

NOTES

TERROR IN THE SKIES: WHO SHOULD PAY THE PRICE?

I. INTRODUCTION

International political terrorism¹ is on the rise. It is a popular means among various groups for obtaining political legitimacy and for carrying out political objectives.² Among the diverse methods of attack,³ airport bombings⁴ and aircraft hijackings⁵ appear to be the

1. International political terrorism has been defined as "the systematic use of extreme violence and threat of violence in order to achieve public and political objectives." See Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1986) (citing Mallison & Mallison, *The Concept of Public Purpose Terror in International Law*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 67 (M. Bassiouni ed. 1975)). Additionally, political terrorism has been defined as the:

use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to political demands of the perpetrators.

See Note, *supra*, at 723 (citing G. WARDLAW, *POLITICAL TERRORISM* 3 (1982)).

2. A more concise definition of political terrorism has been offered, as "[t]he systematic use of murder, and destruction, and the threat of murder and destruction in order to terrorize individuals, groups, communities or governments into conceding to the terrorist's political demands." See Note, *supra* note 1, at 723-24 (citing P. WILKINSON, *TERRORISM AND THE LIBERAL STATE* 49 (1977)) (emphasis added). For an excellent view of the problem of terrorism, see B. NETANYAHU, *HOW THE WEST CAN WIN* (1986). In addition, these various groups include the Palestine Liberation Organization (PLO) and its splinter groups, the Japanese Red Army, and the Italian Red Brigade.

3. The diverse methods include kidnapping, hostage taking, sabotage, and attacks on diplomats. See generally MURPHY, *PUNISHING INTERNATIONAL TERRORISTS* 116 (1985).

4. *Airport Terrorists Kill 13 and Wound 113 at Israeli Counters in Rome and Vienna*, N.Y. Times, Dec. 28, 1985, at A1, col. 6. During these two attacks, grenades and submachine guns were used. The attacks were directed towards crowds at the El Al check-in counters in the Rome and Vienna airports. *Id.*

5. See N.Y. Times, June 15, 1985, at A1, col. 6 (reporting the hijacking of TWA flight 847). Arab terrorists smuggled two hand grenades and two automatic pistols by X-ray machines and security guards at Athens International Airport in Athens, Greece. N.Y. Times, June 17, 1985, at A9, col. 1; see also *Four Killed as Bomb Rips TWA Plane on Way to Athens*, N.Y. Times, Apr. 3, 1986, at A1, col. 6. The Arab Revolutionary Cells, a splinter group of the PLO claimed responsibility. *Id.* They claimed that this bombing was a response in retaliation for American clashes with Libya in the Gulf of Sidra. *Id.*; see also N.Y. Times, Sept. 5, 1986, at A3, cols. 1, 2.

In this attack, four men dressed as security guards and while firing machine guns, seized a Pan Am jumbo jet filled with approximately 400 people at Karachi airport in Pakistan. *Id.* Airport security in Pakistan is usually extremely tight for passengers, who are

terrorist's preferred method for expressing their demands. Since the 1960's, the vulnerability, visibility, and mobility of the aircraft has made it a favorite target for terrorists.⁶ As a result, the airlines, as well as the innocent civilian victims, are forced to "pay the price" in the terrorists war against civilized society.⁷

Air carrier liability for injuries to passengers on international flights is governed by the Warsaw Convention,⁸ as modified by the Montreal Agreement.⁹ The articles of the Warsaw Convention attempt to regulate international air carrier liability in a uniform manner by establishing a presumption of liability,¹⁰ by limiting liability,¹¹ and by establishing defenses against liability.¹² As a result

searched by hand two or three times before boarding. *Id.* at A6, col. 4. It should be pointed out that the responsibility to guard the airport is that of the local government and not Pan Am's. *Id.*

In another incident, Lebanese gunman attempted to hijack an Air Afrique jet. The cabin crew overpowered and captured the gunman after a French passenger was killed and a steward was critically wounded while the plane was on the tarmac at Cointrin Airport. N.Y. Times, July 25, 1987, at A1, col. 3. Also note that cruise ships are not free from the terrorist menace. See, e.g., N.Y. Times, Oct. 8, 1985, at A1, col. 6.

6. See Note, *Keeping "The Wild" Out of "The Wild Blue Yonder": Preventing Terrorist Attacks Against International Flights in Civil Aviation*, 4 DICK. J. INT'L L. 251 (1986). The fact that many air carriers are owned and operated publicly by state governments, rather than privately, is one reason why the aircraft is an extremely powerful symbol open to attack. In addition, an aircraft in flight, despite all of its engineering sophistication, is a uniquely fragile vessel once someone aboard threatens to use a weapon or explosive. For this reason, there will always be a compelling necessity to protect the lives of passengers, particularly since the air commerce system has become such an essential part of life in the twentieth century. See *id.* at 252.

7. See *supra* notes 4 and 5.

8. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. II [hereinafter Warsaw Convention].

9. Montreal Agreement CAB 18900, 31 Fed. Reg. 7, 302 (1966) [hereinafter Montreal Agreement]. For an excellent discussion on the background of the Warsaw Convention and the Montreal Agreement, see Lowenfeld & Mendelshon, *The United States and The Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

10. Warsaw Convention, *supra* note 8. Article 17 of the Warsaw Convention contains a presumption of liability for "damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger . . ." This presumption is rebuttable under Article 20(1) of the Convention. "The carrier shall not be liable if he *proves* that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." See *id.* art. 20(1) (emphasis added).

11. See Warsaw Convention, *supra* note 8. Article 22 of the Convention limits the liability of the carrier for each passenger to 125,000 francs. *Id.* This is equivalent to approximately \$8,300.

12. *Id.* art. 20. "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." See also *id.* art. 21. "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accor-

of the United States dissatisfaction with the low limit of liability, the Montreal Agreement was created.¹³ The Montreal Agreement increased the limits of liability for passenger recovery under the Warsaw Convention from \$8,300 to \$75,000, and replaced the Convention's rebuttable presumption of liability with that of absolute liability.¹⁴ In order for a passenger to recover under the Warsaw Convention, his injuries must fall within the scope of article 17.¹⁵ Briefly, article 17 provides recovery for death or bodily injury sustained if the accident took place on board the aircraft or in the course of embarking or disembarking.¹⁶

Beginning in the early 1970's, the Popular Front for the Liberation of Palestine (PFLP), among other groups, carried out attacks against passengers of airlines.¹⁷ For example, on September 6, 1970, TWA Flight 100 was hijacked en route to New York City from Tel Aviv, by an armed member of the PFLP. The plane was diverted to a desert strip near Amman, Jordan, where the hostages spent six days before being moved to safety.¹⁸ Originating with this

dance with the provisions of its own law, exonerate the carrier wholly or partly from his liability. *Id.*

13. See Montreal Agreement, *supra* note 9. "The Montreal Agreement is a special contract envisioned by article 22(1) of the Convention, whereby the carrier and the passenger may agree to a higher limit of liability. It is a private inter-carrier agreement in contrast to the Convention which is a public intergovernmental agreement." Reukema, *Article 17 of the Warsaw Convention: An Accident is Required for Recovery*, 10 ANNALS OF AIR AND SPACE L. 191, 193 (1985).

14. Reukema, *supra* note 13, at 193.

15. See Warsaw Convention, *supra* note 8, art. 17; see also Comment, *Deterring Airport Terrorist Attacks and Compensating the Victims*, 125 U. PA. L. REV. 1134, 1139 (1977).

16. See Warsaw Convention, *supra* note 8, art. 17.

17. See, e.g., *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973). In *Burnett*, a suit was filed by a husband and wife who were passengers on board a TWA flight scheduled to fly from Athens, Greece to New York. During the course of the flight, the PLO diverted the airplane and forced it to land in the desert near Amman, Jordan. The plaintiffs and other passengers were held captive for six days in the close confines of the airplane's cabin. The plaintiffs were deprived of regular food and water and subjected to the temperature extremes of the desert. Additionally, Mr. Burnett experienced swelling in his ankles, and the couple feared that their lives were in danger. The Burnett's claimed to have suffered emotional trauma. The court found that the Warsaw Convention does not provide recovery for mental anguish. *Id.*; see also *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (*Husserl I*) (mental injuries alone are not comprehended by article 17); *Herman v. Trans World Airlines, Inc.*, 69 Misc. 2d 642, 330 N.Y.S.2d 827 (2d Dep't 1972), *rev'd sub nom. Rosman v. Trans World Airlines*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974); *Rosman v. Trans World Airlines, Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (2d Dep't 1972), *rev'd*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974) (Warsaw Convention does not support a claim that psychological trauma alone is compensable). Cf. *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) (*Husserl II*) (mental injuries alone are comprehended by article 17).

