warsaw System, *uniformity*, the Montreal Convention has three main purposes: 1) modernization of the Warsaw System, 2) protection of the interest of consumers, and 3) achieving an equitable balance of interests,

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[104] See Dempsey & Milde, *supra* note 92 Chapter IV at 5.
1). *the format and legal significance of the documents of carriage* -- the Convention establishes the requirements for the passenger ticket, baggage check, and air waybill; the passenger ticket must include the place and date of issue, the points of departure and destination, intermediate stops if any, the name and address of the carrier, and a notice that carriage is subject to the Warsaw Convention;
2). *the regime of liability* – the Convention applies to international transportation, and provides rules for carrier liability in the event of an accident causing passenger death, wounding or bodily injury while the passenger is on board the aircraft or in the process of embarking or disembarking, the loss or damage of baggage or cargo, and delay; the Convention established a presumption of fault and a reversed burden of proof, enabling the carrier to exonerate itself from liability only if it proved it had exerted all necessary measures to avoid the loss or that it was impossible to do so; the carrier could also reduce its liability if it proved that the claimant was contributory negligent; with respect to cargo and baggage, the carrier enjoyed an additional defense if he proved that the damage was caused by negligent pilotage or negligent handling of the aircraft or in navigation, and that in all other respects, the carrier took all necessary measures to avoid the damage;
3). *the limit of liability* – the Convention established liability limits for carriers for passenger death or injury, cargo and baggage loss or damage, and delay; under Warsaw, these liability ceilings may be pierced if the claimant proves the carrier engaged in wilful misconduct, or that no ticket, baggage check, or air waybill was delivered; and
4). *jurisdiction* – the Warsaw Convention established four fora in which suit can be brought; the plaintiff may bring suit in one of four places within the territories of States which have ratified the Convention: ① the carrier's domicile, which is the State under whose laws it was incorporated; ②the carrier's principal place of business; ③ where the contract was made; or ④ the place of destination. The Montreal Convention added a fifth jurisdiction – the domicile of the claimant if the carrier does business there.

which are clearly mentioned in the preamble.

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention," and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving and equitable balance of interests;

1. Purpose I: Modernization of the Warsaw System

Although the Montreal Convention contains a few "new" principles, it essentially consolidates the existing "Warsaw System" into a single treaty and revises various articles in accordance with modern realities and concerns.[105] In particular, Chapter II(Article 3-16) – *Documentation and Duties of the parties relating to the carriage of passengers, baggage and cargo* and Chapter V(Article39-48) -*Carriage by Air Performed by a person other than the contracting carrier* are closely tied to the modernization of the Warsaw system.

Chapter II provides the legal base of electronic ticketing[106] and facilitates air waybills. Article 3 through Article 11 largely owe their formulation to the Guatemala City Protocol of 1971 and Montreal Protocol No. 4 of 1975, particularly in simplifying and modernizing the documentation requirements and indeed, eliminating their mandatory nature.[107] Chapter V effectively embraces the provisions of the Guadalajara Convention 1961.[108] It contains detailed provisions relating to carriage performed by a carrier other than the contracting carrier, which would include carriers in a code-share or wet lease

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105 Andrew J. Harakas, *Recent Developments Affecting Air Carrier Liability Under The Warsaw Convention And Montreal Convention – The Meaning of Accident and Bodily Injury* (2004) [unpublished, archived at McGill University Institute of Air & Space Law].at 3 [Harakas]

106 Article 3 paragraph 2

Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such means is used, the carrier shall offer to deliver of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

Professor Michael Milde views complete ticketless traveling is not practicable, "the aim of the airlines would be eventually to achieve completely "ticketless" travel to minimize the cost of documentation; however, this may not be generally practicable since the passenger needs some evidence of the contract of carriage for accounting, immigration, successive carriage and other purposes" see Milde, "Liability", *supra* note 1 at 837.

107 Dempsey & Milde *supra* note 92 Chap VI at 2.

108 *Ibid.* Chapter IX at 1.

arrangement.[109]

In June 2005, three major alliances were responsible for more than sixty percent of airline market share.[110] Nowadays, it is almost unavoidable to co-operate with other air carriers in order to survive in the increasingly competitive international air transport market.[111] Thanks to the significant growth of airline alliance, passengers have acquired many more chances to use a carriage performed by a carrier other than the contracting carrier. The Montreal Convention followed two worldwide trends: e-ticketing and code share.

2. Purpose II: Protection of the interests of consumers

This purpose is the most remarkable change of the Montreal Convention in comparison with the Warsaw convention. While there was a strong tendency to protect newborn aviation industry in the Warsaw Convention, the Montreal Convention explicitly states that "RECOGNIZING the importance of ensuring protection of the interests of consumers

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[109] Harakas, *supra* note 105 at 8; See also Dempsey & Milde, *supra* note 92 at Chapter IX at 3: The Presidential transmittal letter accompanying the Montreal convention 1999 when it was presented to the U.S. Senate summarized the provisions of Chapter V of the Convention:
Articles 39-48 of the Convention define the rights of passengers and consignors in operations where all or part of the carriage is provided by an airline that is not party to the contract of carriage (e.g., code-share operations, freight consolidators, etc.).

[110] Korean Air, *Global alliances groups present conditions* (2005 June) [unpublished]

	SKYTEAM	ONEWORLD	STAR ALLIANCE
Year of Foundation	2000	1999	1997
Members	9	8	16
Destinations	684	599	795
Countries	135	135	139
Daily Departure	15,207	7,526	15,000
Lounges	467	392	620
Annual Passenger	344mil	223 mil	384 mil
RPK Market Shares	21%	17%	24%

111 Angela Cheng-Fui Lu, "International Airline Alliances: EC Competition Law/US Antitrust Law and International Air Transport" Hague Kluwer Law International 2003 at 57 [Lu].

in international carriage by air". Dr. Assad Kotaite said in the plenary of the international conference of air law on the 10th May 1999: [112]

International law is a constantly evolving body of norms commonly observed by the members of the international community in their relations with one another... While the Warsaw Convention of 1929 was adopted at a time when international civil aviation was still in its infancy, the present-day aviation industry bears little resemblance to its precursor... [113] *The initial balance of interests between the desire on the part of governments to protect the infant airlines industry from undue financial burden and the individual's right to restitution in case of accident has been the subject of discussion and review for a significant period of time. This review has certainly to take adequate account of the fact that the aviation industry has matured.*

Professor Michael Milde also emphasized the changed circumstances.[114]

Today's air transport is a strong global industry with a vastly improved and steadily improving safety record, most of the world's airlines have been privatized and comprehensive risk insurance is available at competitive rates to cover any type of damages. It would be difficult to find any convincing arguments for special treatment to be accorded to airlines and for the perpetuation of limits of liability in international air transport.

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112 ICAO, *supra* note 98 at 36.
113 Technological-sophisticated equipment, increased mobility of the passenger, a virtually worldwide operating marketing web, and globalization of air transport operations, are only some of the new phenomena that can be observed at the threshold of the new millennium. see *Ibid.*
114 Milde, "Montreal", *supra* note 3 at 838-9.

In fact, a number of unilateral initiatives, and national and private law measures were designed to take greater care of the passenger's interests[115], when the Warsaw System could not reflect reality and provided for unreasonable compensation. The Montreal Convention finally covered intercarrier agreements and national regulation[116] which had made ICAO an outdated organization over the years. The purpose of the Montreal Convention concerning the *Protection of the interest of consumers* has not only the increased the amount of compensation available[117] and restricted defenses,[118] but also influenced the interpretive principle brought to bear on the Montreal Convention.

3. Purpose III: Achieving an equitable balance of interests

Law is an instrument of balancing conflicting social interests.[119] Thus, keeping a balance between the interests of air carriers and passengers must have been a fundamental purpose of the Montreal convention. This purpose should maintain harmony with the second purpose: *protection of the interest of consumers.*

The interest of consumers was protected by eliminating the ceilings of liability imposed by the Warsaw regime based on the principle of restitution.[120] Restitution means renewing the *status quo ante* and does not include the imposition of punitive, exemplary

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115 Leon, *supra* note 103 at 1157 ; See also *Dempsey & Milde supra* note 92 at Chapter 1 at 35-43 : namely, The Montreal Agreement (1966), The Malta Agreement (1974), The Italian Constitutional Court and Law No. 274 (1988), The Japanese Initiative (1992), The IATA Intercarrier Agreements (1995-1996), European Union Regulation 2027/97

116 *Ibid.*

117 Montreal Convention Art.21(1), 21(2).

118 Montreal Convention Art.21(2), 20.

119 Personal notes from Professor Milde's lecture on private international air law 2004.9.1.

120 Dempsey & Milde *supra* note 92 Chapter 3 at 8.

or any other non-compensatory damages[121]; such damages would go beyond "restitution" and would amount to unjust enrichment.[122] Despite the fact that airline industry is not the party to be protected anymore, balancing the interest between air carrier and passengers should be fair and reasonable. The Airline industry is not a special industry to be protected, nor should it take on unreasonable responsibility.

C. Minutes at the Montreal Conference regarding "mental injury" and "state of health of the passenger"

Even though Article 17 (Article 16 in the draft convention[123]) was exhaustively discussed in the Montreal Conference, Article 17 remained unchanged by the Montreal Convention Article 17(1). Consequently, the Montreal Convention and the ICAO preparatory work[124] missed the opportunity to clarify terms and concepts that have been causing difficulties in their interpretation and application: among such "missed opportunities" is the failure to clarify the term "accident"[125] Similarly, the term "bodily injury" will continue creating

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[121] See the Montreal Convention Article. 29.

[122] Dempsey & Milde *supra* note 92 Chapter 3 at 8.

[123] Article 16.1 in the draft convention - Death and Injury of Passengers

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.

Draft Convention For the Unification of Certain Rules For International Carriage By Air, ICAO, DCW Doc No.3;

[124] The efforts of the ICAO to modernize the Warsaw System of air carrier liability formally initiated in the Fall of 1995. The ICAO Legal Committee approved the text of the Draft Convention for the Unification of Certain Rules for International Carriage by Air at its 30th Session, which took place from 28 April 1997 to 9 May 1997. On 4th June 1997, ICAO Council decided that the text should be reviewed by the Secretariat Study Group. On 26th November 1997, ICAO Council decided to establish a Special Group on the Modernization and Consolidation of the Warsaw System which replaced the Secretariat Study Group. The Special Group "refined" the text approved by the Legal Committee- See L.Weber & A.Jakob, "The ICAO Draft Convention on the Modernization of the Warsaw System to be considered by a Diplomatic Conference in 1999" (1998) XXIII Ann. Air & Space. L. 231 at 232-4.

[125] Dempsey & Milde *supra* note 92 Chapter VII at 1.

different interpretations as to whether it does or does not cover such afflictions as "mental trauma", or "post-traumatic syndrome disorder".[126] Unfortunately, the opportunity to clarify the Article 17 that had been causing considerable controversy and utter confusion about interpreting "accident" and "bodily injury" was postponed again. However, during the Montreal conference, changes in trends and purposes concerning "accident" and "bodily injury" were clarified.

1. Meetings of the Commission

a. "Mental injury" in relation to "bodily injury"

At the third meeting of the Commission of the Whole, 12 May 1999, the Delegate of Sweden referred to DCW Doc No.10 presented by Norway and Sweden, which proposed that the words "or mental" be introduced in the first sentence of Article 16, paragraph 1.[127] In the proposal, they maintained that the new convention should expressly provide for compensation in case of mental injury because the effect of a mental injury could be as serious as that of a bodily injury; for example, it would be unfair if two persons, both disabled to the same extent as a result of an accident, were to receive different compensation just because one of them is mentally injured.[128] As for the difficulty of determining whether or not a person suffers from a mental injury, the proposal emphasized that it would not impose any extra burden on the carrier, since the burden of proving the existence of damage lies with the passenger.[129] This proposal was supported

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[126] *Ibid.*

[127] The text would then read" The carrier is liable for damage sustained in the case of death or bodily or mental injury of a passenger..." see. ICAO Doc 9775-DC/2 at 67.

[128] ICAO, *International Conference on Air Law –Vol.II Documents*, ICAO Doc.9775-DC/2 (1999) at 97.

[129] *Ibid* at 98.

by a majority of delegates who commented in the meetings.[130]

The observer of IUAI, however, strongly disagreed with this proposal. He said that the existence of mental injury was very difficult to prove, giving rise to the possibility of fraud and expensive protracted litigation. The cost of claims could be considerable and this would raise a new and additional cost; therefore, this could have a significant impact on the cost of insurance.[131] The observer of IATA also concluded that it would not be appropriate to include mental injury as a separate compensable injury for which damages may be awarded. He argued that if mental injury were included as a separate compensable of Article 17, this would lead to escalated claims and would be highly prejudicial to the interests of air carriers, and ultimately to passengers themselves, as the incidence of claims would result in costly litigation or more costly settlements to avoid litigation.[132]

b. "the state of health of the passenger" in relation to the boundary of "accident"

At the fifth meeting of the Commission of the Whole, 13 May 1999, the Delegate of Norway referred to DCW Doc No.11, which proposed to delete of the last sentence of article 16 (draft convention), paragraph 1, regarding the provision that the carrier was not liable to the extent of death or injury resulting from the state of health of the passenger.[133] He argued that the since the new Convention returned to the word "accident" from the

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[130] ICAO, *supra* note 98 at 67-74 ; Also LACAC member States(21) supported including mental injury; "LACAC pointed out that from an ethical and legal point of view there is no reason not to compensate mental injury..." See *Ibid.* 115-7

[131] ICAO, *supra* note 98 at 69

[132] *Ibid.* at 73; He also gave an instance. Expert studies indicated that approximately one-half the passengers on any given flight experienced fear of flying and any untoward event during flight could potentially cause mental injury to such passengers.

[133] *Ibid.* at 77.

word "events" in the Guatemala City protocol[134], "the state of health of the passenger" provision could not be valid. He said that if the reservation concerning the state of health of the passenger was retained, the carrier would be given a double concession detrimental to the interest of the passenger, which would oppose the spirit of modernization and improved consumer protection as presented in the draft preamble to the Convention.[135]

The discussion regarding "state of health of the passenger" was heated and numerous opinions were suggested: deletion, retention, inserting the term "solely", etc.[136] The delegate of the United States endorsed the proposal of Norway for a different reason. He said the last sentence was not beneficial to air carriers. In his opinion, carriers took the view that the current wording of the last sentence would lead to protracted litigation over the comparative state of health of the passenger. The cost of litigating these matters would exceed any lessening in the judgments that resulted therefrom and the airlines would be better off without this language. The delegate of Canada pointed out that Article 16 was in concordance with one of the basic principles found in the preamble to the Convention: the passenger should be compensated for the losses actually suffered and not compensated for losses more than actually suffered.[137] Thus, he was in favor of retaining the final clause

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[134] See ICAO, *International Conference on Air Law –Vol.III Preparatory Material*, ICAO Doc.9775-DC/2 (1999) at 170; In the report of the legal Committee 30th Session (1997), 4-100 In considering the use of the term "accident" or "event", one delegation observed that the term "accident" had been the object of a number of judicial decisions and that this body of case law could be used to clarify the meaning of this term. Another delegate stated that the term "accident" could be defined as a sudden, unpredictable event or occurrence. The subsequent discussion revealed a clear preference for the use of the term "accident"; 4-105 With respect to the terms "event" and "accident", there was an overwhelming majority in favour of "accident".

