RECENT DECISIONS

AVIATION LAW—PERSONAL INJURY—THE WARSAW CONVENTION, AS MODIFIED BY THE MONTREAL AGREEMENT, ACTS TO ESTABLISH THE AIR CARRIER'S STRICT LIABILITY FOR A PASSENGER'S PERSONAL INJURY INCURRED DURING AN AIRCRAFT HIJACKING.

In September 1970, plaintiff, a New York resident, was a passenger on defendant's aircraft which was scheduled for a direct flight from Zurich, Switzerland, to New York. During that flight, the aircraft was commandeered by members of the Popular Front for the Liberation of Palestine and forced to land on a desert airstrip located some distance from Aman, Jordan, and the plaintiff and fellow passengers were detained for several days. Plaintiff's action for $75,000 for bodily injury and mental anguish allegedly suffered as a consequence of the hijacking was commenced in the Supreme Court of New York, New York County, but was removed to federal district court. Plaintiff's complaint alleged three causes of action: applicability of the Warsaw Convention,[1] as modified by the Montreal Agreement;[2] breach of contract of safe carriage; and negligence of defendant or its agents. Defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and for summary judgment, on the ground that the Warsaw Convention, as modified by the Montreal Agreement, was unavailable to the plaintiff since hijacking is not an "accident" within the intent of the Convention.[3] *Held*, motion denied. The Warsaw Convention, as modified by the Montreal Agreement, operates to establish the carrier's strict liability for passenger's personal injury incurred in circumstances of an aircraft hijacking. *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

The history of the evolution and application of the Warsaw Convention is a manifestation of international response to the multiplying complexities of air travel.[4] While acknowledging the Convention and its amplifying amendments

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[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, July 31, 1934, 49 Stat. 3000 et seq. (1934), T.S. No. 876 (effective October 12, 1934). [Hereinafter the Convention]

[2]C.A.B. Agreement No. 18900 (1966).

[3]Article 17 of the Convention establishes that 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." (Emphasis added.)

[4]In essence, the Convention establishes a presumption of liability on the part of the carrier for death or injury arising out of international air transportation, subject to certain defenses of due care (prior to 1966) and contributory negligence, and a concomitant limitation of liability, subject to certain exceptions of wilful misconduct and notice of applicability to a figure of about $8300.

The Hague Protocol of 1955 amended the Convention among signatory parties by doubling the liability limitation. This Protocol was never ratified by the United States.

Steadily mounting dissatisfaction with the inadequately compensatory liability limitation

and agreements,[5] American courts have confronted only selected articles of the Convention.[6] Prior to the principal case, the application of the Convention and its liability provision to a hijacking situation had been addressed in only one

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prompted the United States to formally present a Notice of Denunciation of the Convention to the Polish Government to become effective on May 15, 1966. Dep't State Press Release No. 268, 50 DEP'T STATE BULL. 923 (1965).

The United States position was further amplified by the assurance that the Notice of Denunciation would be withdrawn if there was reasonable prospect of an international agreement establishing the liability limitation for international air transportation at a figure of $100,000 per passenger or on uniform rules but without any liability limitation, and if, pending the effectiveness of any such international agreement, there was a provisional arrangement among the principal international airlines, waiving the limits of liability up to $75,000 per passenger. *See generally* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 510-11 (1967). *See also* Note, *The 1966 Carrier Agreements: The United States Retains the Warsaw Convention*, 7 VA. J. INT'L L. 140 (1966).

The Notice of Denunciation was withdrawn one day prior to its effective date upon the reaching of an agreement among the majority of international and domestic carriers. The agreement, acknowledged as one of interim character, provided that the carrier parties thereto waived the Article 20(1) defense of due care and raised the liability limitation to $75,000. C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966). In essence, the agreement, known as the Montreal Agreement, establishes the Warsaw Convention regime to be one of strict liability upon the carrier by means of an international inter-carrier contract. *Compare* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12A.02 (Rev. ed. 1971) *with* Kennelly, *Problems Regarding Aviation Litigation*, 20 DEPAUL L. REV. 436, 449 (1971).