18. See, e.g., *Rosman*, 40 A.D.2d 963, 338 N.Y.S.2d 664, *rev'd*, 34 N.Y.2d 385, 314

event, a trend developed whereby victims of terrorist hijackings brought suit against the airline under the Warsaw Convention for mental and emotional injuries sustained during hijackings.¹⁹

At the outset, American courts attempted to interpret article 17 of the Warsaw Convention, specifically whether the French "lesion corporelle" or "bodily injury" encompassed mental injury as well.²⁰ While the issue is still not settled, on the whole, courts have held that personal injuries suffered by a passenger, both physical and mental, are recoverable under the Convention.²¹ In addition, courts have found that according to the Convention, airlines are liable for terrorist attacks in airports when the passenger is in the course of embarking or disembarking.²²

In the wake of the recent terrorist hijackings²³ and the Rome and Vienna airport bombings,²⁴ it appears that a greater focus should be turned toward airline liability today. While the Warsaw Convention and Montreal Agreement provide a cap on recovery for airline accidents per se, they are not adequate systems for dealing

N.E.2d 848, 358 N.Y.S.2d 97.

19. See *supra* note 17 and accompanying text.

20. See *id.*; see also Stanculesco, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lesion Corporelle*, 8 HASTINGS INT'L & COMP. L. REV. 339 (1985).

21. *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (Montreal Agreement permits recovery for mental distress); *Husserl II*, 388 F. Supp. at 1238; *Palagonia v. Trans World Airlines, Inc.*, 110 Misc. 2d 478, 422 N.Y.S.2d 670 (1978) (*lesion corporelle* includes the concept of mental injury as a recoverable damage, even in absence of physical manifestation).

22. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1977); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *aff'g In re Tel Aviv*, 405 F. Supp. 154 (D.P.R. 1975). In both *Day* and *Evangelinos*, a terrorist raid occurred while passengers were in the Transit Lounge of the Hellinikon Airport in Athens, Greece. The attack occurred after the passengers had surrendered their tickets, passed through passport control and entered an area reserved exclusively for those about to depart on international flights. The passengers were in the course of "embarking" within the terms of the Warsaw Convention. *Evangelinos*, 396 F. Supp. at 95; *Day*, 393 F. Supp. at 217; see also *Mache v. Air France*, Judgment of June 3, 1970, at 140, Cass. civ. 1re, Fr., — Bull. Civ.I —, 24 R.F.D.A. 311 (1970). The plaintiff sustained personal injuries when led by two Air France stewardesses. He took a shortcut through an area located beyond the traffic apron but not inside the terminal building. The court held that the plaintiff had completed the operations of disembarking when he stepped off the traffic apron. The *Mache* court limited the scope of disembarking to passage across the runway. See Comment, *supra* note 15, at 1144.

In *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971), the plaintiff completed her international flight and walked through the terminal to the baggage-claim area where she fell to the floor and was injured. The court held that the plaintiff's injury had occurred beyond the scope of article 17, because she had reached a safe point inside the terminal. *Id.*

23. See *supra* note 5.

24. See N.Y. Times, Dec. 28, 1985, at A1, col. 6.

with terrorism which has become a major force in disrupting the normal workings of Western society.

This Note, in Part II, will discuss the Warsaw Convention and the Montreal Agreement. Part III will focus on article 17 and the established law on airline liability for terrorist attacks, and Part IV will discuss alternative solutions to the present Warsaw Convention when dealing with terrorism. This Note will conclude that airlines should not be held to a standard of absolute liability when dealing with terrorist attacks. Rather, it will be suggested that an international fund be set up, financed by the various governments, airlines, and passengers. This fund will be used to both compensate victims and to relieve the airlines from being the sole compensator and a victim itself.

II. BACKGROUND ON THE WARSAW CONVENTION AND MONTREAL AGREEMENT

On October 19, 1929, the Convention for the Unification of Certain Rules Relating to International Transportation by Air was completed and open for signature in Warsaw, Poland.²⁵ It has subsequently become known as the Warsaw Convention. The Warsaw Convention was designed to ensure a certain degree of uniformity of legal obligation in the aviation industry²⁶ as well as to protect the "fledgling" aviation industry from disastrous damage suits.²⁷ The goal of uniformity was achieved by the creation of a cause of action²⁸ and a uniform body of liability rules governing international aviation.²⁹ The protection from disastrous suits was achieved

25. See Warsaw Convention, *supra* note 8; see also Note, *The Emotional Trauma of Hijacking: Who Pays?*, 74 Ky. L. J. 599, 602 (1986). "The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference." Lowenfeld & Mendelsohn, *supra* note 9, at 498. Also note that the original text of the Convention is in French.

26. See Lowenfeld & Mendelsohn, *supra* note 9, at 498. "[S]ince aviation was obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity." *Id.*

27. See Reukema, *supra* note 13, at 192; see also Lowenfeld & Mendelsohn, *supra* note 9, at 499-500. "The Convention established internationally the rule that carriers are liable for damage sustained by a passenger in the course of a flight or while embarking or disembarking (Article 17), but limited this liability to 125,000 Poincare francs - approximately 8,300 United States dollars." *Id.* at 499. This limit was even low for 1929. *Id.*

28. See Reukema, *supra* note 13, at 192 (citing *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)). The Warsaw Convention creates a cause of action for wrongful death. *Id.*

29. This new body of law was intended to supersede the numerous conflicting domestic laws. *Id.*

by placing a monetary limit on the carrier's liability for personal injury,³⁰ damage to cargo³¹ and baggage³² in exchange for a presumption of liability on the part of the carrier.³³

In 1934, when the United States adhered to the Warsaw Convention, the liability limit per passenger for personal injuries was approximately \$8,300.³⁴ During the 1950's and 1960's the United States became dissatisfied with this low limit of liability and proposed revisions to the existing convention.³⁵ In 1955, at a conference in The Hague, there was an agreement on doubling the limit of personal injuries.³⁶ In 1956, the United States signed the Hague Protocol, however the Senate never ratified it, claiming that the level of damages available to Americans traveling abroad was still too low.³⁷ On November 15, 1965, the United States issued a formal notice of denunciation of the Warsaw Convention to be effective May 15, 1966.³⁸

In order to avoid U.S. withdrawal, a conference was convened in the Spring of 1966 in Montreal.³⁹ On May 14, 1966, the day

In *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977), a bomb on an airplane exploded and action was brought against the corporate officers of the air carrier charging negligent failure to institute a satisfactory security system. *Id.* The court held that the plaintiffs could not recover from the air carrier's employees or from the air carrier a sum greater than that recoverable in suit against the carrier itself, as limited by the Warsaw Convention. *Id.*

30. See Warsaw Convention, *supra* note 8, art. 22(1). Article 22(1) provides that the carrier shall be liable up to the limited sum of 125,000 francs or its equivalent. *Id.*

31. *Id.* art. 22(2). Article 22(2) provides that the carrier's liability shall be limited to a sum of 250 francs per kilogram, unless a special declaration of the value at delivery is made by the consignor and a supplementary sum has been paid if required. *Id.*

32. *Id.*. Article 22(2) applies to checked baggage, while article 22(3) applies to unchecked baggage. For unchecked baggage, the liability of the carrier shall be limited to 5,000 francs per passenger. *Id.*

33. *Id.* art. 17. Article 17 applies to personal injury. Article 18 applies to damage done to cargo and baggage.

34. See Reukema, *supra* note 13, at 192.

35. *Id.* at 193.

36. Newman & Barrows, *Legal Remedies Available to Hijack Victims of TWA Flight 847*, 194 N.Y.L.J., July 18, 1985, at 2, col. 3.