[135] ICAO, *supra* note 98 at 77.

[136] See *Ibid.* 77-80.

[137] *Ibid.* 79.

with the compromised solution of adding the word "solely".[138]

2. Meetings of the "Friends of the Chairman" Group

At the 8th meeting of the Commission of the Whole on 17 May 1999- one week after the opening of the Conference- the president[139], on the basis of informal consultations, announced the creation and composition of the "Friends of the Chairman" Group – an informal advisory body not foreseen by the Rules of Procedure.[140] Twenty-eight delegations[141] were requested to participate in the Group representing a geographical balance and different levels of negotiating skills.[142] Although the president opened the meetings of the "Friends of the Chairman" Group to other delegations or observers, the logical difficulty of allowing this was insurmountable as the room selected barely seated more than fifty people comfortably.[143] With an attendance of 584 participants present at the Conference, it seemed hardly suitable that this method of convening a meeting would be conducive towards promoting healthy and productive discussions.[144]

Although the inception of the "Friends of the Chairman" Group was not the best choice, it can be regarded as an understandable choice. Considering the initial discussion in the

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[138] *Ibid.*

[139] Dr K. RATTRAY, Ambassador at large and Attorney General of Jamaica – an experienced internationalist who acted as Rapporteur of the UN Conference on the Law of the Sea and as President of the ICAO Diplomatic Conference in 1991 See, Milde,"Montreal" *supra* note 3 at 848.

[140] See *Ibid.* The idea of "Friends of the Chairman" group was from chairman's personal experience. During the UN Conference on the Law of the Sea, Dr. Rattray drew much consensus-building assistance from the "Friends of the Rapporteur"

[141] ICAO, *International Conference on Air Law –Vol.II Documents*, ICAO Doc.9775-DC/2 (1999) at 440-1 : Australia, Cameroon, Canada, Chile, China, Egypt, France, Ghana, India, Japan, Lebanon, Mauritius, Namibia, New Zealand, Pakistan, Russian Federation, Saudi Arabia, Singapore, Slovenia, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tunisia, United Kingdom, United States, Uruguay, Vietnam

[142] *Ibid.*

[143] Serrao, *supra* note 100 at 35.

[144] *Ibid.*

Plenary Session and in the Commission of the Whole were unproductive and amounted to a repetition of known positions[145] and a desire for making a written agreement within the restricted time, the inception of the special group must have been one of few options that the chairman had.

However, the critical point is that the president of the Conference never did deliver the consensus that the "Friends of Chairman" group reached with regard to mental injury issue. Intense discussion about the most contentious Articles[146] ensued for five days within the "Friends of Chairman" group, and Art.16 was one of the key topics. The delegate of the United States played an important role in the discussion. He said that the record of the proceedings of the Conference reflected that the term "bodily injury" covered mental injury associated with bodily injury. That would show the intent behind that term and would give a unified meaning to it, covering mental injury associated with bodily injury, as was currently the case on the Courts under the common law system and the civil law system.[147] A majority of the delegates had the similar idea of inserting recoverable mental injury into Article 16[148]. As a result of the "Draft Consensus Package"[149] drawn up by the "Friends of the Chairman" Group, the definition of recoverable mental injury became specific through two revisions.

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[145] Milde, "Montreal" *supra* note 3 at 848.

[146] Art.16(Death and Injury of Passenger – Damage to Baggage), Art.19(Exoneration),Art.20(Compensation in Case of Death or Injury of Passengers), Art.21 A – Limit of Liability, Art.22 A- Freedom to Contract, Art.22B(Advance Payments)Art.27(Jurisdiction); See ICAO, *International Conference on Air Law –Vol.1 Minutes*, ICAO Doc.9775-DC/2 (1999) at 110-139, 147-185.

[147] ICAO, *supra* note 98 at 112: DCW-Min. FCG/1

[148] See *Ibid.* 110-122.

[149] ICAO, *supra* note 98 at 491-502: ICAO DCW-FCG No.1 , ICAO DCW-FCG No.1 revised , ICAO DCW-FCG Revision No.2

Draft Consensus Package DCW-FCG No.1 19/5/99

Article 16 – Death and Injury of Passenger

1. The carrier is liable for damage sustained in case of death or ***injury*** *of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.*

2. In this Article the term 'injury', means bodily injury, or mental injury which significantly impairs the health of the passenger.

Draft Consensus Package DCW-FCG No.1 Revised 21/5/99

Article 16 – Death and Injury of Passenger

1. The Same

2. In this Articles the term 'injury', means bodily injury, or mental injury associated with bodily injury, or mental injury which significantly impairs the health of the passenger.

Draft Consensus Package DCW-FCG No.1 Revision 2 24/5/99

Article 16 – Death and Injury of Passenger

1. The Same

2. In this Article the term 'injury', means bodily injury, or mental injury associated with bodily injury, or other mental injury which so seriously and adversely affects the health of the passenger that his or her ability to sustain the day-to-day activities of an ordinary

person is significantly impaired.

Although the Friends of Chairman Group produced reasonable suggestions, Article 16 in the Draft Consensus Package, which could effectively reflect the current situation, was suddenly changed by the Chairman in the thirteenth meeting of the Whole, the day he presented "Consensus Package"[150].

The point of the Chairman's argument was that "the jurisprudence in this area –mental injury- was still developing." Just before he noted that the word "bodily" had been inserted before the word "injury" in the text of Article 16 in DCW-FCG No1 (Revision 2), and that the last sentence of Article 16, paragraph 1 in DCW-FCG No.1 (Revision 2) had been deleted, he said:

All had recognized that under the concept of bodily injury there were circumstances in which mental injury which was associated with bodily injury would indeed be recoverable and damages paid therefore. The Group had equally recognized that the jurisprudence in this area was still developing.[151]

While he noted the deletion of the Article 16 paragraph 2 in the DCW-FCG No1 (Revision 2), the remarkable effort to clarify the definition of "injury", he mentioned once more the same reason: *the jurisprudence in this area was still developing.*[152]

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150 *Consensus Package*, ICAO, 1999, DCW Doc.No.50.

151 ICAO, *supra* note 98 at 201.

152 *Ibid.*

Ultimately, Article 17 (Article 16 in the Draft Convention) has not changed at all.

Article 17 in the Montreal convention – Death and Injury of Passenger

1. The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

D. Criticisms

Since all nations have different jurisprudences, a treaty, an agreement among nations, should be decided by way of compromise. If a treaty is revolutionary, despite its perfectly good intention, many countries (mainly developing countries) can not follow. On the contrary, if a treaty is retrogressive, it will be ignored by many countries (mainly developed countries). We have already witnessed a number of unilateral initiatives, and national and private law measures regarding compensation when the Warsaw System did not reflect the reality.[153] A treaty must be feasible in order to embrace both developed countries and developing countries.

In that sense, Article 17(1) in the Montreal Convention is regrettable. Regardless of the controversy whether or not stand-alone mental injury should be compensated,[154] mental injury associated with or directly resulting from bodily injury, which is *de facto* regarded as compensable injury in most developed countries, should have been expressed in Article

[153] See page at 29-30.
[154] It will be fully explored in Chapter V.

17 in order to make it a feasible provision. Since Article 17 in the Montreal Convention missed the opportunity to represent the reality, it can be viewed as a rather outdated provision until its amendment.

Interestingly enough, the two most influential participants in the Montreal International Conference on Air Law were not member States; they were IATA (the International Air Transport Association) and IUAI (the International Union of Aviation Insurers). This is not surprising because the air carrier is one of the two most important parties, *the other being the passenger,* and IATA and IUAI were representatives of air carriers and air carrier insurers. However, there was no representative of the equally important party, *passenger,* at the Conference. Although one may say that the member States represented the passenger's interest, it is doubtful that they did so effectively. For the same reason that IATA and IUAI could participate in the Conference as observers, involvement of the passenger interest group in future conferences would be beneficial. However, it must be emphasized that the passenger interest group should be different from the plaintiff lawyer group in aviation cases.

CHAPTER IV: ACCIDENT

A. Introduction

The Warsaw Convention and its amendments never did define the "accident" in Article 17, and the Montreal Convention also missed the opportunity to clarify the definition of "accident". Thus, each State has interpreted "accident" within its own jurisdiction.

In common law countries, the conditions that the precedent cases provided have played an important role in defining "accident". Also, common law countries have considered foreign case law when they have determined the definition of "accident". In particular, the U.S. Supreme Court decision *Air France v. Saks 470 U.S. 392 (1985)* has been frequently mentioned not only within the U.S. but also internationally with respect to the interpretation of "accident" in Article 17.

In civil law countries, the definition that the precedent provided regarding "accident" is not a significant concept that the Courts should consider. Rather, the Courts examine the question of whether the air carrier was at fault or negligent in each case. With respect to the liability of carriers in international air transportation, civil law countries apply international conventions which they have signed. As for domestic air transportation, they apply either domestic law (aviation law, commercial law or civil law) or the conditions of air carriers.

B. Common Law Countries

1) UNITED STATES

a. *Air France v. Saks* 470 U.S. 392 (1985).

The United States federal courts have addressed the Warsaw Convention in more than 1,000 cases[155], of which more than 100 cases have referred to the question of what constitutes an aviation "accident" under Article 17 of the Warsaw Convention.[156] The United State Supreme Court has addressed the Warsaw Convention in earnest on only eight occasions[157] and one of them is *Air France v. Saks* 470 U.S. 392 (1985)., which involved an action against the carrier by a passenger who suffered an ear injury caused by normal cabin pressurization changes during landing[158]. *Saks* is the landmark case regarding the definition of "accident" in Article 17. *Saks* decision provided the key elements that constitute "accident":

An airline's liability under the Warsaw Convention for a passenger's injury arises only if the injury is caused by an unexpected or unusual event or happening that is external to the passenger; the definition should be flexibly applied after assessment of all

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155 Dempsey & Milde, *supra* note 92 at Chapter VII 37

156 *Ibid.* at 19

157 *Ibid.* at 37: *(Olympic Airways v. Husain, 124 S. Ct. 1221 (2004) (inaction may constitute an accident under Article 17): El Al Israel Airlines v. Tseng, 525 U.S. 155 (1999) (Warsaw Convention provides the exclusive remedy for losses falling within its terms); Dooley v. Korean Air Lines, 524 U.S. 116 (punitive damages not recoverable under Death on the High Seas Act); Zicherman v. Korean Air Lines, 516 U.S. 217 (1996) (crashes on the high seas governed by the Death on the High Seas Act); Eastern Airlines v. Floyd, 499 U.S. 530 (1991) (purely emotional damages not recoverable under the Warsaw Convention); Chan v. Korean Air Lines, 490 U.S. 122 (1988) (Warsaw's liability limits applicable even though the warning on the passenger ticket did not strictly comply with the Convention's requirements); Air France v. Saks, 470 U.S. 392 (1985) (no recovery under Warsaw where passenger's injury results from her own internal reaction to the normal and expected depressurization of the aircraft); and Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984) (limits of cargo liability under Warsaw tied to the prescribed value of gold).*

158 Andrew J. Harakas, *Recent Developments Affecting Air Carrier Liability Under The Warsaw Convention And Montreal Convention – The Meaning of Accident and Bodily Injury* (2004) [unpublished, archived at McGill University Institute of Air & Space Law].at 13 [Harakas]

circumstances surrounding a passenger's injuries.[159]

In fact, before *Saks* decision in the U.S. Supreme Court, two decisions from the Third Circuit of Appeals provided the definition of "accident" either directly or indirectly. In *Demarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3rd Cir. 1978),* the Court accepted a definition of accident that "must be an unusual or unexpected event or happening".[160] Also, in *Abramson v. Japan Airlines 739 F.2d 130 (3rd Cir. 1984)*, the Court concluded that the occurrence that allegedly aggravated plaintiff's condition was not an "accident" within the terms of Article 17 of the Warsaw Convention.

However, the *Saks* decision is even more important than decisions of *Demarines* and *Abramson* for the following three reasons. First of all, *Saks* is the first U.S. Supreme Court decision regarding "accident" under Article 17. Secondly, it added a new condition-*external,* which could prevent pre-existing infirmity litigations. The last significant factor of the *Saks* decision is that the Supreme Court drew a clear distinction between waiving "due care" defenses under the Article 20(1) of the Warsaw Convention and waiving "accident" requirement under Article 17. Article 20 (1) of the Warsaw Convention[161] embracing defenses of air carrier, waived by the Montreal Agreement 1966 and liability

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[159] *Air France v. Saks*, 470 U.S. 392 (1985) at 392.

[160] See Dempsey & Milde, *supra* note 92 Chapter VII 18-9. In Desmarines, the following definitions of "accident" was posited and since its time (1977) is widely quoted in jurisprudence.
"An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an aeroplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence must be unusual and unexpected event that takes place without foresight."

[161] Article 20
1. The carrier is not liable if he proves that he and his agent have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

regime of air carrier, changed to "absolute liability" within a certain amount of money. ($75,000 in the Montreal Agreement 1966 and 100,000 SDRs-approx.$145,000- in the Montreal Convention 1999). The U.S. Supreme Court Decision in *Air France v. Saks* held:

The "accident" requirement of Article 17 is distinct from the defenses in Article 20(1), both because it is located in a separate article and because it involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury.

In other words, the Supreme Court clarified that unconditional compensation for "accident" is different from defining "accident" unconditionally. Nevertheless, the Supreme Court did not require that the accident necessarily arise out of a risk of air travel or in connection with the operation of the aircraft.[162] In the concurring opinion of *Wallace* decision[163], Judge Pooler viewed that the fact that the Supreme Court had never mentioned anything about the risk of air transportation in the *Saks* decision meant that the Supreme Court had implicitly rejected the risk of air transportation.

Professor Paul Dempsey points out two questions which the *Saks* decision left open.[164]

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[162] Lawrence Goldhirsch, "Definition of 'accident': Revisiting *Air France v. Saks*" in M.Milde, P.Dempsey and H.Khadjavi ed., *Private International Air Law - Cases and Material* vol. 1 (Montreal: McGill University, 2004) 275 at 275.[Lawrence]

[163] Further discussion of this case will be found at 59-64, below

[164] Dempsey & Milde, *supra* note 92 Chapter VII at 23.

The Supreme Court did not address the question of whether a pre-existing infirmity aggravated by unusual, abnormal and unexpected flight operations would constitute an Article 17 accident even though it concluded that a pre-existing condition or sensitivity of the passenger aggravated by "usual, normal, and expected" flight operations would not qualify as an accident. The Supreme Court's reference to "usual, normal, and expected" flight operations also left open a question with which subsequent courts have struggled – whether an accident can be deemed to exist when the injury has nothing to do with flight or travel activity.