Continued United States dissatisfaction with the liability limitation precipitated an effort to deal with the Warsaw Convention by formal amendment at Guatemala City in 1971. Officially entitled "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague of 28 September 1955," the Guatemala Protocol recognized the strict liability principle in the Montreal Agreement, raised the liability limitation to $100,000 with automatic increases, and provided for several additional amendments. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972). Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335 (1972). The inherent tendency of the United States Senate to avoid further commitment to any liability limitation system has delayed ratification of the Protocol. A supplemental plan, allowed by the Protocol, is currently being considered. Boyle, *The Warsaw Convention*, 8 FORUM 268, 278 (1972).

[5]*See, e.g.*, Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied* 392 U.S. 905 (1968).

[6]*Compare* Grey v. American Airlines, 95 F. Supp. 756 (S.D. N.Y. 1950) (Applicability of Convention to domestic flights, Art. 1) *with* Glenn v. Compania Cubana De Aviacion, S.A., 102 F. Supp. 631 (S.D. Fla. 1952) (Nationality of carrier, Art. 1). *Compare Berner* v. United Airlines, Inc., 3 App. Div.2d 9, 157 N.Y.S.2d 884 (1956) (Convention securing jurisdiction, Art. 1) *with* Nudo v. Sabena Belgian World Airlines, 207 F. Supp. 191 (E.D. Pa. 1962) (Convention precluding jurisdiction, Art. 1). *Compare* Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122 (2d Cir. 1951), *cert. denied* 341 U.S. 951 (1951) ("Wilful misconduct" explained, Art. 25) *with* KLM Royal Dutch Airlines Holland v. Turner, 292 F.2d 775 (D.C. Cir. 1961). *Compare* Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949) (Adequate delivery of ticket, Art. 3) *with* Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied* 382 U.S. 816 (1965) (Inadequate ticket delivery). *See* Lisa v. Alitalia-Linee Aeree Italiana, 370 F.2d 508 (2d Cir. 1966), *aff'd* by equally divided Supreme Court, 390 U.S. 455 (1968) (Ticket failed to give notice of applicability of Convention's liability limitation, Art. 3).

jurisdiction (*Herman v. Trans World Airlines, Inc.*[7] and *Rosman v. Trans World Airlines, Inc.*[8]). In the *Herman* case, the Supreme Court of New York held that Article 17 of the Warsaw Convention, as modified by the Montreal Agreement, providing for the air carrier's liability for damage sustained in the event of death or wounding of a passenger, "or any other bodily injury" suffered by a passenger, does not limit "death or wounding" to actual *physical* injury. The court held that a hijacking incident clearly established the liability of the carrier. Summary judgment was granted for the plaintiff.[9] On appeal, the lower court was reversed in a memorandum opinion which held that the precise meaning of the official French text of the Convention presented a triable issue of fact, thereby precluding summary judgment.[10]

The relative absence of judicial interpretation of Article 17 of the Convention[11] is not surprising in light of the facts that aircraft hijacking is a rather recent phenomenon,[12] and that few hijackings have resulted in personal injuries sufficient to raise the issue of Article 17. Nevertheless, the problem is one of increasing concern among the international aviation community, members of the Convention and of the bar as well.[13]

The fundamental problem faced by the court in *Husserl v. Swiss Air Transport Co.* [hereinafter *Husserl*] was that of interpretation of the Warsaw Convention, as modified by the Montreal Agreement.[14] Two separate interpretation problems were presented—the manifest issue of whether "accident" in Article 17 included the notion of hijacking so as to invoke the application of the Convention and, concomitantly, whether "wounding . . . or any other bodily injury" encompassed mental anguish and suffering absent actual bodily injury so that it would give rise to the defendant carrier's liability. The *Husserl* court directly resolved the "accident"-hijacking conundrum, but avoided the "bodily-injury"-mental suffering problem by finding a factual issue involved.[15]

In the absence of a definitive judicial interpretation of Article 17, a liberal construction of the "accident" terminology is acceptable.[16] A broad construction of the Convention is compelled by the necessity to maintain uniformity

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[7]69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972), *rev'd* 40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972). *See* Note, *Emotional Shock Suffered During Aerial Hijacking*, 36 MOD. L. REV. 303 (1973).