37. *Id.*

38. *Id.* A press release announcing the denunciation provided:

The United States would be prepared to withdraw the notice of denunciation deposited today if, prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to \$75,000 per passenger.

Id.

39. Lowenfeld & Mendelsohn, *supra* note 9, at 563.

before the effective date of its denunciation, the United States withdrew its notice of denunciation and announced an interim agreement known as the Montreal Agreement.⁴⁰ The purposes of the Montreal Agreement was to impose absolute liability⁴¹ on the signing carriers for all deaths or injuries involving international travel to and from the United States.⁴² In addition, the Agreement raised the limit of liability under the Warsaw Convention to a maximum of \$75,000 per passenger, including attorney's fees.⁴³

Moreover, the Montreal Agreement changed the liability regime of the Warsaw Convention.⁴⁴ The Convention contained a presumption of liability for "damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. . . ."⁴⁵ This presumption was rebuttable if the carrier could show that all necessary measures were taken to avoid the damage or that it was impossible for the carrier to take such measures.⁴⁶ However, according to the Montreal Agreement, the carrier could no longer use the "all necessary measures" defense.⁴⁷ Thus, a new no-fault absolute liability standard was developed. This means that the carrier will be liable whenever circumstances as set forth in article 17 are met,⁴⁸ no matter who caused the damage.⁴⁹ Furthermore, under the Montreal Agreement, the circum-

40. *Id.*; see also Newman & Barrows, *supra* note 36, at 2, col. 3.

41. Absolute liability is liability in all instances regardless of fault. The Montreal Agreement provides in pertinent part that, "[t]he carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under article 20(1) of said Convention or said Convention as amended by said Protocol." See Note, *supra* note 25, at 607.

42. Note that the Montreal Agreement is not as broad as the Warsaw Convention and applies only to flights having a nexus with the United States. See Newman & Barrows, *supra* note 36, at 2, col. 3. For example, the passengers aboard TWA Flight 847 were scheduled to return to the United States after stopping in Rome. Thus, the Montreal Agreement was applicable. However, it did not apply to those Greek citizens who had Rome as their final destination and no connection to the United States. *Id.* at 2, col. 4.

43. *Id.* at 2, col. 3.

44. Reukema, *supra* note 13, at 193.

45. Warsaw Convention, *supra* note 8, art. 17.

46. *Id.* art. 20(1).

47. Montreal Agreement, *supra* note 9, art. 1(2).

48. See Warsaw Convention, *supra* note 8, art. 17. The circumstances set forth in article 17 are that there is a death or wounding of a passenger or any other bodily injury suffered, as a result of an accident on board the aircraft or in the course of any of the operations of embarking or disembarking.

49. Under the Montreal Agreement, liability is absolute rather than strict. Under strict liability, a causal link is required between the person held strictly liable and the damage. Hence such defenses as acts of third parties and acts of God will survive when liability is strict. See Reukema, *supra* note 13, at 194. Also note that the defense of contributory negligence specified in Article 21 of the Warsaw Convention survives under the Montreal Agree-

stances under which liability arises do not change. Thus, the accident that caused damage must take place on board the aircraft or during embarkation or disembarkation⁵⁰ as set forth in article 17.

III. ARTICLE 17 AND ESTABLISHED LAW FOR AIRLINE LIABILITY FROM TERRORIST ATTACKS

In order to trigger application of the Warsaw Convention and Montreal Agreement, a passenger's injuries must fall within the terms of article 17.⁵¹ Article 17 of the Warsaw Convention states the circumstances under which airlines are required to compensate injured passengers.⁵² The article provides that:

The carrier shall be liable for damage sustained in the event of 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*.⁵³

The article does not create a cause of action but merely establishes a presumption of liability under the applicable substantive law.⁵⁴

Under the Warsaw Convention, courts have found that the burden is on the plaintiff to prove that there was an accident.⁵⁵ The article 17 accident requirement is a way to ensure that there is no liability for injuries that arise from internal causes.⁵⁶ Accord-

ment's liability regime, and does not detract from the absolute quality since an absolute liability system can provide for exemptions in specified circumstances. *Id.*

50. Warsaw Convention, *supra* note 8, art. 17.

51. See Warsaw Convention, *supra* note 8, art. 17; Note, *supra* note 25, at 610.

52. See Warsaw Convention, *supra* note 8, art. 17.

53. See Warsaw Convention, *supra* note 8, art. 17 (emphasis added).

54. See *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1234 (S.D.N.Y. 1975) (*Husserl II*); see also Frippando, *Warsaw Convention - Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 GEO. WASH. J. INT'L L. & ECON. 59, 61 (1985). The Warsaw Convention was interpreted as providing uniform rules regarding proper forum, applicable law, statute of limitation, effect of a passenger's contributory negligence and limitations on liability. *Id.* These uniform rules did not apply unless the passenger's domestic claim satisfied the conditions for liability imposed by article 17, including that the claim involved death, wounding, or other bodily injury. *Id.* at 62.

55. See *Husserl II*, 388 F. Supp. at 1238. As stated by District Judge Tyler, "for an injury to be comprehended by the Warsaw Convention it must have been proximately caused by an accident; hence, to establish liability, one must prove proximate causation and, likewise, must prove his actual injuries and their worth." *Id.*

56. Reukema, *supra* note 13, at 206. A passenger cannot recover if his injury is purely an internal reaction to the usual, normal and expected operation of the aircraft. Thus, if a passenger with a history of heart attacks has a heart attack in flight, or a person who has had a stroke has a seizure on board, then as long as the onset of the medical problem is not due to an unexpected or unusual event during the flight, the carrier will be excused from

ingly, it has been held that a hijacking, terrorism in airports, and other criminal acts of third parties are accidents as defined by article 17.⁵⁷ In *Husserl v. Swiss Air Transport Co. Ltd.*,⁵⁸ for example, suit was brought against an airline for bodily and mental injuries suffered during a terrorist hijacking.⁵⁹ The airline argued that if the cause of the damage was intentional then it was not an accident and the Warsaw Convention was not applicable.⁶⁰ The court found that there was no logical basis to distinguish between sabotage⁶¹ and hijacking, and since sabotage was considered an accident under the Convention, then so must hijacking.⁶² In addition, the court concluded that if the airline was not held liable in hijacking cases, then the function of the Warsaw Convention and Montreal Agreement to redistribute the costs in air transportation would be defeated.⁶³

A. THE INTERPRETATION OF "BODILY INJURY"

The most litigated provision under the Warsaw Convention is whether a passenger can recover for mental injuries sustained as a result of a hijacking.⁶⁴ One of the main reasons for this litigation is the fact that the Warsaw Convention is written in French and courts are divided as to the appropriate meaning of *lesion corporelle*.⁶⁵ Another reason for this litigation is that the intent of

liability. *Id.*

57. *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (*Husserl I*). It should be noted that airline hijackings were "probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated" *Id.*

58. 388 F. Supp. 1238 (S.D.N.Y. 1975) (*Husserl II*).

59. *Id.* at 1242.

60. *Id.* at 1243.

61. Sabotage has been defined as the "malicious destruction of or damage to property with the intention of injuring a business or impairing the economic system or weakening a government or nation . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1995 (1981).

62. *Husserl II*, 388 F. Supp. at 1238.

63. *Id.*

64. See Newman & Barrows, *supra* note 36, at 2, col. 3. Part of this problem is the fact that the official Warsaw Convention is written in French. Article 17 is at issue where the phrase, "en cas de mort, de blessure ou de toute autre lesion corporelle" has been translated as "in the event of the death or wounding of a passenger, or any other bodily injury." *Id.* Additionally, it should be noted that the Convention creates a cause of action for wrongful death. See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Thus far there have been fewer wrongful death actions filed for terrorist hijackings than emotional distress actions.