Although the *Saks* decision contributed to avoiding a great number of litigations by providing a definition of "accident" for which air carriers should be held responsible, it is regrettable that the Supreme Court kept silent regarding these two questions. These open questions resulted in two disappointing decisions: *Wallace v. Korean Air Lines 214 F.3rd 293 (2nd Cir.2000)* and *Olympic Airways v. Husain 124 S.Ct. 1221 (2004).*

b. *Wallace v. Korean Air Lines 214 F.3rd 293 (2nd Cir.2000)*

From the *Saks* decision to the *Wallace* decision, the lower courts have uniformly refused to find an Article 17 "accident" in cases of passenger-on-passenger assaults, unless the airline plays a causal role in the commission of the assault.[165] However, the U.S Second

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[165] Andrew Harakas, *Petition for writ of certiorari Korean Air Lines v. Wallace* (2000) [unpublished, archived at McGill University Institute of Air & Space Law].at 8 [Harakas, "Wallace"]. See *Lonngadinos v. American Airlines. Inc.*, 199F.3d68,70-71(1st Cir.2000); see also *Gezzi v. British Airways*,991 F.2d 603,604(9th Cir.1993)(noting that passenger assault does not relate to the operation of the aircraft); *Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278 (N.D. III. Dec. 1, 1997)(intoxicated passenger's unwanted sexual advances, coupled with the refusal of flight attendants to intervene, is "accident");*Stone v. Continental Airlines. Inc.*, 905 F.Supp.823(D.Hawaii 1995)(plaintiff punching another passenger is not risk characteristic of air travel); *Curley v. American Airlines, Inc.*,846 F.Supp.280,283(S.D.N.Y.1994)(detention

Circuit, known as the most influential circuit, held that sexual assault committed by a co-passenger was an "accident" within the meaning of the Warsaw Convention although there was no causal role played by the air carrier.

On the evening of August 17, 1997, Ms. Brandi Wallace boarded Korean Air Line (KAL 61) from Seoul, Korea to L.A, California. Mr. Kwang Yong Park who was seated next to Wallace, sexually assaulted her. When the plane arrived in L.A, airport police arrested Park. Subsequently, Park pleaded guilty to the crime of engaging in sexual misconduct and was sentenced to two years probation by the United States District Court for the Central District of California. Wallace brought a suit against defendant KAL alleging that the airline was liable for the sexual assault under the common law of negligence and under the Warsaw Convention.[166]

The U.S District Court, S.D. in New York held that the incident in the *Wallace* case was not an "accident" because there was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of the flight and sexual molestation is not a risk characteristic of air travel or related to the operation of an airplane.[167] In the decision, the Court cited two lines of precedent regarding "accident" after the *Saks* decision: the cases where the cause of injury was "a characteristic risk of air travel" and "the cases where the air carrier had facilitated a tort by a fellow passenger, or

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and search by Mexican authorities due to accusation of smoking marijuana in airplane lavatory "hardly a characteristic risk of air travel"); *Price v. British Airways,* 1992 WL 170679 at 2-3(S.D.N.Y. July 7, 1992)("To suggest that a fistfight between two passengers is a characteristic risk of air travel is absurd")

[166] *Wallace v. Korean Air*, 214 F.3d 293 (2nd Cir. 2000).[*Wallace*]

[167] *Wallace v. Korean Air*, 1999WL 187213(S.D.N.Y. 1999) at 5.

committed a tort itself." The Court said that the latter cases rest on the theory that air carrier should be liable for torts that are proximately caused by the abnormal or unexpected operation of the aircraft or the abnormal or unexpected conduct of airline personnel.[168]

In the decision of the Second Circuit, the *Saks* case was examined, and two categories of cases where courts had wrestled with the *Saks* definition of "accident" were cited. The two categories of cases were differentiated based on whether or not risks inherent in aviation existed. In one category, courts held that an "accident" under Article 17 must arise from "such risks that are characteristic of air travel."[169] In the other category, the court held that an airline would presumably be liable for all passenger injuries, including those caused by co-passenger torts, regardless of whether or not they arose from a characteristic risk of air travel.[170]

The decision emphasized that the *Saks* court had not addressed whether an event must relate to air travel to be an Article 17 "accident" and the Second Circuit had no occasion to decide whether all co-passenger torts are necessarily accidents for purposes of the Convention. Then, the Court deployed an unusual, unexpected, and unreasonable form of argument:

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[168] *Ibid* at *4*.

[169] *Wallace, supra* note 166 at 298, See cases, *Stone v. Continental Airlines, Inc.*, 905 F.Supp. 823, 827(D.Haw.1995);(quoting *Price v. British Airways*, No.91 Civ.4947,23 Av. Cas.!8465,1992 WL 170679, at 3(S.D.N.Y. July 7, 1992);*Curley v. American Airlines, Inc.*, 846 F.Supp. 280, 283 (S.D.N.Y.1994)

[170] In *Wallace*, only one case was mentioned; *Barratt v. Trinidad & Tobago (BWIA Int'l) Airways Corp.*, No. CV 88-3945, 1990 WL 127590 (E.D.N.Y. Aug.28, 1990)

Happily, this Talmudic debate is academic in the unique circumstances of this case this argument is unnecessary... This is so because we conclude that an Article 17 "accident" occurred here even under the narrower characteristic risk of air travel approach...It is plain that the characteristics of air travel increased Ms. Wallace's vulnerability to Mr. Park's assault. When Ms. Wallace took her seat in economy class on the KAL flight, she was cramped into a confined into a confidential space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark. It was then that the attack occurred.[171]

This was, is, and will be the most absurd theory regarding the interpretation of "characteristic risk of air travel". There is no distinction between Ms. Wallace in the airplane and an audience in a dark movie theater, where an individual sits in a confidential space beside people whom the individual does not know. A passenger in a train or night bus would be in the same situation. Nevertheless, the U.S Second Circuit decided that the Korean Air was liable because Mr. Park's assault on Ms. Wallace was an "accident" in the language of *Saks*: "an unexpected or unusual event or happening that [was] external to the passenger."

The Second Circuit appears to have opened the Pandora's Box of liability for any incident that injures a passenger while aboard an aircraft, a result plainly antithetical to the Warsaw compromise, which insisted that only an "accident" be the triggering mechanism

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[171] *Wallace, supra* note 166 at 299.

for recovery under strict liability.[172] Mr. Jong Bok Kim, Former Vice President (legal department) of Korean Air, criticized that the Second Circuit artificially applied the *Saks* decision in order to achieve the designed aim: compensation for the plaintiff in the *Wallace* decision.[173]

The Second Circuit Judge, Pooler, advanced a less unreasonable argument in the concurring opinion. She maintained that imposing an "inherent in air travel" requirement did not accord with the plain meaning of the *Saks* decision and a co-passenger's tort satisfied the Supreme Court's interpretation of "accident" as "an unexpected or unusual event or happening that is external to the passenger." She criticized both the decision of the district court and the majority decision of the Second Circuit since they engrafted an "inherent in air travel" requirement, which the Supreme Court has already implicitly rejected, into the *Saks* test.

Logically, this approach followed the *Saks* decision literally, and this theory is exactly what the *Saks* decision missed. This approach was admissible due to the open question which the Saks decision left: *whether an accident can be deemed to exist when the injury has nothing to do with flight or travel activity.*

Nevertheless, two essential questions remained. Firstly, what is the air carrier liable for? Although a negligence–based approach does not play a role in creating an "accident"

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[172] Dempsey & Milde, *supra* note 92 Chapter VII at 33.
[173] Jong Bok Kim, "Analysis on Recent Principle Cases in U.S. Courts related to Carriers" (2001) 13 Korean J. Air & Sp. L. 289.

under Article 17 in the U.S. Courts[174], it should be considered that Ms. Wallace was in a duty of care relationship with the air carrier. KAL personnel were not aware that Mr. Park was a "sexual predator" and they reacted properly and promptly[175] when Ms. Wallace notified them of the assault. Although she was not under perfect care, which seems to be impossible in any situation, she was under the reasonable care[176] of the air carrier. Secondly, how can air carriers avoid the liability that the Second Circuit imposed? Mr. Harakas who was a lawyer of Korean Air in the *Wallace* Case, described the way that an air carrier could avoid the liability interestingly.

"*The standard...of the Second Circuit will impose liability for damage sustained in Warsaw Convention transportation unless the air carrier segregates passenger according to gender (same sex assaults remain problematic), seat female passengers in aisle seats only, hire sufficient cabin crew to be able to provide constant surveillance, eliminate closing of window shades during in-flight movies and fly with the interior lights illuminated at all times.*[177]"

The *Wallace* decision was deeply regrettable since passenger-on-passenger assault was not considered an "accident" within the meaning of Article17. It is lamentable that the U.S. Supreme Court denied the petition for a writ of certiorari.[178]

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[174] See the majority decision of *Olympic Airways v. Husain 124 S. Ct. 1221 (2004).*
[175] Wallace has conceded that the assault was not caused "by a lack of due care on the part of" KAL. See Harakas, "*Wallace*",*supra* note 165 at 4
[176] As a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Also termed due care; ordinary care; adequate care; proper care.225 *Black's Law Dictionary* 8th ed., s.v. "reasonable care".
[177] Harakas, "*Wallace*" *supra* note 165 at 26-7.
[178] Korean Air filed a petition for writ of certiorari. The plaintiff's waived their right to file an opposition

c. *Olympic Airways v. Husain 124 S. Ct. 1221 (2004)*

The other question which Saks Decision left open *whether a pre-existing infirmity aggravated by unusual, abnormal and unexpected flight operations would constitute an Article 17 accident,* provoked the latest Supreme Court decision addressing the Warsaw Convention, *Olympic Airways v. Husain* 124 S. Ct. 1221 (2004). The Supreme Court held that the flight attendant's unexpected and unusual conduct in three times refusing to move an asthmatic passenger to another seat further away from the smoking section of the airplane, constituted an "accident" within the meaning of the Warsaw Convention. In reaching this conclusion, the Court disregarded nearly two decades of precedent, domestically and internationally, regarding the interpretation of Article 17 of the Warsaw Convention.[179]

While Rubina Husain and her husband, Dr. Hanson were traveling overseas,[180] she requested that Olympic Airways provide seats away from the smoking section because Dr. Hanson had asthma and was sensitive to secondhand smoke. After boarding, they discovered that their seats were only three rows in front of the smoking section[181]. A flight attendant refused the respondent's three requests to move Dr. Hanson. As the smoking

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but the court then ordered them to file a brief in response to the petition. The Court thereafter denied certiorari. – e-mail from Andrew Harakas (10 August 2005)

[179] *Harakas, supra* note 158 at 13-4.

[180] In December 1997, Dr. Hanson and his family flew from San Francisco to Athens and Cairo for vacation. The trip involved a stop in New York where Dr. Hanson learned that Olympic Airways allowed smoking on international flights. Dr. Hanson and his family asked for and were assigned seats in the non-smoking section. On January 4, 1998, Dr. Hanson began the return trip from Cairo to the United States via Athens. Dr. Hanson was seated in the non-smoking section on the flight from Cairo to Athens. He died on the plane , OLYMPIC 417 from Athens to New York – Andrew Harakas , *Petition for writ of certiorari Olympic Airways v. Husain* (2004) [unpublished, archived at McGill University Institute of Air & Space Law].at 8 [Harakas, "*Husain*"] at 4-5.

[181] Upon boarding Olympic Flight 417 from Athens to New York, Dr. Hanson and his family noticed that Dr. Hanson was seated in non-smoking row 48 and that the smoking section began in row 51. –*Ibid.*

noticeably increased, Dr. Hanson walked toward the front of the plane to get fresh air. He then received medical assistance but died.

Rubina Husain filed a wrongful death action and the district court found the petitioner liable for Dr. Hanson's death. The U.S. Ninth Circuit affirmed this result, concluding that, under *Saks* definition of "accident," the flight attendant's refusal to reseat Dr. Hanson was clearly external to him, and unexpected and unusual in light of industry standards, Olympic Air policy, and the simple nature of the requested accommodation.[182] The Supreme Court granted certiorari and affirmed the result in a 6-2 opinion. The Supreme Court agreed with the parties that the *Saks* definition of "accident" governed the case, but disagreed on which event should be the focus of the "accident" inquiry.[183]

In Saks, the Court focused on "what causes can be considered accidents" and did not suggest that only one event could be the "accident." Indeed, the Court recognized that "any injury is the product of a chain of causes." Thus, for purposes of the "accident" inquiry, a plaintiff need only prove that "some link in the chain was an unusual or unexpected event external to the passenger."...

The issue we must decide is whether the "accident" condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin. We conclude that it is.

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[182] *Husain v. Olympic Airways* 316 F.3d 829 (9th Cir. 2002).
[183] Harakas, "*Husain*", *supra* note 180 at 15.

Although any injury is the product of a chain of causes, some link in the chain must be a critical cause which actually leads to an injury. The Supreme Court disregarded the fundamental cause of Dr. Hanson's death. He died because of asthma and food allergies from which he had suffered severely for a long time[184], not because of the refusal of the flight attendant to reseat him. Also, he could have avoided this situation by asking another passenger to change seats, or by leaving his seat earlier before his condition deteriorated. The majority of the Supreme Court in *Husain* never reconciled its decision with the *Saks* opinion's explanation in very clear terms that the "accident" requirement of Article 17 "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury."[185]

This decision is also criticized for the blockade of ways that air carriers can circumvent. From a practical point of view, the air carrier should be able to select passengers who do not have a special susceptibility which may incur risk to themselves on board in order not to face cases similar to *Husain*. Indeed, the International Air Transportation Association (IATA) provided the recommended practice regarding refusal and limitation of carriage, and most other air lines adopted it in their conditions of carriage.[186] In reality, the strict

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[184] For more than 20 years prior to his death, Dr. Hanson suffered from asthma for which he did not receive regular treatment. Dr. Hanson also suffered from severe food allergies but the extent of which was unclear. In the two years prior to his death, Dr. Hanson had suffered two medical emergencies that the record shows may have been caused by asthma or food allergies. At trial, experts for both parties agreed that at leas one of these episodes was likely caused by food-related allergies. In light of his existing medical conditions, Dr. Hanson carried an emergency kit containing epinephrine in the event of an allergic reaction to food. In addition, Dr. Hanson regularly carried and used a Proventil/Albuterol inhaler to aid his breathing. – *Ibid.* at 4.

[185] *Ibid.* at 17.

[186] IATA – Passenger Services Conferences Resolutions Manual: Recommended Practice 1724 – General Conditions of Carriage (Passenger and Baggage) Article 7.1 RIGHT TO REFUSE CARRIAGE

selection is not feasible; however, this decision may lead to the tendency of discriminating against vulnerable passengers. More fundamentally, the dissenting opinion which Justice Scalia authored and Justice O'Connor(the author of the *Saks* opinion) joined expressed concern about the striking change.

When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight'... It is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty constantly... Maintaining a coherent international body of treaty law requires us to give deference to the legal rules our treaty partners adopt. It is not enough to avoid inconsistent decisions on factually identical cases.[187]

This can be seen as a very thoughtful explanation. If unified law were to be interpreted inconsistently from one nation to another, there would be no point of unifying in the first place. The main purpose of both the Warsaw convention 1929 and the Montreal Convention 1999 is unification, and each of the member States has discretionary duty to interpret the Conventions consistently.

The U.S. Supreme Court has given the term "accident" a whole new meaning, one unprecedented in common law interpretations of the Warsaw Convention.[188] So far, this

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... We may also refuse to carry you or your Baggage if one or more of the following have occurred or we reasonably believe may occur:... 7.1.3. your mental or physical state, including your impairment from alcohol or drugs, presents a hazard or risk to yourself, to passengers, to crew, or to property.

[187] *Olympic Airways v. Husain* 124 S.Ct. 1221(2004) at 1232.

[188] Dempsey & Milde, *supra* note 92 Chapter VII at 44.

danger applies only in the United States, as other jurisdictions may not find guidance or inspiration in *Husain*.[189] Whether or not the *Husain* decision will replace the *Saks* decision completely in both the U.S. and the other jurisdictions, and if it will be recurred as often as the *Saks* decision was in the other jurisdictions, are eagerly awaited.

2. UNITED KINGDOM.

a. *Morris v. KLM* [2002] UKHL 7

Facts similar to *Wallace* were involved in the U.K. case *Morris v. KLM*.[190] Morris, a 16 year old female, suffered as a result of an indecent assault by another passenger during an overnight flight from Kuala Lumpur to Amsterdam.[191] A claim on her behalf asserted that she suffered serious stress – a mental trauma, requiring medical treatment. In the decision of the House of Lord, the Court strictly distinguished the accident test from the compensation test. The Court admitted that this case constituted as an "accident"; however, the air carrier was not liable for the damage since the damage was mental injury unaccompanied by a physical injury. [192] Nevertheless, the significant point is that the House of Lord confirmed the existence of an "accident".[193]

In Miss Morris's case the defendant [KLM] argued that the indecent assault which she suffered could not reasonably be described as an accident. The Court of Appeal held that it was not necessary to show that the event had any relationship with the operation of the

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[189] *Ibid.*
[190] *Ibid.* at 34.
[191] Condon & Forsyth LLP, *The Liability Reporter 2003,* (Montreal: International Air Transportation Association, 2003) at 13, [Liability Reporter 2003]
[192] Dempsey & Milde, *supra* note 92 Chapter VII at 34.
[193] See *Ibid.*

aircraft or carriage by air, that the incident in which Miss Morris was involved exemplified a special risk inherent in air travel and that she had sustained an accident within the meaning of the article: [2002]QB 100, 112, para31. So long as it occurred during the time when the passenger was in the charge of the carrier, the passenger was entitled to be compensated for its consequences if the carrier was not able to discharge the burden posed by article 20 of showing that he and his servants and agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.[194]

The similarity of the approach to the concept of an "accident" by the Courts on both sides of the Atlantic may cause considerable concern for the air carriers: are they to be deemed to be general "insurers" for any types of alleged damage suffered by a passenger, however unpredictable, unrelated to the operation of the aircraft and beyond their control?[195] Considering the draft history of the Warsaw Convention, this trend would not be what drafters intended. Compared to Article 21 of the draft convention by the CITEJA, which implied that no matter what happens during carriage, if a passenger suffers death, wounding or any other bodily injury, the carrier shall be liable for damage, Article 17 of the Warsaw convention added the filter: "accident", which proves that liability of air carrier is not unconditional.

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[194] King v. Bristow Helicopters LTD; Morris v. KLM Royal Dutch Airlines (2004), [2004] 1 Lloyd's Rep. 745 (H.L.) at 762.

[195] Dempsey & Milde, *supra* note 155 Chapter VII at 34.

b) *The Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ 1005

Deep Vein Thrombosis (DVT) occurs when a blood clot forms in the deep vein of the calf. The clot (thrombus), or a portion thereof, may break away and travel up through the venous system to other parts of the body, including the lungs, where it can cause a pulmonary embolism and lead to fatality.[196] Over the last couple of decades, a number of passengers on long domestic or international flights have sustained DVT; thus, DVT litigation, especially arising out of international transportation, has become an important issue throughout the world.[197]

In *The Deep Vein Thrombosis and Air Travel Group Litigation*[198], the English High Court struck out claims for DVT brought by fifty-five passengers against twenty-seven air carriers.[199] Each of the claimants suffered DVT resulting in serious injury or death, "alleged to have been caused, in essence, by cramped seating conditions and a failure to warn of the danger posed by the flight or to advise of the appropriate steps to minimize or eliminate the danger of suffering a DVT."[200] The English High Court held that DVT was not an "accident", and the claimants appealed. On July 3, 2003, the English Court of Appeal unanimously dismissed the claimants' appeal and held that the onset of DVT was not an "accident" within the meaning of Article 17 in the circumstances set out in the agreed specimen factual matrix.[201] The Court cited with approval the judgment of the

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[196] Harakas, *supra* note 158 at 21.
[197] *Ibid.* at 21-2.
[198] [2003] EWHC 2825
[199] Liability Reporter 2003, *supra* note 191 at 36.
[200] *Ibid.*
[201] Condon & Forsyth LLP, *The Liability Reporter 2004,* (Montreal: International Air Transportation Association, 2004) at 37, [Liability Reporter 2004].

U.S. Supreme Court in *Saks v. Air France*[202], and held that inaction can never be described as an accident.[203]

A critical issue in this appeal is whether a failure to act, or an omission, can constitute an accident for purposes of Article 17. Often a failure to act results in an accident, or forms part of a series of acts and omissions which together constitute an accident. In such circumstances it may not be easy to distinguish between acts and omissions. I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident...[204]

Further, the Court held that the permanent feature in an aircraft, such as the seating configuration, the pressurization, supply of oxygen, and the temperature in the cabin could not amount to an event, and nor could failure to warn about the risk of DVT.[205] The House of Lords will hear reinstated appeals on October 19, 20 2005.[206] It remains to be seen whether or not the *Husain* decision, the striking change regarding "accident" in the U.S. Supreme Courts, will change the decisions of the lower Courts (the English High Court and the English Court of Appeal) which upheld *Saks*.

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[202] It was adopted by the UK House of Lords in *Morris v. KLM*, see Liability Reporter 2003 *supra* note 191 at 36.

[203] Liability Reporter 2004, *supra* note 201 at 37.

[204] *The Deep Vein Thrombosis and Air Travel Group Litigation* (2003), [2004] Lloyd's Rep. 321 (C.A.).; In the dissenting opinion of the U.S. Supreme Court Decision. *Olympic Airways v. Husain*, Justice Scalia quoted this part. The majority opinion disagreed with the petitioner's argument that the flight attendant's failure to move Dr. Hanson was inaction, whereas Article 17 requires an action that causes the injury.

[205] Liability Reporter 2004, *supra* note 201 at 37.

[206] Condon & Forsyth LLP, *The Liability Reporter 2005,* (Montreal: International Air Transportation Association, 2005) at 43[Liability Reporter 2005].

3. AUSTRALIA

a. *Povey v. Qantas Airways LTD* [2005] High Court of Australia 33.

As of February 18, 2002, 316 cases had been commenced in the Supreme Court of Victoria by plaintiffs claiming damages for DVT, allegedly suffered as a result of long haul flights. One case in the Supreme Court of Victoria, *Povey v. Civil Aviation Safety Authority & Ors*, was selected as a test case to determine the issue of whether or not DVT could be the result of an accident within the meaning of the Convention.[207]

The facts of the case were that, in February 2000, the plaintiff was a passenger on a Quantas flight to London via Bangkok and then returned on British Airways to Sydney via Kuala Lumpur. The plaintiff claimed that he had suffered a severe DVT as a result of an alleged accident, and hence brought suit against the airlines.

The Supreme Court of Victoria denied defendants' motions for summary judgment, holding that the plaintiff had set forth two allegations which, if pleaded, would disclose a viable claim: (1) that the airlines had certain knowledge about DVT, its causes, its relationship to the cramped conditions in economy class and precautions which could be taken to minimize the risk of its occurrence; and (2) that it was common place for airlines to issue warnings and advise passengers of risks of which the airline was aware.[208] The airlines obtained leave to appeal from the decision at first instance.[209] The Court of Appeal held that the plaintiff's allegations could not constitute an Article 17 "accident,"

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[207] Liability Reporter 2003, *supra* note 191 at 37.
[208] Harakas, *supra* note 158 at 31.
[209] Liability Reporter 2004, *supra* note 201 at 35.

and dismissed the claims.[210]

On appeal, in *Quantas Ltd & British Airways PLC v. Povey*,[211] all three members of the Court of Appeal agreed that the issue of this case is the question of the meaning of "accident". In the leading judgment of Ormiston JA, the meaning given to the word "accident" was consistent with the meaning of "accident" in the decision of the U.S. Supreme Court in *Air France v. Saks*.[212] Judge Orimiston noted:

...It is hard to see how a failure to warn or advise passengers , a 'non-event' as it were, can ever constitute an accident within the meaning of the article, notwithstanding the presence of surrounding circumstances which would make the failure unexpected or unusual...

Then, Judge Ormiston concluded that the flight conditions asserted by the plaintiff as constituting an "accident" did not come within the expression in *Saks*. It should be noted that in reaching this decision, Judge Ormiston reviewed the district court and appellate court decisions in *Husain*, as well as other United States cases, and determined that *Husain*, as well as a number of those other decisions, "had led to interpretation of the Warsaw Convention which, with the greatest respect, seem to have forgotten the language used [in Saks] and the careful analysis by O'Connor, J."[213] In addition, Judge Ormiston

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[210] Harakas, *supra* note 158 at 31.
[211] [2003] VSCA 227, 2003, The decision of this case was mentioned in the dissenting opinion of the U.S. Supreme Court Decision. *Olympic Airways v. Husain.*
[212] Liability Reporter 2004, *supra* note 201 at 35.
[213] *Harakas, supra* note 4 at 32-3.

correctly pointed out that the *Husain* court mistakenly investigated whether the injury had resulted from "unexpected or unusual" behavior, but "behavior" may not comprehend any event, happening or "accident" at all.

The High Court of Australia reaffirmed the Appeal Court decision. The majority opinion of the High Court concluded that suffering DVT was not an accident; rather, "accident" was a reference to something external to the passenger.[214] With respect to the U.S. Supreme Court decision in *Husain*, the High Court made clear that the *Husain* case did not have any relevance to the *Povey* case, since nothing happened on board the aircraft which was in any respect out of the ordinary or unusual in *Povey* case.[215] Also, the High Court held that references to describe the absence of warning about DVT as a "failure to warn" are irrelevant and unhelpful.[216]

4. CANADA

a. *McDonald v. Korean Air* [2003] 171 Ontario Court of Appeal 368

Plaintiff Ken McDonald was a passenger on board a Korean Air flight from Toronto to Hong Kong, with intermediate stopping places in Anchorage, Alaska, and Seoul. Upon his arrival in Hong Kong, Mr. McDonald felt pain in his leg, was taken to the hospital and diagnosed with a DVT.[217] Mr. McDonald brought an action for damages against Korean Air alleging that Korean Air's failure to warn him of the risks of DVT constituted an

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[214] *Povey v. Qantas Airways LTD,* [2005] LEXIS [34] (H.C.A.),[*Povey*]
[215] *Ibid.* [40].
[216] *Ibid.* [40-1].
[217] *McDonald v. Korean Air.* 2002 WL 1861837 (Ont. S.C.J. Sept. 18,2002)

accident under Article 17 of the Warsaw Convention.[218]

The Ontario Superior Court of Justice followed the *Saks* definition of accident. However, they showed a slightly different attitude from the U.S. Courts in terms of negligence. The Court declined to find that an unusual or unexpected event had occurred to satisfy the *Saks* definition of accident where there were no allegations that the plaintiff had anything other than a normal flight. Regarding the plaintiff's argument that the failure of the air carrier to warn and educate passengers on long duration flights was the breach of the duty of care and was an "accident" within the meaning of Article 17, the court held that:

I find that in not advising passenger of the risk they assume, an airline may be negligent, but this negligence is not in itself an accident within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger.[219]

It can be seen that the Court does not exclude negligence when they considered defining "accident", whereas the U.S. Courts completely exclude negligence-based approach from defining "accident". The Ontario Court of Appeal unanimously dismissed an appeal from that decision[220] and an application for leave to appeal to the Supreme Court of Canada was refused[221]

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[218] Liability Reporter 2004, *supra* note 201 at 38.
[219] *McDonald v. Korean Air* [2002] ON.C. LEXIS 482 [17].
[220] *McDonald v Korean Air* [2003] A.C.W.S.J. LEXIS 2190.
[221] *McDonald v Korean Air* [2003] S.C.R. LEXIS 452.

C. Civil law Countries

1. FRANCE

The original Warsaw Convention 1929 was drawn up in French and the French version is the only official and authoritative text[222]; therefore, how to interpret "accident" in French courts is meaningful not only in France but also internationally. According to *CODE DE L'AVIATION CIVILE (*Civil Aviation Code), the Warsaw Convention applies to domestic flights as well as international flights.[223]

Since there is no definition regarding "accident" in the Warsaw Convention or in the domestic French law, French authors only subsume those events under the term "accident", in the course of which the *aircraft or its cargo* have been *damaged*, or in the course of which the *passengers or other third parties* have been *injured.*[224]

Nevertheless, the highest court in France specified the boundary of "accident", holding that the word 'accident' could not be reduced to mechanical and technical events on the aircraft. In *Haddad c. Air France*, 179RFDA 329 rev'd 1979 RFDA 323(CA Paris 19 June 1979), aff'd 1982 RFDA 342 (Cass. 16 Feb.1982), the court held that the term "accident"

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[222] Article 36 –
The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

[223] Article L321-3
La responsabilité du transporteur de marchandises ou de bagages est régie, au cas de transport par air, par les seules dispositions de la Convention de Varsovie du 12 octobre 1929 ou de toute convention la modifiant et applicable en France, même si le transport n'est pas international au sens de cette convention.
Article 322-3
La responsabilité du transporteur de personnes est régie par les dispositions de la Convention de Varsovie comme prévu aux articles L. 321-3, L. 321-4 et L. 321-5.

[224] Giemulla *supra* note 63 Chapter 3 at 9.

had to be extended even to the unexpected actions of third parties during the course of the flight, and thus upheld the plaintiff's right to sue the airline for injuries sustained during a terrorist attack.[225]

2. GERMANY

Germany has the most well-established domestic aviation law in civil law countries.[226] *Luftverkehrsgesetz* (the German Air Transport Act) was established on 1st August 1922 soon after the First World War had ended. The latest amendment was made on 6th April 2004 in order to follow the Montreal Convention 1999 and EU 2027/97. As for the liability of the carrier, section 45 regulates:

Air Transport Act § Section 45 Liability of Personal Damages

1. The carrier is liable for damage sustained in case of death, bodily injury or harmful health of 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.[227]

With respect to the term 'accident', most German-speaking legal writers refer to some 'common language', according to which the term 'accident' is defined as 'a suddenly

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[225] Lawrence, *supra* note 162 at 275.

[226] Doo Hwan Kim, Theory of Jurisprudence for the New International Aviation Law (Seoul: Korean Studies Information Co.Ltd, 2005) at 326 [*Kim*].