65. See Stanculesco, *supra* note 20, at 339. There has been much debate on this issue. See, e.g., *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240

the drafters of the Convention is not clear,⁶⁶ and the question remains as to whether the drafters envisioned terrorism and hijackings as being a menacing force in aviation in the 1980's.⁶⁷

Without a clear understanding of the term *lesion corporelle*, it is difficult to determine from what injuries a passenger may recover.⁶⁸ If the injuries are not comprehended by the Convention, they may not be subject to the Convention's limits on liability.⁶⁹ Thus, in such cases where mental injuries are sustained, and are not comprehended by the Convention, the plaintiff will not be entitled to the airline's liability of \$75,000 and may not have absolute liability available as provided by the Montreal Agreement.⁷⁰

Following a series of terrorist aircraft hijackings in September of 1970, a number of suits were brought by passengers on planes diverted to the Jordanian desert, seeking to recover from the airlines for injuries received in the course of the hijackings.⁷¹ On the whole, these injuries were not physical in nature, such as broken arms and legs, but rather psychological and emotional.⁷² In *Burnett v. Trans World Airlines, Inc.*,⁷³ the plaintiffs were on such a hijacked flight.⁷⁴ They were held captive for six days in the airplane's cabin and were deprived of regular food and water.⁷⁵ Additionally, Mr. Burnett experienced swelling in his ankles, and the couple feared that their lives were in danger.⁷⁶ As a result, the Burnetts claimed to have suffered severe emotional trauma.⁷⁷

The District Court of New Mexico strictly construed the War-

(2d Cir. 1973) (*Husserl I*); *Palagonia v. Trans World Airlines, Inc.*, 110 Misc. 2d 478, 442 N.Y.S.2d 670 (1978); *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 330 N.Y.S.2d 827 (2d Dep't 1972), *rev'd sub nom. Rosman v. Trans. World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974); *Rosman v. Trans World Airlines Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (2d Dep't 1972), *rev'd*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974). The courts in all these cases attempt to interpret *lesion corporelle*, and distinguish it from *lesion mentale*.

66. See Note, *supra* note 25, at 614. The court in *Rosman* states that the study of the minutes of the Warsaw Convention indicated that the drafters did not define or discuss what was meant by article 17 and whether physical injury is a bodily injury. *Id.*

67. *Id.*

68. See cases cited *supra* note 65; *Husserl II*, 388 F. Supp. at 1238.

69. See Warsaw Convention, *supra* note 8, art. 17.

70. See Newman & Barrows, *supra* note 36, at 2, col. 3.

71. See cases cited *supra* note 65.

72. *Id.*

73. 368 F. Supp. 1152 (D.N.M. 1973).

74. *Id.* at 1153.

75. *Id.*

76. *Id.*

77. *Id.*

saw Convention by determining that the French legal meaning of "bodily injury" applied and that French law distinguished between bodily injury and mental injury under the terms of the Convention.⁷⁸ However, the court left open a wide area in allowing recovery for mental injuries by stating that "emotional distress . . . directly precipitated by [a] bodily injury [would be] considered as part of the bodily injury itself."⁷⁹

In 1974, the New York Court of Appeals decided *Rosman v. Trans World Airlines, Inc.*⁸⁰ and *Herman v. Trans World Airlines, Inc.*⁸¹ The plaintiffs in *Rosman* and *Herman* were among the passengers on board the same hijacked TWA flight as *Burnett*.⁸² Mrs. Rosman claimed that she had suffered a backache, swollen feet, and discoloration of her legs and back resulting from immobility.⁸³ Her two children claimed to have developed skin irritations and boils from lack of sanitary facilities, and the scarcity of food and water caused her and the children substantial weight loss and dehydration.⁸⁴ Similarly, Mrs. Herman claimed that she slept little, lost much weight, became extremely frightened and developed a skin rash.⁸⁵ Both plaintiffs claimed "severe psychic trauma."⁸⁶ The court found this type of trauma to be natural, noting that "while none of them alleged to have been shot, struck or personally assaulted by any of the hijackers, the plaintiffs, all Jewish, naturally feared that their lives were in grave danger."⁸⁷ However, the central controversy in *Rosman* concerned the meaning of "bodily injury" and whether it encompassed both physical and mental injury or harm.⁸⁸ The court held that the plaintiffs could offer proof at trial and recover for "palpable, objective bodily injuries suffered on the aircraft, irrespective of impact."⁸⁹ However, the plaintiffs could not offer proof or recover "for psychic trauma alone."⁹⁰

78. *Id.* at 1155. The court determined that because the Warsaw Convention was drafted in French, the French legal meaning of bodily injury applied. *Id.*

79. *Id.* at 1158.

80. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

81. 40 A.D.2d 850, 337 N.Y.S.2d 827 (1972), *rev'd sub nom.* *Rosman v. Trans World Airlines Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

82. *See supra* note 73 and accompanying text.

83. 34 N.Y.2d at 389, 314 N.E.2d at 848, 358 N.Y.S.2d at 99.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 396, 314 N.E.2d at 848, 358 N.Y.S.2d at 99.

89. *Id.* at 397, 314 N.E.2d at 848, 358 N.Y.S.2d at 99.

90. *Id.* *But see* *Batalia v. State of New York*, N.Y.2d 176, N.E.2d 729, 10 N.Y.S.2d 237

The broadest reading of *lesion corporelle* was found in *Husserl v. Swiss Air Transport Co. (Husserl II)*.⁹¹ Mrs. Husserl was a passenger on a Swiss Air flight from Zurich, Switzerland to New York on September 6, 1970.⁹² In flight, a group of Arab terrorists hijacked the airplane and directed the pilot to fly to the desert near Amman, Jordan.⁹³ The passengers were forced to remain on the plane for "24 hours under circumstances less than ideal for physical or mental health."⁹⁴ The women and children passengers were moved to a hotel in Amman where they stayed until September 11th. Mrs. Husserl arrived in New York on September 13th.⁹⁵ As a result of the hijacking, Mrs. Husserl claimed that she suffered "bodily injury and severe mental pain and anguish resulting from her expectations of severe injury and/or death"⁹⁶ She did not claim to be physically injured.⁹⁷

As with *Burnett* and *Rosman*, in *Husserl II* the court had to determine whether mental injuries were compensable under the "any other bodily injury provision of article 17."⁹⁸ The court looked at the intent of the draftsmen concerning the inclusion of mental anguish in article 17.⁹⁹ The court reasoned that "the Parties probably had no specific intention at all about mental and psychosomatic injuries because, if they had, they would have clearly expressed their intentions."¹⁰⁰ Additionally, the court found no evidence that the draftsmen "intended to preclude recovery for any particular type of injury."¹⁰¹ Therefore, the court concluded that in order to have uniform liability of air carriers, "the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are thus comprehended by article 17."¹⁰²

Following in the footsteps of the court in *Husserl II*, the District Court of California and the New York Supreme Court held

(1961) (allowing recovery for psychic trauma without physical injury).

91. 388 F. Supp. at 1238 (S.D.N.Y. 1975).

92. *Id.* at 1242.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1249.

100. *Id.*

101. *Id.* at 1250.

102. *Id.*

mental injuries to be compensable under the Warsaw Convention. In *Krystal v. British Overseas Airways Corp.*,¹⁰³ the Krystals were passengers on a British Overseas flight scheduled to fly from Bombay, India to London, England.¹⁰⁴ The airplane was diverted by hijackers to Amsterdam, Holland.¹⁰⁵ The Krystals sued the airline claiming damages for mental distress resulting from fright, anxiety, stress, fear and loss of sleep.¹⁰⁶ The court denied the defendant's motion for summary judgment, holding that mental injuries are compensable under article 17 as a matter of law.¹⁰⁷

Similarly, in *Palagonia v. Trans World Airlines*,¹⁰⁸ the plaintiff brought action against the airline seeking damages for psychic or mental damage arising from a hijacking on an international flight.¹⁰⁹ Once again the issue revolved around the expression "bodily injury," and as in *Husserl II*, the court found that *lesion corporelle* includes the concept of mental injury as a recoverable damage even without physical manifestations.¹¹⁰

B. AIRPORT ATTACKS - DEFINING EMBARKING AND DISEMBARKING

Passengers in air terminals may be in more danger now than before the advent of strict airport security.¹¹¹ This is particularly true since the December 1985 bombings at the Rome and Vienna airports.¹¹² Equally relevant to this issue is the extent to which the airline may be liable for injuries received within the terminal.¹¹³ The status of such liability may be determined by construing "the operations of embarking or disembarking" phrase in article 17.¹¹⁴ However, since article 17 provides no guidance as to when embarking or disembarking takes place, the courts are left to decide this issue for themselves.