[227] § 45 LuftVG Haftung für Personenschäden

1. *Wird ein Fluggast durch einen Unfall an Bord eines Luftfahrzeugs oder beim Ein-oder Aussteigen getötet, körperlich verletzt oder gesundheitlich geschädigt, ist der Luftfrachtführer verpflichtet, den daraus entstehenden Schaden zu ersetzen.* [translated by Doo Hwan Kim]

Professor Kim views that "gesundheitlich geschädigt (harm on health)" includes mental injury.- Kim, *supra* note 221 at 329. for further analysis, see Chapter V.

intruding, damaging event which is external to the passenger', and this definition has been accepted by German courts in several cases.[228]

There were two interesting German district court decisions regarding "accident". The German District Court in Köln allowed for the possibility that national law could intervene in international flights to some degree, in contrast to the U.S. Supreme Court Decision in *Tseng.*[229] In the Köln decision[230], the Court held that damage to plaintiff's health resulting from fellow passengers smoking cigarettes on a long-distance flight was not covered by the Article 17, as the potential injury was not caused by an accident. The Court added that the carrier might perhaps be held responsible – under national law – for breach of contract, i.e., as in violation of his duty to exercise proper care, as set out in the contract carriage. The German District Court in Frankfurt held that the type of harm alleged by a plaintiff who claimed that the closeness of the rows of seats exposed him to DVT did not constitute an "accident" in the Article 17.[231]

3. CHINA

China ratified the Warsaw Convention 1929 on 28th July 1958, the Hague Protocol 1955 on 20th August 1975, and the Montreal Convention 1999 on 31st July 2005.[232] China also

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[228] Giemulla *supra* note 63 at Chapter 3 at 9.

[229] In *El Al Israel Airlines, Inc. v. Tseng* 522 U.S., the U.S. Supreme Court made it clear that recovery for personal injury suffered "on board an aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of the Warsaw Convention, is not available at all.- see Weigand *supra* note 82 at 928.

[230] Giemulla, *supra* note 63 at Chapter 3 18-9 ; Amtsgericht(German District Court) Köln 1981 Zeitschrift für Luft- und Weltraumrecht (ZLW) 315

[231] Harakas, *supra* note 158 at 34; *Reiner Vorlander v. Deutsche Luftahansa*, File No. 2-21 O54/01 (Frankfurt Main Dist. Ct. Oct. 29,2001), aff'd, 23-U 243/01 (Nov. 6, 2002)

[232] Online: International Civil Aviation Organization <http://www.icao.int/icao/en/leb/mtl99.htm> Unusually, the instrument of ratification by China contains the following declaration:

has domestic law regarding civil aviation, *Civil Aviation Law of the People's Republic of China*. It was established on 30th October 1995 and amended it on 29th April 1998. The Civil Aviation Law fully accepted the Warsaw Convention 1929, the Hague Protocol 1955, the Guadalajara Convention 1961, Montreal Protocol No2 and No.4, and the Rome Convention 1952.[233]

Civil Aviation Law of the People's Republic of China, consisting of 16 chapters and 214 articles, combines public air law and private air law. It clarifies the distinction between domestic air transport and international air transport[234] and provides different rules with respect to compensation.[235] However, when it comes to the concept of "accident", it has a common standard.

"The Convention does not apply in the Hong Kong Special Administrative Region of the People's Republic of China until notified otherwise by the Government of the People's Republic of China."
In addition, the Representative of China on the Council of ICAO made the following declaration at the time of deposit of the instrument of ratification: "The Convention applies in the Macao Special Administrative Region of the People's Republic of China."; During the Montreal Conference 1999, China proposed the clause: States with more than one system of law(DCW Doc No.34) The proposal was accepted in the Conference. (Article 56 – so called "Hong Kong Clause") Article 56 allows a State which has two or more territorial units in which different systems of law are applicable to - It was anticipated that China might ratify the Convention with respect to Hong Kong and Macao before it was ready to accept it for the entire territory of China.

[233] Kim, *supra* note 226 at 340.

[234] Article 107
"Domestic air transport" referred to in this Chapter means any transport in which, according to the contract of transport by air between the parties, the place of departure, the place of destination and the agreed stopping place are all situated within the territory of the People's Republic of China. "International air transport" referred to in this Chapter means any transport in which, according to the contract of transport by air between the parties, the place of departure, the place of destination or the agreed stopping place, whether or not there be a break in the transport or a shipment, is not situated within the territory of the People's Republic of China

[235] Article 128 first paragraph –
The limits of carrier's liability in domestic air transport shall be formulated by the competent civil aviation authority under the State Council and put in force after being approved by the State Council
Article 129
In international air transport, the liability of the carrier shall be as the following: (1) The liability of the carrier for each passenger is limited to the sum of 16,600 units of account. Nevertheless, the passenger may agree with the carrier in writing to a limit of liability higher than that prescribed by this sub-paragraph; Since China ratified the Montreal Convention 1999 on 31st July 2005, a limit of liability will be changed to 100,000 units.

Article 124

The Carrier shall be liable for the death or personal injury of a passenger, if the accident took place on board the civil aircraft or in the course of any of the operations of embarking on or disembarking from the civil aircraft; provided that carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

4. JAPAN

Japan ratified the Warsaw Convention 1929 on 20th May 1953, the Hague Protocol 1955 on 10th August 1967, and the Montreal Convention 1999 on 20th June 2000. Since Japan does not have domestic law regarding liability of air carriers, liability of international air transport and liability of domestic air transport rely on treaties[236] and conditions of carriage for passengers and baggage, respectively. Japanese civil law and commercial law also deal with the liability of domestic air transport carriers.[237]

Although Japan does not have domestic law regarding the liability of air carriers, its unified system applies *de facto*, since Japan Airlines (JAL) and All Nippon Airways (ANA), the largest and second largest airlines in Japan, have almost equivalent provisions with regard to the liability of air carriers in their conditions of carriage. Japan Airlines and All Nippon Airways abide by the Warsaw System and the Montreal Convention 1999 with respect to the liability of international flight.

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[236] According to the Constitution of Japan Article 98(2), treaties concluded by Japan are domestically binding.
Article 98 (2)
The treaties concluded by Japan and established law of nations shall be faithfully observed.
[237] Kim, *supra* note 226 at 338.

17. Liability of Carriers - Conditions of carriage (International flight) of JAL[238]

(A) applicable laws

Carriage performed by JAL shall be subject to the rules and limitations relating to liability established by the Convention[239] *as applicable to the Carriage unless such Carriage is International Carriage to which the Convention does not apply.*

Since Japan ratified the Warsaw Convention 1929 and the Hague Convention 1955, as well as the Montreal Convention 1999, those Conventions can clearly cover any cases based on treaty relationships. As far as domestic flight is concerned, the conditions of carriage have a specific provision.

Rule 42 – Liability of carrier Conditions of carriage (Domestic Flights) of JAL[240]

Carrier shall be liable for damage arising in connection with death or wounding of, or any other bodily injury suffered by, a passenger if the incident or accident causing the damage takes place on board or in the course of embarking or disembarking.

5. KOREA

Korea only ratified the Hague Protocol 1955 on 13th July 1967 without ratifying the

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[238] Online: Japan Airlines <http://www.jal.co.jp/en/carriage/index_c015.html>; see also Liability of Carriers - Conditions of carriage (International flight) of ANA, Online: All Nippon Airways <http://www.ana.co.jp/eng/int/others/yakkan/yakkan_e_17_hd.html>

[239] "Convention" means whichever of the following instruments is applicable to the contract of Carriage: Warsaw Convention 1929, Hague Protocol 1955, Montreal Protocol No.1 and No.2 1975, Montreal Convention 1999 – Article 1 - Definitions – Conditions of carriage (International Flight) in both JAL and ANA

[240] Online: Japan Airlines <http://www.jal.co.jp/en/dom/yakkan>; see also Liability of Carriers – Conditions of carriage(domestic flight) of ANA, <http://www.ana.co.jp/eng/dms/others/yakkan/c2_4_hd.html>

Warsaw Convention 1929[241]. Korea does not have domestic law regarding the liability of air carriers. According to Korean Constitutional law Article 6 (1)[242], the Hague Protocol has the same effect as domestic law; therefore, liability of international air transport is regulated by the Hague Protocol. Liability of domestic air transport is regulated by conditions of carriage for passengers and baggage, Korean civil law, and Korean commercial law. Korean Air and Asiana Airlines have similar conditions of carriage regarding liability of carriers:

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Article 17 Liability of carriers - Conditions of carriage (International flight) of KAL

3. Waiver of Liability Limitation and Defenses; Reservation of Rights of Recourse.

Except as the Convention[243] or other applicable law may otherwise require:

KAL is not liable for any death, injury, delay, loss or claim of whatsoever nature (hereinafter in this Conditions of Carriage collectively referred to as "damage") arising out of or in connection with carriage or other services performed by KAL incidental thereto, unless such damage is proved to have been caused by the negligence or willful fault of KAL and there has been no contributory negligence of the passenger.

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[241] 7 ICAO member States ratified the Hague Protocol without ratifying the Warsaw Convention.(El Salvador, Grenada, Kazakhstan, Lithuania, Monaco, Republic of Korea, Swaziland. Among them, Lithuania and Monaco ratified Montreal Convention 1999 and Swaziland signed it.) Online: International Civil Aviation Organization < http://www.icao.int/cgi/goto_m.pl?/icao/en/leb/treaty.htm>; Complicated treaty relationship between Korea and the U.S led the case: Chubb& Son Inc. v. Asiana Airlines (2000) Appeal Court. (The U.S. ratified the Warsaw but never ratified the Hague at that time. The U.S. finally ratified on 15th September 2003) It is expected that Korea will ratify the Montreal Convention 1999 in the near future.

[242] Article 6 (1)

Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.

[243] Article 1 – Conditions of carriage (International flight) of KAL

CONVENTION means the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (hereafter called "the Warsaw Convention") or that Convention as amended at The Hague, September 28. 1955 (hereafter called "the Warsaw Convention as amended at The Hague, 1955), whichever may be applicable.

As far as domestic flight is concerned, KAL and Asiana Air have little difference in definition from Article 17 in the Convention and Article 17 in the conditions of carriage.

RULE 39. LIABILITY OF CARRIER - Conditions of carriage (Domestic Flights) of Asiana Airline

Carrier shall be liable for damage sustained in the event of the death or wounding of or any other bodily injury to a passenger, only when the accident that caused the damage so sustained took place on board the aircraft or in the course of any of the operation of embarking or disembarking.

6. TAIWAN

The Republic of China (Official name of Taiwan) is not a member of ICAO for political reasons. Therefore, it is doubtful that Taiwan belongs to the Warsaw System. According to Professor Michael Milde, The Republic of China is within the boundary of Warsaw regime for two reasons. First, if only one China exists, the Warsaw regime will apply to Taiwan as it applies to mainland China automatically. Secondly, IATA regulation that adopts the Warsaw regime includes Taiwan. Therefore, the Warsaw regime *de facto* applies to Taiwan. On the contrary, the U.S. Court of Appeals in *Mingtai Fire & Marine Insurance v. United Parcel Service 177 F.3rd 1142(9th Cir.1999)* decided that Taiwan is not a signatory to the Warsaw Convention because Taiwan is not bound by the People's Republic of China's (China) adherence to the Convention.

The Republic of China has Civil Aviation Law which was established on 30th May 1953

and the latest amendment was made in 2003.[244] Civil aviation law of the republic of China consists of public air law and private air law. Article 91(Chapter IX - Liability for Compensation) in the Civil Aviation Law stipulates the liability of air carriers.

Article 91

The aircraft operator shall be liable for accidental death or injury of passengers in the aircraft or while embarking or disembarking the aircraft. But if such death or injury is attributed to the passenger's fault, such liability may be exonerated or reduced.

D. Conclusion

In the remarkable book: *National Airlegislations and the Warsaw Convention* (1937), which was mentioned in the *Saks* U.S. Supreme Court decision, Dr. D. Goedhuis maintained that "...in order to avoid uncertainties on this subject [an interpretation of the word accident used in article 17], it is desirable to modify article 17 at the next revision of the Convention..."[245] The discussions about clarification of article 17 in the Warsaw Convention began soon after the Warsaw Convention was established; however, nothing about the definition of "accident" has been clarified.

Meanwhile, the U.S. Supreme Court definition in *Saks*: *an unexpected or unusual event or happening that is external to the passenger* has had significant influence in common law countries. Although *Husain,* the new U.S. Supreme Court decision regarding

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[244] It has been amended six times. (1974, 1984, 1995, 1998, 1999,and 2003).

[245] D.Goedhuis, "*National Airlegislations and the Warsaw Convention*", (Hague: Martinus Nijhoff, 1937) at 200.[Goedhuis].

"accident" in the article 17, gave the term "accident" a new meaning, it never changed the definition of "accident" that *Saks* had provided.

Deep Vein Thrombosis (DVT) continues to challenge the airline industry both in terms of defending claims, and in terms of taking appropriate measures to prevent claims from arising.[246] So far, not many courts have yet squarely addressed the question of whether DVT results from an accident for the purposes of the Warsaw Convention.[247] Some plaintiffs' counsels view *Husain* as a door opener to DVT claims. However, after a few initial successes by plaintiffs in the trial courts, the tide has turned in favor of the air carriers rejecting liability on the part of the air carrier.[248] As in the *Husain* decision, two criticisms of DVT cases can be raised. Firstly, most DVT cases have been related to pre-existing inferiority, which must have been the primary cause. More importantly, DVT claimants could have avoided the situation by taking precautions; such as walking around periodically or stretching their legs.[249]

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[246] Condon & Forsyth LLP, *The Liability Reporter 2002,* (Montreal: International Air Transportation Association, 2002) at 45, [Liability Reporter 2002]

[247] *Ibid.*

[248] *Harakas*, *supra* note 158 at 21.

[249] Nevertheless, some authors have different opinions. See Ruwantissa Abeyratne, "aviation and social responsibility: rights of the passenger" (2002) 27 Ann. Air & Sp. L. 64, "The issue of DVT brings to bear important legal issue pertaining to the liability of the air carrier who knows or ought to know of this particular risk factor. Insomuch as the carrier is required to take all possible measures to ensure clean air in the cabin, consistent cabin pressure and ultimate safety of the flight –all of which portend risk factors if not attended to- a restricted seat pitch may be a potential hazard to the health of the passenger... Sudden turbulence or the unexpected sounding of a smoke alarm in the cabin are typical profiles of an accident. If such were to be the case, would it be reasonable to consider the affliction of a passenger with DVT an accident? A probable approach that a common law court may adopt is to treat a proven instance linked to air travel as an accident in the same way as in instances of turbulence. Of course, in a similar vein, the carrier may be expected to issue prior warning and advice as to how cope with the risk. In such circumstances the analogy of an accident, and possible negligence that would take the issue beyond a mere accident, would be a distinctly logical sequence"

In civil law countries, the definition of "accident" in Article 17 is not as important as it is in common law countries. They judge an air carrier's liability by the question of whether or not the air carrier was negligent or at fault. Nevertheless, since air transportation is highly intertwined with other countries, and because the influence of the U.S. in the aviation market is tremendous, they closely observe the U.S. trend as well as the trend of other common law countries regarding the interpretation of "accident".

CHAPTER V: BODILY INJURY

A. Introduction

The term *bodily injury* itself is not as confusing as the term *accident.* However, there was no change concerning compensable damage in Article 17 since the Warsaw Convention 1929 was established, while the concept of "mental injury" has developed significantly in various fields. Although the Guatemala City Protocol 1971 changed "bodily injury" to "personal injury", which arguably includes "bodily injury" and "mental injury", it never entered into force. Thus, each jurisdiction started to stretch the meaning of "bodily injury" in the Article 17 or applied domestic law regarding "mental injury" to aviation cases to overcome the limit of compensable damage in the Article 17.

In common law countries, the U.S. Supreme Court decision *Eastern v. Floyd 499 U.S. 530 (1991)* has played a major role in deciding boundary of compensable injuries. Although common law countries admit the fact that the Warsaw system does not allow compensation for "mental injury", they are stretching the meaning of "bodily injury" in the article 17 by interpreting it as flexibly as they can.

In civil law countries, when the Courts examine "bodily injury" and "mental injury" in aviation cases, they consider what their Civil Code, the backbone of domestic private law, says regarding compensable damage. Although some civil law countries have independent private domestic air law that deals with compensable damage in aviation accidents, the private domestic air law can not be free from principles that the Civil Code

stipulates.

A. Common law Countries

1. UNITED STATES

a. Eastern v. Floyd, 499 U.S. 530 (1991)

The *Floyd* decision has been as influential as the *Saks* decision both domestically and internationally. The U.S. Supreme Court in *Floyd* clarified that Article 17 in the Warsaw Convention did not allow recovery for purely mental injuries.

On May 5, 1983, an Eastern Airlines flight departed from Miami, bound for the Bahamas. Shortly after takeoff, one of the plane's three jet engines lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engines failed due to loss of oil pressure. The plane began losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport. Respondents, a group of passengers on the flight, brought separate complaints against Eastern Airlines, each claiming damages solely for mental distress arising out of the incident. The District Court entertained each complaint in a consolidated proceeding.[250]

After the District Court had concluded that mental anguish had not been compensable

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[250] *Eastern Airlines v. Floyd* 499 U.S. 530 (1991)[*Eastern Airlines v. Floyd*]

under Article 17, the Court of Appeals for the Eleventh Circuit reversed. The Appeal Court held that Article 17 provided recovery for purely mental injuries unaccompanied by physical trauma.[251] Finally, the Supreme Court reversed the Appeal Court decision holding that Article 17 of the Warsaw Convention does not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.[252]

In reaching its decision, the Supreme Court considered the following three factors. First of all, the Court examined the "French legal meaning" of "lesion corporelle" by a textual approach as well as a contextual approach. Through contemplating a bilingual dictionary, French legislation, judicial decisions, and scholarly writing, the Court decided that a proper translation of the term "lesion corporelle" was "bodily injury" and it did not embrace mental injury. Secondly, the Supreme Court studied the negotiating history of the Warsaw Convention and agreed that there was no evidence that that the drafters or signatories of the Convention specifically considered liability for psychic injury or the meaning of "lesion corporelle". Lastly, the Court concluded that the Warsaw Convention's amendments (The Hague Protocol 1955 and The Guatemala City Protocol 1971) and the Montreal Agreement 1966 supported the narrow translation of "leision corporelle".

Although the *Floyd* decision contributed to preventing a distortion of the term *bodily injury,* it left two open questions as the *Saks* decision did. The Supreme Court held that:

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[251] *Floyd v. Eastern Airlines* 872 F.2d 1462 (1989).
[252] *Eastern Airlines v. Floyd, supra,* note 242 at 530.

The issue whether passengers can recover for mental injuries accompanied by physical injuries is not presented or addressed here, since respondents do not allege physical injury or physical manifestation of injury. Nor does this Court reach the question whether the Convention provides the exclusive cause of action for injuries sustained during international air transportation, since the Court of Appeals did not address it and certiorari was not grated to consider it here.[253]

The second question that remained in the *Floyd* case was answered by the following Supreme Court decision: *El Al Israel Airlines v. Tseng, 525 U.S. 155 (1999).* However, the first question that had remained, which was the highly controversial topic in the Montreal Conference in 1999, was answered by neither Conventions nor the Supreme Court decisions. While the Warsaw system, including the Montreal Convention, and the U.S. Supreme Court did not provide criteria for whether or not passengers could recover for mental injuries accompanied by physical injuries for the last fifteen years, new criteria was formed: passengers can recover for mental injuries resulting directly from bodily injury.

b. *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999)

The Supreme Court in *Tseng* shed light on the exclusivity of the Warsaw Convention regarding an action for injuries sustained during international air transportation. Also, the Tseng decision reaffirmed that the passenger could not recover by the airline under Article

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[253] *Ibid.* at 532.

17 of the Warsaw Convention, for solely psychic or psychosomatic injuries[254].

On May 22, 1993, Tsui Yuan Tseng arrived at JFK Airport to board an El Al Israel Airlines flight to Tel Aviv. During pre-boarding procedures, an El Al security guard questioned Tseng about her destinations and travel plans. The guard considered that Tseng's responses were "illogical," and ranked her as a "high risk" passenger. Tseng was taken to a private security room and she was told to remove her shoes, jacket, and sweater, and to lower her blue jean to mid-hip. A female security guard then searched Tseng's body outside her clothes by hand and with an electronic security wand. After the search, El Al personnel decided that Tseng did not pose a security threat and allowed her to board the flight. Tseng later testified that she "was really sick and very upset" during the flight, that she was "emotionally traumatized and disturbed" during her trip, and that she underwent medical and psychiatric treatment for lingering effects of the body search. Tseng filed suit against El Al in 1994.[255]

The District Court dismissed Tseng's personal injury claim because Tseng "sustained no bodily injury" as a result of the search and the Warsaw Convention does not permit "recovery for psychic or psychosomatic injury unaccompanied by bodily injury". The Court of Appeals reversed and concluded that the Warsaw Convention does not shield the very same "routine operating procedures"[256] The Supreme Court reversed the Second Circuit decision and held that recovery for personal injury suffered "on board [an] aircraft

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[254] *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999) at 165, [*El Al v. Tseng*]
[255] See, *Ibid.* at 155-6.
[256] *Ibid.* at 155.

or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of Warsaw Convention, is not available at all.[257]

In its decision, the Supreme Court in Tseng started with referring to two Supreme Court cases which reserved decisions on the Convention's exclusivity: the Saks decision which expressed no view concerning whether or not the passenger could maintain "a state cause of action negligence"; and the Floyd decision which declined to reach the question of whether the Convention "provides the exclusive cause of action for injuries sustained during international air transportation."[258] After reviewing relating provisions of the Warsaw Convention[259], the purpose of the Convention, the drafting history of Article 17, the ratification of Montreal Protocol No.4[260], and decisions of other Convention signatories[261], Justice Ginsburg, author of the majority opinion, wrote that:

We hold that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.

Indeed, the few courts that have addressed the scope of the Convention's exclusivity since

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[257] *Ibid.* at 155.
[258] *Ibid.* at 162.
[259] Art.1,17,18, 19, 24, see *Ibid.* at 162-3.
[260] Montreal Protocol No.4, which amended Warsaw Convention to preclude passengers from bringing actions under local law when they cannot establish air carrier liability under treaty, merely clarifies, and does not alter, Convention's rule of exclusivity, had been ratified by the Senate on September 28, 1998,a year before the Supreme court decided.
[261] Prior to *Tseng*, courts in both the United Kingdom and Canada found the Convention to be exclusive. See *Weigand supra* note 82 at 928.

Tseng generally have done so in a relatively broad fashion.[262] The other significant point that the Tseng decision made is that the Supreme Court reaffirmed that solely psychic or psychosomatic injuries are not compensable under Article 17.

The Convention provides for compensation under Article 17 only when the passenger suffers "death, physical injury, or physical manifestation of injury," *Eastern Airlines, Inc. v. Floyd*, a condition that both the District Court and the Court of Appeals determined that she sustained no "bodily injury" and could not gain compensation under Article 17 for her solely psychic or psychosomatic injuries.

c. Enrlich v. American Airlines, Inc., 360 F. 3d 366 (2d Cir. 2004)

Despite renewed attacks[263] on the meaning of "bodily injury" under Article 17 of the Warsaw Convention, the appellate courts in the United States continue to give the phrase a narrow interpretation to exclude mental anguish damages.[264] The U.S Second Circuit in a recent case. *Enrilich v. American Airlines (2004)* provided today's trend regarding mental injury and confirmed "*Floyd's* spirit".

In *Enrlich v. American Airlines, Inc.,* the plaintiff sought recovery for physical and mental injuries allegedly sustained during the evacuation of an American Eagle flight,[265] which

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[262] *Ibid.*at 931.

[263] Some courts have permitted recovery for mental injuries provided there is some physical injury, even unrelated, which serves as a threshold for recovery of psychological injuries; In re Air Crash at Little Rock, 291 F.3d at 511; see also In re Aircrash Disaster Near Roselawn, Ind on Oct 31, 1994,954 F.supp.175,178-179(N.D.III.1997); Chendrimada v. Air India,802 F.Supp.1089,1092-1093 (S.D.N.Y 1992). see *liability reporter 2003 supra* note 191 at 3.

[264] Harakas *supra* note 158 at 36.

[265] On May 8,1999, Gary and Maryanne Enrlich boarded American Eagle Flight No.4925 in Baltimore,

had overshot the runway at the New York's JFK airport.[266] The Court of Appeal affirmed the district court decision and held that the airline was not liable, pursuant to Article 17 of the Warsaw Convention, for mental injuries not caused by bodily injury. In reaching its decision, the Second Circuit Appeal Court extensively reviewed the plain meaning of Article 17, French legal material, the negotiating history of the Warsaw Convention, the purpose of the Convention, anomalous and illogical interpretations of the Convention, judicial decisions of sister signatories, and the negotiating history of the Montreal Convention.

The value of this decision is found in the fact that the Court addressed the other question left open by the Supreme Court in *Floyd*, and represented today's mainstream view regarding emotional damages.[267]

To address the issue presented by this appeal, we must reach the question left unresolved by the Supreme Court in Floyd... After reviewing that provision in accordance with the proper canons of treaty interpretation, we conclude...that Article 17 allows passenger to bring a Warsaw Convention action against air carrier to recover for their mental injuries but only to the extent that they flow from bodily injuries.

In addition, the Court emphasized the spirit of *Floyd*. The Appeal Court gave examples

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Maryland. They intended to travel to JFK, where they were scheduled to connect to an American Airlines flight to London.; It was an international flight; therefore the Warsaw Convention applied.

[266] 2005 Liability Reporter, *supra* note 206 at 17

[267] Also see 2003 Liability Reporter, *supra* note 191 at 9; the mainstream view, which is widely attributable to the opinion from the Northern District of California in *Jack v. Trans World Airlines, Inc.*, permits recovery for mental injuries only to the extent the distress is caused by the physical injuries sustained.

which the Northern District of California in *Jack v. Trans World Airlines, Inc.(854 F. Supp. 654,665(N.D. Cal 1994)* and *Lloyd v. American Airlines.*291 F.3d (2002) had decided.

"the happenstance of getting scratched on the way down the evacuation slide [should] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the crash."... if we determined that a "physical injury, no matter how minor or unrelated," could "trigger recovery of any and all post-crash mental injuries," that conclusion would violate the "sprit of Floyd."... Hence, we hold that permitting passengers to recover for mental injuries that were not caused by bodily injuries violates the sprit, rather than the letter of Floyd.

2. UNITED KINGDOM

a. King v. Bristow Helicopters LTD; Morris v. KLM Royal Dutch Airlines[268]

In February 2002, the House of Lords jointly considered the decisions in *King* and *Morris* regarding the issue of a carrier's liability for mental injury under the Warsaw Convention. The House of Lords affirmed that purely emotional distress and depression are not recoverable under the Warsaw Convention, although damages for the physical manifestation of a mental injury would be recoverable.[269]

In *King v. Bristow Helicopters LTD.*, the plaintiff, Philip King, alleged that he was suffering from PTSD as a result of a life-threatening incident, when the helicopter in

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[268] *King v. Bristow Helicopters LTD; Morris v. KLM Royal Dutch Airlines* (2004), [2004] 1 Lloyd's Rep. 745 (H.L.).[*King*]
[269] *Ibid.*

which he was traveling[270] experienced an engine failure and descended rapidly to the helideck, where it became engulfed in smoke[271]. The passenger developed post-traumatic stress disorder. As a result of the stress he suffered an onset of peptic ulcer disease.[272] In awarding the plaintiff damages under the Warsaw Convention, the Scottish Court of Sessions refused to follow *Floyd* and held that the drafters of the Warsaw Convention did not intend to distinguish between physical and mental injuries.[273]

In *Morris v. KLM*, the English Court of Appeal reversed the decision of the Bury County Court, which had awarded Morris, 16 year old female, damages for emotional distress she suffered as a result of an indecent assault by another passenger during an overnight flight from Kuala Lumpur to Amsterdam.[274] Ms. Morris did not sustain any physical injury. The Court of Appeal held that the natural meaning of the term "lesion corporelle" was physical harm.[275]

Bristow Helicopter and Miss Morris appealed the principal question of law in both cases being whether a person, who suffered no physical injury but who did suffer mental injury or illness such as clinical depression as a result of an accident on board an aircraft, had a claim against the carrier under Article 17 of the Convention.[276]

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[270] His flight was non-international carriage by air within the meaning of the Carriage by Air Acts (Application of Provisions) Order, 1967:S.I. 1967/480. Schedule 1 to the 1967 Order applies to such carriage the Warsaw Convention as amended by the Hague Protocol.- See *Ibid*, at 756.
[271] 2003 Liability Reporter, *supra* note 191 at 13.
[272] *King, supra* note 268 at 749.
[273] 2003 Liability Reporter, *supra* note 191 at 13.
[274] *Ibid.*
[275] *Ibid.*
[276] *King, supra* note 268 at 746.

The main point that the House of Lords considered was the question of whether or not mental injury caused bodily injury. As for the *King* case, the House of Lords deemed that the peptic ulcer disorder that King suffered involved the tissues of the body and was therefore a kind of bodily injury.[277] Thus, the House of Lords unanimously held that compensation might be awarded to King under Article 17 for the physical manifestation of a mental injury.[278] On the contrary, the House of Lords held that Morris was unable to recover for her emotional distress and depression since the assault did not cause her any physical injury.[279]

In reaching its decision, one of the major factors that the House of Lords reviewed was comparative jurisprudence. Lord Nicholls of Birkenhead who wrote the majority opinion explicitly mentioned that the *Floyd* decision was the most important decision[280] and referred to two other cases: *El Al Israel Airlines Ltd. v. Tseng(*1999) 525 U.S. 155 and *Kotsambasis v. Singapore Airlines Ltd.,* (1997) 42 N.S.W.L.R. 110 (in the New South Wales Court of Appeal). Although Lord Nicholls of Birkenhead reinforced the mainstream view which comparative jurisprudence provided: "somebody who suffered no physical injuries but suffered mental injury or illness had no claim under Article 17", he held that in two respects, mental injury and illness might be relevant.[281]

First, there is no reason in principle to exclude from consideration pain and suffering

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[277] *Ibid.*
[278] 2003 Liability Reporter *supra* note 191 at 10
[279] *King, supra* note 268 at 746.
[280] *Ibid.* at 752.
[281] *Ibid.* at 752-3.

caused by physical injury. It may therefore cover mental injury caused by a physical injury... Secondly, I would hold that if a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms, such as strokes, miscarriages or peptic ulcers, the threshold requirement of bodily injury under the Convention is also satisfied.