In *Day v. Trans World Airlines, Inc.*¹¹⁵ and *Evangelinos v.*

103. 403 F. Supp. 1322 (C.D. Cal 1975).

104. *Id.* at 1322.

105. *Id.*

106. *Id.* at 1323.

107. *Id.* at 1324.

108. 110 Misc. 2d 478, 442 N.Y.S.2d 670 (1978).

109. 110 Misc. 2d at 478, 442 N.Y.S.2d at 670.

110. *Krystal*, 403 F. Supp. at 1324.

111. See Comment, *supra* note 15, at 1134. This is because aircrafts are less attractive, targets resulting from tight and effective security measures. *Id.*

112. See N.Y. Times, Dec. 28, 1985, at A1, col. 6.

113. See Comment, *supra* note 15, at 1134.

114. Warsaw Convention, *supra* note 8, art. 17.

115. 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

Trans World Airlines, Inc.,¹¹⁶ the Second and Third Circuit Court of Appeals allowed recovery for injuries sustained in the Hellenikon Airport attack of 1973.¹¹⁷ On August 5, 1973, at Hellenikon Airport in Athens, Greece, two Palestinian terrorists "hurled three grenades and unleashed a salvo of small-arms fire into a line of passengers preparing to board TWA Flight 881 to New York."¹¹⁸ The passengers had gone through several of the required boarding procedures, and were attacked while they were standing in line at the departure gate waiting to be searched by a TWA representative.¹¹⁹

The major issue in the *Day* and *Evangelinos* cases was whether the passengers sustained their injuries "in the course of . . . the operation of embarking."¹²⁰ TWA argued that there should be no liability under the Warsaw Convention while the passenger was still inside the terminal building.¹²¹ The court in *Day* rejected this "location of the injury" test in favor of an "activity" approach.¹²² The Second Circuit Court of Appeals applied a tripartite test based on the activity (what the plaintiffs were doing), control (at whose direction) and location.¹²³ The court reasoned that the passengers were acting at the express direction of TWA's agents.¹²⁴ They were not free to roam at will through the terminal but were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding.¹²⁵ Thus, the plaintiffs were in the course of

116. 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1977) (en banc).

117. *Day*, 528 F.2d at 32.

118. *Id.*

119. *Id.* Briefly the boarding procedures were as follows. After entering the terminal, the passenger would present his ticket, deposit his luggage, and pay a departure tax at the check-in counter of his chosen airline. At the check-in counter, he would be given a boarding pass and baggage check. The passenger would then proceed through Greek passport and currency control and descend a flight of stairs into the Transit Lounge. (It should be noted that only passengers waiting to board international flights would be allowed inside the lounge area where they were required to remain until boarding.) While waiting for his flight, the traveler would secure his seat assignment, and when his flight was announced, he would proceed to the designated departure gate where he and his hand luggage would be searched by Greek police. The passenger then would go through the doors of the terminal building and cross a short terrace outside. Finally, he would board a bus which would transport him to the waiting plane. *Id.*

120. *Day*, 528 F.2d at 33 (quoting Article 17 of the Warsaw Convention).

121. *Id.* at 33.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

embarking.¹²⁶

The Third Circuit Court of Appeals in *Evangelinos* agreed with the result in *Day* but stated that its reasoning "differed slightly."¹²⁷ The court placed less weight upon carrier control over passengers than did the court in *Day*.¹²⁸ "While control remains at least equally as important as location and activity, it is an integral factor in evaluating both location and activity. A standard based primarily upon these three factors seems best calculated to effect the policies underlying article 17."¹²⁹ Thus, the Warsaw Convention applied.¹³⁰

However, in *Martinez Hernandez v. Air France*,¹³¹ a debarkation case, the First Circuit Court of Appeals applied the tripartite test of *Day* and found that the airline could not be held liable for a terrorist attack which occurred in the baggage pickup area.¹³² In *Martinez Hernandez*, three Japanese terrorists boarded a plane in Rome.¹³³ On arrival at Lod Airport in Israel, the plane stopped about one-third to one-half mile from the terminal building.¹³⁴ The passengers descended movable stairs to the ground and then rode a bus to the terminal.¹³⁵ They presented their passports for inspection to Israeli immigration officials and then went into the main baggage area of the terminal.¹³⁶ While the passengers were waiting for their baggage, three Japanese terrorists removed their luggage from the conveyor belt and opened fire upon persons in the baggage area, killing and wounding several.¹³⁷ The court stated that the passengers were "free agents roaming at will through the terminal" and that since the airline personnel had no control over them, the airline was not liable under the terms of the Warsaw Convention.¹³⁸

126. *Id.* at 34.

127. *Evangelinos v. Trans World Airlines Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152, 155 (3d Cir. 1977). The court also noted that there is a substantial interest in uniformity of decision in this area. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. 545 F.2d 279 (2d Cir. 1976).

132. *Id.*

133. *Id.* at 281.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* The District Court of Puerto Rico cited *MacDonald v. Air Canada*, as controlling precedent that the attack did not occur during disembarkation. *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971). In *MacDonald*, a passenger fell in the baggage pickup

IV. DISTRIBUTING THE COSTS - AN ALTERNATIVE TO ABSOLUTE LIABILITY

As has been previously noted, the Montreal Agreement imposes absolute liability on the air carrier in the event of an accident,¹³⁹ which has been held by courts to include terrorism¹⁴⁰ and hijacking.¹⁴¹ However, what has failed to be recognized is that terrorist acts are not ordinary "accidents" in the sense of airplane crashes, fires or pressure problems, but rather, are a product of the times and a "risk which accompanies international travel."¹⁴² As a result, a provision regarding terrorist attacks, both in the airport and in the air, should be encompassed in a supplemental provision to the Montreal Agreement.¹⁴³ This provision should provide an alternative to absolute liability and should redistribute the costs that the airline would ordinarily be subjected to under the present system.¹⁴⁴

A. THE SECURITY ISSUE

Under the present system, absolute liability is justified on the theory that for the time period when the passenger is under the airline's control, the airline could best prevent injuries from occurring.¹⁴⁵ Subsequently, the argument follows that the airline should

area. *Id.* at 1402. Similarly, the court in *In re Tel Aviv* found the "operation of disembarking terminated by the time the passenger had descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal." *In re Tel Aviv*, 405 F. Supp. 154, 156 (D.P.R. 1975).

139. See Warsaw Convention, *supra* note 8, art. 17.

140. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp 95 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d. Cir. 1977); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert denied*, *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

141. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973); *Rosman v. Trans World Airlines, Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (2d Dep't 1972), *rev'd*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

142. *Evangelinos*, 550 F.2d at 159 (Seitz, J., dissenting).

143. See Montreal Agreement, *supra* note 9, at 302.

144. The present system is the Warsaw Convention as modified by the Montreal Agreement. See *supra* notes 25-50 and accompanying text.

145. See Reukema, *supra* note 13, at 202. But see N.Y. Post, Jan. 17, 1987, at 12, col. 1. A mock hijacking was conducted by the Indian Government to test the airline security system. As a result, the Indian Government is in a better position to prevent injuries from occurring. But *c.f.* N.Y. Times, Apr. 3, 1986, at A9, col. 1. The Federal Aviation Administration (FAA) recognizes the need for increased security, and security technologists have devised a new method for "thwarting the smuggling of bombs aboard aircrafts." *Id.* In addition, there is an increase in different types of terrorist weapons, making security an even more difficult job. The plastic gun, for example, is being tested by the United States Army. *Id.* The small metal parts of such firearms and cartridges would produce X-ray images, but

provide tighter security to guard against the risk of terrorist attacks.¹⁴⁶ However, the question remains as to what standard an airline should be held to. El Al, the Israeli national airline, for example, has the tightest security of any airline in the Western world.¹⁴⁷ This security system has minimized incidents, but has not prevented them.¹⁴⁸ Since the 1960's, El Al has encountered sporadic ground attacks and limited effects of cargo hold explosions.¹⁴⁹

Briefly, El Al's security consists of devices under the airplane's wings to protect against surface to air missiles by altering their flight through electronic means.¹⁵⁰ Thus far, no other airline uses this device.¹⁵¹ Additionally, El Al conducts interrogation¹⁵² during baggage inspections. The baggage in the cargo hold goes through an initial search and then is placed inside armored altitude chambers from which air is pumped out to simulate the drop in atmospheric pressure as the plane gains altitude.¹⁵³ The purpose of this is to double check that the bags do not contain an explosive rigged to go off when the pressure drops.¹⁵⁴ Furthermore, the magnetometer test is often supplemented by frisking.¹⁵⁵

With respect to U.S. airline security, Pan Am has one of the most extensive security programs in the industry.¹⁵⁶ Pan Am screens passengers, employees, airport facilities, baggage and the aircraft with unrelenting thoroughness.¹⁵⁷ In addition, they have devised a plan called ALERT, in which the company works in close cooperation with security and military forces provided by the gov-

their outlines on fluoroscope would be difficult to identify. *Id.* Also note that the FAA adopted an amendment to the Federal Aviation Regulations on the Transportation of Federal Air Marshals, providing that Federal Air Marshals be used aboard high-risk flights. Amendment 108-2, 50 Fed. Reg. 27,924 (1985) (to be codified at 14 C.F.R. pt. 108).