In other words, mental injury caused by physical injury and mental injury that causes physical symptoms would be recoverable in his view. Since the most important requirement is physical injury or symptoms, it can be seen that there is no considerable difference between this approach and that of the mainstream U.S. cases. However, this theory is, in fact, very progressive. With respect to mental injury caused by physical injury, the U.S. Courts emphasized the words: "flowing from" or "directly" between mental injury and bodily injury. Moreover, with respect to mental injury that causes physical symptoms, the U.S. Eight Circuit Court *in re Air Crash at Little Rock, 291 F.3d at 512* explicitly held that the physical manifestation of mental injuries such as weight loss, sleepless, or physical changes to the brain resulting from chronic PTSD is not compensable under the Warsaw Convention.[282]

In terms of brain injury, Lord Nicholls of Birkenhead insisted:

It would be wrong to regard Article. 17 as limited by the state of medical and scientific knowledge that was current in the 1920s; ... ; and if the brain could be shown to be injured and the other conditions for compensation under article 17 are satisfied, it would not be right to refuse compensation under the article on the ground that in 1929 an injury

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[282] 2003 Liability Reporter *supra* note 191 at 10.

of that kind would not have been capable of being demonstrated.

On the one hand, this argument looks absolutely reasonable simply because the brain is part of the body, and medical development enables doctors to find brain damages which could not have been found in 1929. On the other hand, this approach can distort the meaning of "bodily injury" in Article 17. Lord Hobhouse of Woodborough emphasized in his individual opinion:

Bodily injury simply and unambiguously meant a change in some part or parts the body of the passenger which was sufficiently serious to be described as an injury...The scientific developments have not changed the meaning of the article. The meaning of the phrase bodily injury has not changed. The criterion or test remains the same. All that has changed is the ability of certain plaintiffs to bring their cases within it.

Therefore, Lord Hobhouse of Woodborough believed that a passenger must be prepared to prove that a psychiatric illness, which can correspond to physical changes in the brain, may often be evidence of a bodily injury.

However, the U.S. Eighth Circuit *in re Air Crash at Little Rock, 291 F.3d* objected the view that brain dysfunction could be a bodily injury. As for the theory that Post Traumatic Stress Disorder (PTSD) is actually a physical injury within the meaning of the Warsaw Convention since people with chronic PTSD may have brain dysfunction, the U.S. Eighth Circuit held that "subsequent physical manifestations of earlier emotional injury are not

compensable under the Warsaw Convention".[283]

The question of whether or not a brain injury or dysfunction is a bodily injury can be a key issue in the compensation of mental injury. Since the brain is a highly sophisticated body part, it can easily be changed, but not necessarily damaged, by emotional disturbance such as shock, fear or mental anguish. Therefore, in order to be compensated for mental injury in the Warsaw System, the passenger should prove that the change of the brain is sufficiently serious to be described as a bodily injury. It will all be a question of medical evidence.

3. AUSTRALIA

- *Kotsambasis v. Singapore Airlines (1997)* 42 N.S.W.L.R. 110.

The Australian New South Wales Appeal Court in *Kotsambasis v. Singapore Airlines* held that the term "bodily injury" in Article 17 of the Warsaw Convention does not include purely psychological injury.

On 28 May 1992, Miss Kotsambasis boarded a Singapore Airlines aircraft in Athens, which was scheduled to fly to Sydney via Singapore. Shortly after takeoff, she was leaning forward in her seat when a sudden jolt threw her back into her seat. Other passengers were screaming and she saw smoking coming from a starboard engine. After an announcement that there was an engine problem and that the aircraft would be returning to Athens, the aircraft landed over an hour after takeoff. However, the

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[283] See *Ibid.* The Eight Circuit relied on *Carey v. United Airlines 255 F.2d 1044(9th Cir.2001)* and *Terrafranca v. Virgin Atlantic Airways 151 F.3D 108 (3rd Cir. 1998)*

passengers could not disembark for one and a half hours due to a lack of facilities at the Athens airport. Following disembarkation, she took a flight to Paris to take a flight to Singapore. At the Paris airport, she had to carry two heavy suitcases and a bag over her shoulder which caused her pain in the back. Miss Kotsambasis brought a suit against Singapore Airlines to recover for damages on the basis of psychological injuries as well as back injuries.[284]

At the beginning of the decision, the Court clarified that this claim was regulated by the *Australian Civil Aviation Carriers Liability Act 1959*[285], which adopted the Warsaw Convention and Hague Protocol, not based on negligence or contract.[286] Then, the Court demonstrated how to interpret "bodily injury" properly according to the *Civil Aviation Carriers Liability Act* Section 8[287] and *Vienna Convention on the Law of Treaties* Article 31 and 32[288]. Taking these into consideration, the Court decided that "lesion corporell" in the authentic French texts can be regarded essentially as the equivalent of the words "bodily injury":[289]

Both ["bodily injury" and "lesion corporelle"] have the same ambiguity, namely whether

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[284] *Kotsambasis v. Singapore Airlines (1997),* 42 N.S.W.L.R. 110 (N.S.W.C.A.) [*Kotsambasis*]

[285] Australian Civil Aviation Carriers Liability Act 1959 Section 13
The carrier is 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.

[286] *Kotsambasis, supra* note 284 at 112.

[287] *Ibid* at 113, Section 8(1) of the Act provides that it is the text as set out in the Schedule to the Act which is the text of the Convention for the purposes of the Act. Section 8(2) provides: "If there is any inconsistency between the text of a Convention as set out in a Schedule and the text that would result if the authentic French texts of the instruments making up the convention were read and interpreted together as one single instrument, the latter text prevails."

[288] See page 11-2.

[289] *Kotsambasis, supra* note 284 at 114.

the phrase can be taken to refer to a psychological injury. This ambiguity can only be resolved by looking at the intention of the contracting parties and adopting a purposive approach to the interpretation of the Convention. It is immediately apparent that the adjective "bodily" is a word of qualification or limitation...that courts are not at liberty to consider any words as superfluous or insignificant... It is clear that the draftsmen of the Convention did not intend to impose absolute liability in respect of all forms of injury.

The Australian Appeal Court also reviewed the *Floyd* decision and entirely agreed with it. In particular, the Court quoted what Judge Marshall wrote in *Floyd* decision regarding the history of negotiations of the Warsaw Convention and the state of the law in many of the other contracting states at the time:[290]

No evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic or the meaning of lesion corporelle...Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the convention.

For the same reason that the *Floyd* decision left open "the issue whether passengers can recover for mental injuries accompanied by physical injuries", Meagher JA who wrote the *Kotsambasis* decision did not answer the question of whether or not Article 17 provides compensation for psychological injuries accompanied by physical injuries. He maintained

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[290] *Ibid.* at 115.

that it was not necessary to answer the question since Kotsambasis did not suffer a physical injury which came within the terms of Article 17. He continued that the place that her injury was sustained was the Paris airport, although she had felt a pain in her back on board.[291]

Nevertheless, Stein JA showed a different approach in the concurring opinion of the *Kotsambasis* decision. His opinion is similar to the opinion of Lord Nicholls of Birkenhead in the U.K. House of Lord decision: *King v. Bristow Helicopters LTD; Morris v. KLM Royal Dutch.*

...Where mental anguish follows and is caused by physical injury, recovery for both injuries is covered... Moreover, if the psychological injury is proven to be a species of bodily injury, then it would constitute "bodily injury" within the article.[292]

4. SOUTH AFRICA

a. Potgieter v. British Airways, C.P.D. High Ct. of South Africa (2005)

The High Court of South Africa clarified the exclusivity of the Warsaw system regarding air carrier liability and boundaries that the air carrier should compensate in Article 17 as U.S. Supreme Court had decided in *Tseng.*

The plaintiff, Mr. Potgieter, who traveled on a British Airway flight from Cape Town to London in September 2000, brought a claim against British Airways averring that he was

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[291] *Ibid.* at 116.
[292] *Ibid.* at 121.

"humiliated and degraded" and his "dignity was severely impaired" when a flight attendant approached the plaintiff and his male partner and requested them "not to kiss each other as doing so was offensive to other passengers on the flight."[293] The plaintiff and his partner allegedly hugged and kissed each other in a normal way and manner which would have accepted between two heterosexual people.[294]

Mr. Justice Davis considered the leading authorities from the House of Loads (*Sidhu v. British Airways* and *Morris v. KLM*) as well as the U.S. Supreme Court (*Eastern Airlnes v. Floyd* and *El Al v. Tseng*) along with other authorities from the Canadian Appeal Court and the French Court de Cessation.[295] Accordingly, the High Court of South Africa agreed with the views of the U.K, U.S and Canadian Courts, which decided that the Warsaw Convention provided the exclusive cause of action and sole remedy for a passenger who claims for loss, injury and damages sustained in the course, or arising out, of his international carriage.[296] Therefore, the High Court of South Africa held that the Warsaw System was the exclusive way that the plaintiff could claim and because the plaintiff did not allege death, wounding or other bodily injury suffered by him as a result of an accident, the defendant could not be liable in terms of the Article 17.[297]

C. Civil law countries

1. FRANCE

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[293] Keith Richardson "Air Carrier Liability: Exclusivity of Warsaw regime" *BLG Aerospace News* (1 March 2005) 4. online: Barlow Lyde & Gilbert <http://www.blg.co.uk/blg> [Richardson]
[294] 2005 Liability Reporter *supra* note 206 at 19
[295] Richardson, *supra* note 293.
[296] 2005 Liability Reporter, *supra* note 206 at 19
[297] *Ibid.* at 19-20.

The French term "lesion corporelle" has been widely reviewed in common law countries. In the landmark case, *Floyd,* U.S. Supreme Court started to review the cases which interpreted "lesion corporelle" and concluded that the term "lesion corporelle" was interpreted as "bodily injury" and did not embrace mental injury.[298] More than two decades later, the U.S. Second Circuit in *Enrlich* had a different interpretation.

The Second Circuit understood that French law would allow a party to recover for not only "dommage materiel", compensation for any expenses or financial loss resulting from the injury or death[299], but also "dommage moral", compensation for pain and suffering.[300] Based on prominent books and important cases[301], the U.S Second Circuit in *Enrlich* was aware that, under certain circumstances, French law allowed parties to recover for "dommage moral" even if they had not suffered a physical injury.[302] The Court also criticized the way in which the Supreme Court in *Floyd* had interpreted "lesion corporelle".

When the [Floyd] Court sought to examine whether French law in 1929 allowed parties to recover for purely mental injuries, the Court limited the scope of French materials that it would consider as part of its analysis; the Court refused to rely on French judicial decisions that did not involve a mental injury caused by flight or shock.[303]

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[298] See page 82.
[299] René H. Mankiewicz, *The liability regime of the International Air Carrier*, (Deventer: Kluwer Law and Texation Publishers, 1981) at 157 [Mankiewicz]
[300] *Ibid.*
[301] See *Enrlich v. American Airlines, Inc.*, 360 F. 3d 366 (2d Cir. 2004) at 379-80.
[302] *Ibid.* at 380.
[303] *Ibid.*

Indeed, in 1929 when the Warsaw Convention was established, French law had recognized for many years the right of a plaintiff to recover for mental suffering alone, even though it was not caused by a physical injury.[304] Moreover, since the concept of "heads of damages" is unknown to French law which permits compensation for any damage, whether *material* or *moral*[305], mental injury unaccompanied by injury to the body can rightly be subsumed under Article 17.[306] Consequently, Professor Mankiewicz's *bona fide* interpretation of "lesion corporelle" seems reasonable:

While 'bodily injury' is undoubtedly a grammatically correct translation of "lesion corporelle", it may rightly be argued that the meaning of that expression in French law and its equivalents in other civil laws are more correctly rendered by the expression 'personal injury'.[307]

However, even though French was the only authentic language in the Warsaw Convention and the French term "lesion corporelle" infers "personal injury", not "bodily injury" in French domestic law, other jurisdictions do not need to follow the meaning of "lesion corporelle" in France. Rather, how drafters understood "lesion corporelle" in the Warsaw Conference and what the drafters meant in the Conference must be considered to be more important factors.

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[304] *Mankiewicz, supra* note 299 at 145.
[305] *Ibid,* at 157.
[306] *Giemulla supra* note 63 Chapter 3 at 7.
[307] *Mankiewicz supra* note 299 at 141.

2. GERMANY

German Air Transport Act (Luftverkehrsgesetz) Section 45 stipulates liability for personal injury (Haftung für Personenschäden). Although Luftverkehrsgesetz generally adopted Article 17 in the Warsaw Convention, it has broader expression about "bodily injury".

§ 45 LuftVG Haftung für Personenschäden

Wird ein Fluggast durch einen Unfall an Bord eines Luftfahrzeugs oder beim Ein-oder Aussteigen getötet, körperlich verletzt oder gesundheitlich geschädigt, ist der Luftfrachtführer verpflichtet, den daraus entstehenden Schaden zu ersetzen.

While "getötet" and "körperlich verletzt" can unambiguously be interpreted as "to be killed"[308] and "bodily injury"[309], respectively, interpreting "gesundheitlich geschädigt" is not perfectly clear. Since "gesundheitlich" can be interpreted as "for reasons of health"[310] or "relating to one's health"[311] and "geschädigt" can be interpreted as "impaired"[312], "gesundheitlich geschädigt" can be generally interpreted as "for reasons of impaired health" or "relating to one's impaired health." According to Professor Doo Hwan Kim, "gesundheitlich geschädigt" was interpreted as "harmful health of passenger" within the meaning of the provision.

§ 45 Liability of Personal Damages

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[308] Online: The New English-German Dictionary <http://www.iee.et.tu-dresden.de/cgi-bin/cgiwrap/wernerr/search.sh>
[309] *Ibid.*
[310] *Ibid.*
[311] *Ibid.*
[312] *Ibid.*

The carrier is liable for damage sustained in case of death, bodily injury or harmful health of 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[313]

It is worth noting that compensation for injury of health is permissible in the German Civil Code (BGB). German Civil Law, which was reformed on August 1. 2002, allows compensability of non-pecuniary heading of harms.[314] While the first paragraph of § 253 BGB(formerly § 847 BGB) states the basic rule, namely, the non-compensability of non-pecuniary injury, the second paragraph of § 253 BGB exceptionally grants compensation for non-pecuniary headings as a consequence of any claim on the grounds of an injury to the body, freedom, health or sexual self-determination of the claimant.[315] Since this provision is a principle of BGB, it is generally accepted that passenger liability under § 45 LuftVG would be applied for the principle of § 253 BGB.

It is clear that "harmful health" is a broader term than "bodily injury" and it can be assumed that "harmful health" includes "bodily injury" as well as "mental injury". Therefore, it can be taken to mean that the German Air Transport Act (Luftverkehrsgesetz) broadly includes death, bodily injury and mental injury which can harm one's health as the boundary of compensation.[316]

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[313] E-mail from Professor Doo Hwan Kim (28 August 2005) [translated by Doo hwan Kim]
[314] Basil Markesinis, Michael Coester, Guido Alpa, and Augustus Ullstein, *Compensation for personal injury in English, German and Italian Law – a comparative outline* (Cambridge: Cambridge University 2005) at 60.[Markesnis].
[315] *Ibid.*
[316] Kim Dae-Kyu, "Aircarrier's Liability by revised German Air Transport Act 2004"(2004) 19 Korean J.

3. CHINA

Article 124 in *Civil Aviation Law of the People's Republic of China* stipulates that the carrier is liable for "personal injury" of a passenger.

Article 124

The Carrier shall be liable for the death or personal injury of a passenger, if the accident took place on board the civil aircraft or in the course of any of the operations of embarking on or disembarking from the civil aircraft; provided that carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Although the official English interpretation of the Chinese Article 124 explicitly mentioned "personal injury"[317], it is not clear whether or not personal injury includes mental injury. In particular, The Chinese General Principle of Civil Law does not contain rules regarding mental injury. It only contains a provision regarding compensation for physical injury. [318] Nevertheless, the Chinese jurisprudence on mental injury is developing. China's first draft Civil Code, which is currently under review, has expanded the scope of compensation for emotional suffering resulting from the infringement of these rights.[319] Moreover, the interpretation by the Supreme Court, which practically

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Air & Sp. L. at 191.

[317] Ministry of commerce of the people's republic of China, online: <http://www.fdi.gov.cn/resupload/epdf/e01549.pdf>.

[318] Article 119 of the Chinese General Principle of Civil Law

Anyone who infringes upon a citizen's person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses.

[319] Online: China's official gate to News and Information <http://www.china.org.cn/english/2002/Dec/51934.htm>

plays a very important role in injury compensation, provides compensation for mental injury under the condition: *seriousness.*

The Supreme Court's Interpretation on Several Issues in the Application of Law Concerning the Trial of Cases about Reparation for Physical Injury,[320] (entered into force in May 1st, 2004)

Article 1: Where the claimant brings a suit to require for compensation for property damage and mental injury due to the infringement of rights to life, health or person, the people's court should accept the suit.[321]

Article 8: Where a tort results in mental injury in which, however, no serious consequences exist, and the plaintiff demands compensation for mental injury, the people's court, generally, shall not favor such a claim. Alternatively, the people's court may order the defendant to cease infringements, rehabilitate the reputation of the victim, eliminate the ill effects, and extend of apology to the plaintiff. Where a tort results in mental injury and serious consequences, according to the requirement of the plaintiff, the people's court may order the defendant to pay the compensation for mental injury, except ordering the defendant to cease infringements, rehabilitate the reputation of the victim, eliminate the ill effects, and extend of apology to the plaintiff.[322]

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[320] Online: China view <http://news.xinhuanet.com/legal/2003-09/15/content_1081304.htm>

[321] 第一条：因生命、健康、身体遭受侵害，赔偿权利人起诉请求赔偿义务人赔偿财产损失和精神损害的，人民法院应予受理[translated by Lihong Li]

[322] 第八条　因侵权致人精神损害，但未造成严重后果，受害人请求赔偿精神损害的，一般不予支

4. JAPAN

According to a Japanese official interpretation of "bodily injury" in Article 17(1) of the Montreal Convention (傷害), Japan appears to exclude purely mental injury.[323] However, they seem to admit compensation for mental injury accompanied by bodily injury.

In principle, the Civil Code of Japan Article 710 allows compensation for non-pecuniary damage.

Article 710 (Non-pecuniary damage)

A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefore even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

In addition to the Civil Code, Japan has a unique compensatory system for civil traffic accidents. The Traffic Section of the Osaka District Court made public booklets entitled "The Calculation Standard Regarding Damages in the Civil Traffic Accident Suits", and, in recent years, most Japanese Courts make good use of "The Calculation Standard Regarding the Civil Traffic Accident Suits", edited by the Traffic Accident Treatment

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持，人民法院可以根据情形判令侵权人停止侵害、恢复名誉、消除影响、赔礼道歉。因侵权致人精神损害，造成严重后果的，人民法院除判令侵权人承担停止侵害、恢复名誉、消除影响、赔礼道歉等民事责任外，可以根据受害人一方的请求判令其赔偿相应的精神损害抚慰金。[translated by Lihong Li]

[323] Katsutoshi Fujita "Some Legal Aspects on the Aviation Law in Japan" (2001) 13 Korean J. Air & Sp. L. at 334-5.

Board consisting of three Bar Associations in Tokyo.[324] There are three items in the Calculation Standard, namely, lost interests, consolation money, and funeral fees.[325] Among them, consolation money is compensation money for finding solace in mental and physical torture.[326]

Indeed, in the case of the China Airline Airbus accident in Nagoya Airport on April 26, 1994[327] , the Nagoya Court conceded to the plaintiffs' argument about compensation for mental injury suffered on December 26th 2003. Although the judges reduced the amount of compensation that the plaintiffs had requested, they did recognize compensation for mental injury.

According to Professor Katsutoshi Fujita, since U.S. courts in landmark cases understood that "other bodily injury" in the Warsaw Convention did not include purely mental injury, and the Montreal Convention turned back to "bodily injury" from "personal injury" in order to omit purely mental injuries such as trauma or shock, "bodily injury" in the Montreal Convention does not include mental injury as long as it is unaccompanied by

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[324] Masao Sekiguchi "liability of the Passenger carriage by air in Japan" (Paper presented to the Worldwide Conference on Current Challenges in International Aviation, Montreal Canada, September 24-26, 2004) [unpublished] at 1 [Sekiguchi].
[325] *Ibid.* at 2.
[326] *Ibid.* at 3.
[327] China Airlines Airbus A300 B4-622R B 1816 took off from Taipei International Airport at 0853 UTC (1753 JST) on April 26, 1994 and continued flying according to its flight plan. About 1116 UTC (2016 JST), while approaching Nagoya Airport for landing, the aircraft crashed into the landing zone close to E1 taxiway of the airport. On board the aircraft were 271 persons: 256 passengers (including 2 infants) and 15 crew members, of whom 264 persons (249 passengers including 2 infants and 15 crew members) were killed and 7 passengers were seriously injured. The aircraft ignited, and was destroyed.- Online: Aircraft accident investigation report 96-5 by aircraft accident investigation commission in the Ministry of Transport, Japan <http://sunnyday.mit.edu/safety-club/nag-1.html>.

bodily injury.[328] Therefore, it can be seen that Japan has a trend similar to that of most common law countries; although they exclude purely mental injury, they partially permit compensation for mental injury accompanied by bodily injury.

5. KOREA

Although there is no specific provision about compensation for mental injury in aviation cases, Korea seems to permit to some extent compensation for mental injury regardless of the existence of bodily injury.

In principle, the Civil Code of Korea Article 751 allows compensation for non-pecuniary damage, including mental anguish.

Article 751 (Compensation for Non-Economic Damages)

(1) A person who has injured the person, liberty of fame of another or has inflicted any mental anguish to another person shall be liable to make compensation for damages arising therefrom.

Moreover, the Seoul Civil District Court endorsed the plaintiffs' claim for compensation for mental injury suffered in KAL's skid at the Cheju Airport in 1994.[329]

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[328] Fujita Katsutoshi, "On the Decision of December 26,2003 by the Nagoya District Court-In re China Airlines Disaster of April 26,1994-" in *Beyond Boundaries of Air and Space Law- Liber Memorials for Professor Masao Sekiguchi* (Tokyo:Yachio Shuppan, 2005) 323 at 341 [translated by Atsuko Otsuka]

[329] Shin Sung Hwan, "Korean Air Skid in Cheju Island Case" in *Proceeding of the 7th International Aerospace Law Seminar* (Cheongju: Air Force Academy Republic of Korea, 1995) 121 at 127 [Shin]

On August 10th 1994, a Korean Air (KAL) domestic jetliner took off from Seoul's Kimpo International Airport bound for Cheju International Airport, skidded on the runaway and went straight into the wall of Cheju International Airport. After the skid, the airplane burst into flames. All 152 passengers and 8 crew aboard escaped safely from the Airbus 300 plane which was engulfed in flames. However, eight passengers and one crew member (co-pilot) were reported to have sustained light injuries.[330]

Some of the passengers brought a suit against Koran Air based on mental injury.[331] Plaintiff Kim Ho Sung and plaintiff Hyung Woon Joon claimed that they suffered mental trauma because they saw their wives and children (Plaintiff Kim's two daughters, nine year-old girl and six year-old girl and Plaintiff Hyung's two sons, 4 year-old boy and one year-old boy at that time) terrified in the accident (the children fainted shortly afterwards in the airplane due to the skid) and for the next few months, their children often vomited and suffered from nightmares so that they needed medical treatment. The case was settled by judicial compromise[332], and Korean Air compensated for the mental injury.

In fact, the Court referred to Commercial Code of Korea Article 148. Nevertheless, since the relation between Civil Code and Commercial Code is intertwined, it is generally recognized that "damages" in the Commercial Code Article 148 includes "non-economic damages" in the Civil Code Article 751.

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[330] *Ibid.*
[331] *Ibid.*
[332] Seoul Civil District Court, Case 94가합 105841.

Section 2, Carriage of Passengers

Article 148 (liability for damages sustained by a passenger)

(1) A carrier shall not be relieved of liability for damages from any injury sustained by a passenger arising from the carriage unless the carrier proves that neither he nor any of his employees has failed to exercise due care in connection with the carriage.

(2) In determining the amount of damages, the court shall take into account the circumstances of the injured party and of his family.[333]

Consequently, it can be assumed that the Korea Civil Code and the Commercial Code allow compensation for mental injury.

D. Conclusion

While there is no doubt that bodily injury is compensable damage all over the world, the question of whether or not mental injury is compensable has diverse answers. The question is directly implicated in cultural differences and the distinct legal consciousness of each country. Generally speaking, developed countries tend to admit mental injury as compensable damage whereas the concept *mental injury* is developing in the remaining countries.

Indeed, the chairman of the Montreal conference deployed the argument that the jurisprudence in mental injury was still developing, when he deleted the proposal of the Friends of Chairman Group which recognized that mental injuries might be recoverable

[333] E-mail from Professor Doo Hwan Kim (16 September 2005) [translated by Doo hwan Kim]

under certain circumstances.[334] However, the criticism is unavoidable that Article 17 of the Warsaw System, particularly the Montreal Convention, does not reflect reality. It did not change or clarify Article 17 at all, although there was confusion regarding interpreting compensable injuries.

In fact, reality reveals the difference from Article 17 with respect to compensable injuries. In common law countries, while the Courts do not allow recovery for purely mental injuries unaccompanied by bodily injury, they generally accept that mental injury could be compensable if that injury results directly from the bodily injury. In civil law countries, they follow what their Civil Code provides regarding mental injury. Since the concept of mental injury has developed or is developing in the countries, their Civil Code admits mental injury as compensable damage or will admit it in the near future.

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[334] ICAO, *International Conference on Air Law –Vol.1 Minutes*, ICAO Doc.9775-DC/2 (1999) at 201

CONCLUSION

Treaties must be observed by the rule *pacta sunt servanta.* However, pursuing consistency of treaties is not easy since every country interprets treaties in own jurisprudence. Thus, deciding how to interpret treaties is absolutely imperative in order to reduce the inconsistency as little as possible. International customary law and the Vienna Convention 1969 provide the rules: treaties should be interpreted on a textual basis to the maximum possible degree and with the teleological approach as a supplement.

The Warsaw Convention 1929, the axis of the private international air law, unfortunately, did not provide clear definitions regarding "accident" and "bodily injury" in the Article 17 and it brought considerable confusion to countries interpreting the Article 17. Its amendments, the Hague Protocol 1955 and the Guatemala Protocol 1971, which were supposed to follow changes and overcome the drawbacks of the original Convention, did not succeed in clarifying the meanings: "accident" and "bodily injury".

The Montreal Convention 1999, which modernized the Warsaw System but changed the purpose of the System from the protection of air carriers to the protection of the interest of consumers, entered into force on November 5, 2003. Although the Montreal Convention could have clarified Article 17 after the wider, lengthy debate, Article 17 was sacrificed for the success of the Montreal Convention 1999. In order to change the outdated compensation provision (Article 22), the competent Chairman in the Montreal Conference made a compromise by abandoning the amendment of Article 17. Once again, the Warsaw System failed to clarify Article 17.

Lack of clarification has meant the decentralization of the authority of the Warsaw System concerning Article 17. When countries interpret the Article 17 in their jurisdictions, they start to stretch the meanings "accident" and "bodily injury". This phenomenon is not surprising, since Article 17 is not precise enough to give proper guidance. In actuality, a more specific definition than that offered by Warsaw System has become stabilized: the criterion of an *unusual, unexpected and external event* which the U.S. Supreme Court in *Saks* provided has been almost universally adopted. In terms of "bodily injury", not only physical injury but also mental injury which results directly from the physical injury is compensable in many jurisdictions or mental injury itself is compensable in some jurisdictions, although Article 17 never mentioned "mental injury".

When a treaty does not reflect the reality, either revolutionarily or retrogressively, countries are forced to escape the regime. The international air transportation community has already witnessed massive confusion when the Warsaw System was not realistic with respect to limit of liability. From the Montreal Protocol 1975 to the Montreal Convention 1999, the ICAO made no effort to modernize the Warsaw System. When the Warsaw System did not reflect the reality, unilateral actions[335] were taken from late eighties. However, no amount of unilateral or collective "patchwork" can replace the appropriate process of amendment of the Convention and establish a solid international legal regime

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[335] The Italian Constitutional Court and Law No. 274 (1988),The Japanese Initiative (1992),The IATA Intercarrier Agreements (1995-1996)

to be applied by the courts of law.[336]

Although definitions of "accident" and "bodily injury" have stabilized in some jurisprudence, the important fact is that the definitions are not derived from the Warsaw System. Therefore, the definitions cannot be as authoritative as a treaty would make them. Also, different definitions regarding "accident" and "bodily injury" in different countries will bring further confusion in the international air transport community once again.

Since 1929, there have been calls to amend Article 17 and clarify the terms: "accident" and "bodily injury". The international air transportation community knows that Article 17 is ambiguous and needs to be specified. At present, countries are stretching the meaning of "accident" and "bodily injury" to be as flexible as possible since the Article 17 did not reflect reality. The best and quickest way to solve the problem is not to evade it but to face it. The ICAO should amend Article 17 to clarify the terms: "accident" and "bodily injury".

The amendment of Article 17 is not simply a matter of changing words. When interpreted by different countries, the terms "Event" and "personal injury", which have been referred in the Guatemala City Protocol, would bring about the same confusions as those caused by "accident" and "bodily injury". Rather, Article 17 should be specified. The Draft Consensus Package of "Friends of Chairman Group" in the Montreal Conference 1999, which was changed by the chairman at the last minute, could have significantly reduced

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[336] Milde "Montreal", *supra* note 3 at 843.

confusions by excluding pre-existing inferiority from the boundary of Article 17 and by specifying the term "injury". Also, balance between the interests of air carrier and passenger should be considered. Today, airline industry is not a special industry to be protected anymore. At the same time, it is not special industry to take unreasonable responsibility. Balancing the interest between air carrier and passenger is never easy; however, it will be the fundamental goal that the Warsaw System should pursue. Definitions of "accident" and "bodily injury" must be specified and clarified based on this goal.

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