146. Under the common-law rule, a carrier owes his passenger an extraordinary duty of care. See Comment, *supra* note 15, at 1157.

147. N.Y. Times, Dec. 28, 1985, at A4, col. 3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* There is a great deal of interrogation before one passes the baggage check point. Israeli security inquires into the destination and purpose of the passenger's trip. In one instance an interrogator called a young girl's stepmother to verify the reason why she was making the trip. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* It should be noted that in Israel, the Israeli Government has total control over security. However, they must defer their security to foreign governments in foreign airports. *Id.*

156. N.Y. Times, Sept. 6, 1986, at A6, col. 4.

157. *Id.*

ernments of the United States and other countries.¹⁵⁸

It should also be mentioned that security at foreign airports is the responsibility of the local government and not the airline.¹⁵⁹ Thus, for example, in the Hellenikon airport attack in Athens, Greece, the airport was guarded by the Greek Government and the preboarding physical searches were required and controlled by the Greek police.¹⁶⁰ It is doubtful that the airline could have prevented the terrorist attack.¹⁶¹ Therefore, it is questionable whether TWA should be held liable for the terrorist attack because the Greek Government failed in its security responsibilities.¹⁶²

B. THE DEEP POCKET APPROACH

It has been suggested by the court in *Day* that the air carrier pay for the passenger's injuries, because it would be preferable to allocate the costs of the terrorist attack among the entire population of air travelers, rather than to require the victim to bear the expense alone.¹⁶³ The court in *Day* assumes that the "corporate defendants have more than ample financial resources."¹⁶⁴ However, the pockets of international airlines may not be as deep as the

158. *Id.*

159. *Id.* As a result of this, the International Security and Development Act of 1985 was enacted. See International Security and Development Act of 1985, Pub. L. No. 99-83, § 551(b)(1), 99 Stat. 225 (1985). It requires the FAA to inspect security at all foreign airports where American travelers might be in jeopardy. *Id.* As a result of these federal security requirements, 185 foreign airports are subjected to airport security assessments. See SEMI-ANNUAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM, Jan. 1-June 30, 1986 (Nov. 1986). The assessments are conducted on a regularly scheduled basis with emphasis on those locations posing the greatest threat to civil aviation security. *Id.* at 6.

Airport security in Pakistan is extremely tight; passengers are searched two or three times by hand before boarding. N.Y. Times, Sept. 6, at A6, col. 1. In the hijacking of Pan Am Flight 73 on Sept. 4, 1986, the failure of airport security was not Pan Am's fault but rather that of the local government of Karachi. *Id.*; see also N.Y. Times, Sept. 5, 1986, at A3, cols 1, 2. Also note that security in Rome is handled by a mixed force of the regular national police and the *carabinieri*, the paramilitary police corps under the Defense Ministry. N.Y. Times, Apr. 3, 1986, at A8, col. 4.

Moreover, the U.S. Government has passed legislation which officially authorizes the executive branch to issue a travel advisory whenever a country after 90 days notice, fails to improve airport security to a level equivalent to, "at a minimum, the standards and appropriate recommended practices contained in Annex 17 to the ICAO Convention." See Note, *supra* note 6, at 272.

160. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977).

161. See Comment, *supra* note 15, at 1153.

162. *Id.*

163. *Day v. Trans World Airlines, Inc.*, 528 F.2d at 31 (2d Cir. 1975).

164. See Comment, *supra* note 15, at 1153.

court believes.¹⁶⁵ Hijacking has had an adverse financial effect on international air carriers.¹⁶⁶ Conceivably, such liability could halt flights to destinations where terrorist attacks are likely, in fear that liability to passengers would be a financial catastrophe.¹⁶⁷

Specific flights may even be avoided altogether.¹⁶⁸ For example, as a result of the 1985 terrorist attacks, Americans were changing their travel plans or staying home.¹⁶⁹ According to tourism officials, bookings to Greece,¹⁷⁰ Egypt,¹⁷¹ Israel,¹⁷² and Italy¹⁷³ have sharply decreased. In Britain, there has been a 30 percent decline since the Achille Lauro hijacking and airlines are offering free flights and excursions to boost business.¹⁷⁴

The courts have allocated the cost of terrorist attacks to the airlines without considering the equities of the burden. Even though the protection of the injured passenger is guaranteed, the requirement that airlines should have to pay the price for attacks which they are powerless to prevent could, inevitably, lead to a reduction of air service which is both damaging to the airline industry and to tourism.

C. GOVERNMENT LIABILITY

Airlines are said to be a source of "national pride and a method of world wide advertising; so much so that many countries maintain their national airlines with subsidies in the face of stag-

165. *Id.*

166. *Id.* In 1974, Pan Am lost over \$80 million. TWA lost international operations as well as did Japan Airlines, Alitalia, and Air France. *Id.* at 1155.

167. *Id.*

168. *Id.* Note also that a move was underway by the International Airline Pilots Association to boycott governments found responsible for terrorist acts. N.Y. Times, Apr. 3, 1986, at A8, col. 4. A country would be boycotted if it encouraged, financed, trained or harbored terrorists. *Id.*

169. *On Terrorism and Tourism: Americans Alter Travel Plans*, N.Y. Times, Apr. 2, 1986, at A1, col. 1. Travel agents reported a surge of interest in American and other Western Hemisphere destinations. *Id.* American Express reported increased bookings to Disneyland and other domestic attractions, as well as to South America. *Id.*

170. *Id.* at A13, col. 1. In 1985, Greece lost \$100 million in tourist revenue as a result of the TWA hijacking, and bookings in 1986 were expected to be half of that in 1985. *Id.*

171. The Egyptian tourist industry was in ruins after the 1985 terrorist incidents and the Achille Lauro hijacking. *Id.*

172. In 1986, half as many Americans traveled to Israel after Arab terrorists hijacked a TWA jet out of Athens. Until the terrorist attacks, American tourism had been running 25 percent ahead of previous years. However, despite the American tourist decline, El Al's traffic has remained level. This is due to their widely recognized "tough security stance." *Id.*

173. Hotel cancellations in Italy were 30 percent and growing. *Id.*

174. *Id.*

gering deficits that would bankrupt any other corporation."¹⁷⁵ This thought leads one to suggest that perhaps the individual governments should be liable to the injured passengers.

Government bodies control, own, and manage many of the world's major airports,¹⁷⁶ and very often in state-owned airports, security is provided by police agencies.¹⁷⁷ A victim of a terrorist attack "should be able to recover from the host government if the injuries are a result of the government's negligence in providing protection."¹⁷⁸ Additionally, governments are better able to spread the costs over the taxable population,¹⁷⁹ where there is a governmental interest in promoting tourism and stimulating foreign investment and commerce.¹⁸⁰

Moreover, a sense of responsibility would help create an interest in rigorous security measures at international airports.¹⁸¹ By imposing liability on international airlines for airport attacks, some nations may become lax in their airport security measures, thus holding the "wealthy" airlines responsible for preventing attacks.¹⁸² Therefore, if the terrorist was stopped at the gate by an adequate government security system, there would be no threat of a hijacking and no need to hold the airline liable for the injuries resulting from one.

175. Comment, *Warsaw Convention Limitations on Air Carrier Liability: A Critical View*, 17 INT'L AM. L. REV. 591 (1986).

176. *Id.* at 1163.

177. *Id.*

178. *Id.* However, this also brings up the question of sovereign immunity. See, e.g., Comment, *supra* note 15, at 1160. "To avoid offending other governments by unfair or abusive claims of sovereign immunity, nations often agree by treaty or contract to waive immunity from suit for their business enterprises which operate abroad." *Id.* at 1161. "This waiver allows airport attack victims to overcome the sovereign immunity barrier and sue the foreign government if that government's responsible agency did business in the United States." *Id.* at 1162. However, a waiver of sovereign immunity can be overridden by the State Department according to U.S. foreign affairs law. *Id.*

179. *Id.* at 1160. It could be argued that the costs of injuries associated with air travel should be borne by airline passengers alone. However, the benefits of air transportation extend to many others. The entire community benefits from the profits of tourist spending, airline supply, and foreign currency. *Id.*

180. *Id.* at 1156.

181. *Id.*; see also *supra* note 168 and accompanying text.

182. See Comment, *supra* note 15, at 1155; see also BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, ECONOMIC SANCTIONS TO COMBAT INTERNATIONAL TERRORISM, SPECIAL REP. No. 149 (July 1986). Economic sanctions may be used to pressure targeted states to change their policies against terrorism. *Id.* At the Tokyo economic summit, seven participating heads of government agreed in their Declaration on International Terrorism that: "Terrorism has no justification . . . [It] must be fought effectively through determined, tenacious, discreet and patient action combining national measures with international cooperation." *Id.*

D. COMPENSATION RELIEF - A PROPOSAL

Thus far, this Note has examined the applicability of the Warsaw Convention and Montreal Agreement in compensating victims of various aviation mishaps.¹⁸³ Particularly, the focus has been on terrorist attacks, and the difficulty the courts have encountered in interpreting Article 17 of the Warsaw Convention in relation to the injuries suffered as a result of these attacks.¹⁸⁴ Additionally, the most common arguments have been presented explaining why the airlines, and perhaps the governments, should be held liable to the victims.¹⁸⁵ However, at present there appears to be no adequate solution for alleviating the burden of total liability placed upon the airline. Thus, it is recommended that an international compensation fund be established to lessen the financial burden imposed upon the airline, which usually has no control over the terrorist attacks.¹⁸⁶

Aircraft hijackings and airport bombings are crimes of our time. However, they are not uncontrollable if those whose interests are affected - governments, carriers, and the traveling public - are willing to take the necessary measures no matter how inconvenient they may be.¹⁸⁷ The proposed fund is such a necessary measure.¹⁸⁸ Under a tripartite contribution fund, a percentage of the passenger's ticket, matched by the airline's donation and the government's allowance, would combine to compensate victims and to assist the airline.

As early as 1974, Justice Stevens lent support to this idea in his dissent in *Rosman v. Trans World Airlines, Inc.*¹⁸⁹ Justice Stevens stated that even as victims of crime are compensated by local governments, nations could, and perhaps should, create and con-

183. See *supra* notes 8-147 and accompanying text. Aviation mishaps include liability for personal injury, damage to cargo and baggage. See *supra* notes 31-33 and accompanying text.

184. See *supra* notes 51-147 and accompanying text.

185. These common arguments are that the airline should provide tighter security, that the airline can best afford the expense or the deep-pocket approach, and that the governments should be held liable. See *supra* notes 148-92 and accompanying text.

186. See *supra* notes 154-71 and accompanying text.

187. See Evans, *The Law and Aircraft Hijacking*, 1 SYRACUSE J. INT'L L. & COM. 273 (1973). The author suggests that rigorous security measures, not only searches, but fines for careless carriers or dilatory airports, can be effective. *Id.* As a result, it could be argued that this statement could be broadly construed to include an international compensation fund for victims of terrorist attacks.

188. See *supra* notes 51-192 and accompanying text.

189. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d at 385, 404, 314 N.E.2d 848, 859, 58 N.Y.S.2d 97 (1974) (Stevens, J., dissenting).

tribute to a fund which would compensate victims of hijackings.¹⁹⁰

Moreover, the need for such a fund can find support in the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986.¹⁹¹ The act provides compensation to government employees and members of their families who are victims of terrorism.¹⁹² Additionally, the act calls for strict security safeguards and for international cooperation for the maintenance of effective airport security.¹⁹³ Clearly, such international cooperation could be extended one step further in developing a new compensation system.

1. A Suggested Scheme

The New York Crime Victims Compensation Fund¹⁹⁴ and the International Fund for Oil Pollution Damage¹⁹⁵ are two existing funds which can serve as models for the proposed International Compensation Fund. The Crime Victims Compensation Fund was enacted in 1966 in reaction to a fatal stabbing of a passenger on a New York City subway.¹⁹⁶ This fund was an attempt to apply an ancient remedy to a contemporary problem.¹⁹⁷

The Victim's Compensation Fund is designed to give governmental financial assistance to victims of crime.¹⁹⁸ In order to grant the award, the board members must find that there was a crime committed, that the crime directly resulted in personal physical in-

190. *Id.*

191. Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Pub. L. No. 99-399, § 801, 100 Stat. 853 (1986).

192. *Id.* at 857. This act establishes a Diplomatic Security Service to perform security functions, including those of investigation, warrant, and arrest. It also authorizes funds for a five year program to upgrade or rebuild U.S. facilities abroad for security reasons, and compensation for government employees and members of their families who are victims of terrorism. *Id.*

193. *Id.*

194. N.Y. EXEC. LAW § 620 (McKinney 1982).

195. International Convention on the Establishment of an International Fund for Oil Pollution Damage, in 11 I.L.M. 284 (1972) [hereinafter Fund Convention].

196. See Weinstein, *Crime Victims Compensation*, 17 N.Y.L.F. 145 (1972). In October of 1965, Arthur Collins, a passenger on a New York City subway, attempted to eject a man who was annoying two women. The man resisted and Collins was stabbed to death in front of his wife and child. Collins was earning \$6,000 a year at the time of his death. His employer paid his family one month's salary and then hired his wife. As a Good Samaritan measure, the New York City Council awarded Mrs. Collins \$4,200 per year for the rest of her life. *Id.*

197. See *id.* Justice Weinstein notes that the subject of compensating victims of crimes can be traced back 4000 years to Hammurabi Code.

198. N.Y. EXEC. LAW § 620 (McKinney 1982). "[I]t is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime." *Id.*

jury or death of the victim, and that the crime was promptly reported to the authorities.¹⁹⁹ Additionally, the fund provides awards for loss of earnings or support, and reduces the amount of payments to the victim if the victim receives additional compensation from insurance, other public funds, from the person who committed the crime, or through emergency awards.²⁰⁰

Adapting this fund to the present proposal would be possible, since the situations are almost identical. The New York Victim's Compensation Fund compensates victims of a crime, and airline passengers are victims of terrorist hijackings. Moreover, the New York fund only allows compensation for bodily injury which is similar to the article 17 provision allowing recovery for "death or wounding or bodily injury."²⁰¹

The second model fund is the International Fund for Oil Pollution Damage. It was developed as a result of the "catastrophic grounding" of the supertanker, the *Torrey Canyon*, off the coast of England.²⁰² The shipwreck ruined the beaches and holiday resorts on both sides of the English Channel and destroyed animal, bird and marine life as well as lucrative fisheries.²⁰³ As a result, new international regimes of liability and compensation for damages caused by oil pollution on the high seas and in coastal areas were established.

One system was set up by two international conventions under the Intergovernmental Maritime Consultative Organization (IMCO).²⁰⁴ These conventions include the International Convention of Civil Liability for Oil Pollution Damage (CLC),²⁰⁵ and its partner, the International Convention on the Establishment of an International Fund for Oil Pollution Damage (Fund Convention).²⁰⁶ The CLC is based on strict vessel owner liability.²⁰⁷ If the claimant can show actual fault on the part of the owner, then the

199. *Id.* § 631.

200. *See id.* § 631(4).

201. *See* Warsaw Convention, *supra* note 8, art. 17.

202. *See* Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, 6 *NETH. Y.B. INT'L L.* 177, 198 (1985).

203. *Id.*

204. *See* Jacobsen, *Oil Pollution: The 1984 London Protocols and the AMOCO CADIZ*, 15 *J. MAR. L. & COM.* 467 (1984).

205. *See* International Convention on Civil Liability for Oil Pollution Damage, in 9 *I.L.M.* 45 (1970) [hereinafter CLC].

206. *See* Fund Convention, *supra* note 195.

207. *See* Jacobson, *supra* note 204, at 473. The owner can be found liable up to a specified monetary limit, regardless of fault. *Id.*

liability becomes unlimited.²⁰⁸ This convention also provides a limited number of affirmative defenses including "acts of war, acts of God, acts or omissions of third parties with intent to cause damage, the claimant's intentional or negligent acts or omissions, and governmental negligence regarding navigational aids."²⁰⁹

After the approval of the CLC, it was obvious that adequate compensation was not available for claimants in case of catastrophic spills.²¹⁰ Thus, the Fund Convention was adopted as a supplement to the CLC.²¹¹ The organized fund is comprised of an Assembly, a Secretariat headed by a Director, and an Executive Committee elected by the Assembly.²¹² Specifically, the financing of the Fund Convention is provided by mandatory contributions from the oil companies.²¹³ The contribution amounts are assessed on the basis of the number of tons of oil annually received at ports and terminals of the states subscribing to the Fund Convention.²¹⁴

The main purposes of the Fund Convention are to:

1. provide additional compensation for damages and clean-up costs over and above the shipowner's liability;
2. to indemnify the shipowners and their insurers for additional burdens that the Convention may impose on them
3. achieve a more equitable distribution of the costs of oil pollution damage among the interests participating in the transportation of oil and its derivatives; and
4. to compensate victims for injuries which may not be within the scope of harms covered by the Liability Convention.²¹⁵

Moreover, the Fund Convention has no obligation if it is shown that the pollution damage was a result of hostilities or war, or that the oil escaped from a state owned or operated ship used for gov-

208. *Id.* Liability is imposed only on the owner of a ship.

209. *Id.*

210. *Id.* at 474; see also Goldie, *supra* note 202, at 202. Goldie states that as a result of the increased number of oil spills, the CLC's maximum limits failed to reflect realistic sums for covering the costs of such disasters. *Id.* "They were not only insufficient in amount, but were inconsistent in certain areas 'including the scope of coverage.'" *Id.*

211. See Jacobson, *supra* note 204, at 474. The Fund Convention provided additional compensation for clean up costs and damages above the tanker owner's liability under the CLC. *Id.*

212. See Goldie, *supra* note 202, at 200. The Executive Committee is elected by the Assembly on the basis of geographical distribution and the quantity of oil received by the States so qualifying. *Id.*

213. *Id.* at 201.

214. See Jacobson, *supra* note 204, at 475.

215. *Id.* at 474.

ernment non-commercial service.²¹⁶ Secondly, the Fund Convention is not liable if the pollution damage was a result of negligence on the part of the claimant.²¹⁷

Another form of recovery, voluntary agreements, are devised by oil companies and tanker owners.²¹⁸ These voluntary liability agreements are the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP)²¹⁹ and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL).²²⁰ These agreements provide forms of recovery to national governments or individuals for clean-up costs in certain pollution cases.²²¹ However, even with these two supplementary agreements, slight inadequacies exist in this system.²²²

At a Diplomatic Conference in 1984, the Secretary General of IMCO requested that the participating States consider and adopt three draft proposals to revise the CLC and the Fund Convention.²²³ The main goal of the Protocols was to raise the liability limits of ships.²²⁴ Subsequently, on May 25, 1984, the CLC and Fund Convention Protocols were adopted.²²⁵

Once again, a comparison can be drawn between an oil spill catastrophe and a hijacking or terrorist attack which can be classified under the same level of severity. The CLC's liability limits are analogous to the Warsaw Convention and Montreal Agreement liability limitations, as well as absolute liability standard. The CLC has even taken a similar historical course to that of the Warsaw Convention in its attempts to raise liability limitations as viewed by the 1984 Conference. Moreover, the Fund Convention's organizational structure could be adopted so that an "Assembly" would allocate the Fund's resources. Such decisions would have to be

216. Goldie, *supra* note 202, at 201.

217. *Id.* at 201-02.

218. *See id.* at 202.

219. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, reprinted in 8 I.L.M. 497 (1969).

220. Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, reprinted in 10 I.L.M. 137 (1971).

221. *See* Jacobson, *supra* note 204, at 471-72.

222. *See id.* at 472; *see also* Goldie, *supra* note 202, at 202.

223. *See* Goldie, *supra* note 202, at 203. The three drafts were (1) a Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea; (2) a Protocol to Revise the International Convention on Civil Liability for Oil Pollution Damage; (3) a Protocol to Revise the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. *Id.*

224. *Id.*

225. *Id.*

made concerning the compensation to be paid to the victim, the increase cost of passenger tickets and the percentage of contribution from them, as well as the amount of airline contribution and of governmental support.

The New York Legislature, by enacting the Victim's Compensation Fund, recognized that many innocent people suffer personal physical injury or death as a result of criminal acts, and that there is a need for governmental financial assistance for such victims of crime. Similarly, the international community should recognize the need for a fund to assist the airlines in making compensation payments to passenger victims. Clearly, this is a small "price to pay" in order to maintain international travel in this age of terrorism.

V. CONCLUSION

In August of 1985, five of the U. S. citizens on TWA Flight 847, who were taken hostage in Lebanon by Shiite Moslems, filed lawsuits against the airline.²²⁶ These actions were commenced almost two months after the hostages' release.²²⁷ The reasons given for their delay were that there was sympathy among the hostages and potential jurors for the airline.²²⁸ In addition, the hostage families did not have the "moral indignation" to sue because they thought the TWA crew performed well.²²⁹ Moreover, research has shown that half of the potential jurors think that hostages should just forget about their ordeal and be happy they are alive.²³⁰

It is with this thought in mind that a change is needed in the present system. The courts for the most part have determined that mental injury is recoverable under Article 17 of the Warsaw Convention.²³¹ Additionally, the courts have defined embarking and disembarking.²³² However, they have failed to recognize that there is an unfair burden being placed upon the airline industry - a burden which only governments can control. While it is not proposed

226. Tarr, *Five Ex-Hostages Sue TWA; Some Settlements Reached*, NAT'L L.J., Sept. 2, 1985, at 6, col. 1. The lawsuits claimed that TWA should have kept the terrorists and their weapons off the plane. *Id.*

227. *Id.*

228. *Id.* TWA's outside counsel said that this suggested that the passengers were not angry with TWA. *Id.*

229. *Id.*

230. *Id.* But see *Darsch v. TWA*, 85-3234-MA, stating that the plaintiffs were more interested in suing to promote air travel safety than in collecting damages.

231. See *supra* notes 93-116 and accompanying text; see also Warsaw Convention, *supra* note 8.

232. See *supra* notes 117-47 and accompanying text.

that the present system be eliminated, a modification is needed in order to balance the costs between the airlines, the passengers, and the governments.

It has been suggested that the proposed Airline Liability Compensation Fund be modeled after the New York Victim's Compensation Fund and the International Fund for Oil Pollution Damage.²³³ The Airline Liability Compensation Fund would only apply to terrorist acts in the airport or on the aircraft, thus the action would still have been recoverable under Article 17 of the Warsaw Convention for the victim to receive compensation.²³⁴ Once it is determined that the airline is liable for the bodily injury, then the victim may recover a percentage from the compensation fund.²³⁵ The purposes of the fund should be clearly set forth and should both adequately compensate the victim passenger according to the terms of the Warsaw Convention while still alleviating the airline from the total financial burden of victim compensation.²³⁶

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233. See *supra* notes 207-39 and accompanying text.

234. See *supra* notes 51-54 and accompanying text.

235. Depending upon the agreed allocation scheme, the victim may recover all or a percentage from the fund. This would have to be decided at an international conference. See Fund Convention, *supra* note 195.

236. Note that as does the Warsaw Convention, this proposal would apply only for international flights. In addition, the reasons for the price increase should be made known to the public. Also note that a common insurance fund has been proposed as a recovery system for air accidents. See Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297, 318 (1982). "When an air accident occurs, full and just compensation can be derived from the fund." *Id.*