[8]40 App. Div.2d 963, 338 N.Y.S.2d 664 (1972).

[9]69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972).

[10]40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972).

[11]*See* note 3, *supra*.

[12]A. LOWENFELD, AVIATION LAW, VII-1 *passim* (1972).

[13]*See generally* Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339 (1972); McPherson, *Recent Developments in Aerial Hijacking: An Overview*, 6 AKRON L. REV. 119 (1973); E. MCWHINNEY, AERIAL PIRACY AND INTERNATIONAL LAW 16 (1971).

[14]351 F. Supp. 702, 706 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[15]*Id.* at 708.

[16]Chocktaw Nation of Indians v. United States, 318 U.S. 423 (1943). Shafter v. United States, 237 F. Supp. 152 (S.D. N.Y. 1967), *aff'd* 400 F.2d 584 (2d Cir. 1968), *cert. denied* 393 U.S. 1086 (1969).

among the member nations.[17] A recent Fifth Circuit case, *Block v. Compagnie Nationale Air France*[18] rather liberally found the Convention's liability limitation applicable to air charters, an issue not addressed in the Convention itself. It has even been suggested that a *strict* reading of the Convention would yield the same result as *Husserl*. The dissenting opinion in the *Herman* case argued that a strict interpretation of the Convention, as modified by the Montreal Agreement, would likewise present the conclusion that hijacking was an Article 17 "accident."[19]

Guidance for the interpretation of the Convention, specifically how hijacking relates to "accident" in Article 17, may be discerned from developments subsequent to the signing of the Convention.[20] While there is no indication that the contemporary idea of hijacking was discussed at Warsaw, the *travaux préparatoires* for the Montreal Conference in 1966 reveal that "sabotage" was discussed by the delegates with some concern.[21]The final agreement reached by the carriers clearly delineated the principle of strict liability,[22] without any reservation for sabotage or hijacking, nor was there any apparent inclination to distinguish between them. Post-Montreal Agreement commentary similarly avoids any distinction between hijacking and sabotage in terms of a carrier's liability.[23]

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[17]Block v. Compagnie Nationale Air France, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied* 392 U.S. 905 (1968). Comments of Mankiewicz, *Symposium on the Warsaw Convention*, 33 J. AIR L. & COM. 519, 645 (1967).

[18]386 F.2d 323 (5th Cir. 1967). *But see* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.05[1a] (1970 Supp.).

[19]Herman v. Trans World Airlines, Inc., 40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972) (Hopkins, Acting P.J., dissenting). Judge Hopkins expressed the opinion that since the Montreal Agreement, to which defendant was a party, was a private contract among carriers, it is not entitled to the same respect as a treaty, but should be construed as any other private contract, *i.e.*, ambiguities should be resolved against the authors and all inferences drawn in favor of the beneficiaries. 4 WILLISTON ON CONTRACTS §§ 621, 610 (B) (3d ed. 1957).

[20]*Cf.* Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971); *accord*, Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied* 392 U.S. 905 (1968). RESTATEMENT OF FOREIGN RELATIONS LAW §§ 149, 150. *Harvard Research in International Treaties*, 29 AM. J. INT'L. L. 937, 938 (Supp. 1935). *See* Art. 31(3)(a), Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 8 INT'L LEGAL MATERIALS 679 (1969), 63 AM. J. INT'L. L. 875 (1969). For the view that "accident" does *not* include acts committed by other passengers, see Milde, *The Problems of Liabilities in International Carriage by Air*, ACTA UNIVERSITATIS CAROLINAE 58 (Prague 1963).

[21]A proposed amendment to relieve the carrier of Article 17 liability if the damage was "the result of a wilful act by a third party intended to, and having the effect of, destroying the aircraft," was not discussed at the Conference. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 571 (1967).

[22]*See* note 4, *supra*.

[23]Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 352 (1972). Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421, 427 (1970). In *Husserl*, Judge Tyler apparently finds the inability or failure to distinguish between sabotage and hijacking to be significant, especially in view of the U.S. Dept. of State press releases accompanying the promulgation of C.A.B. Order No. E-23680; *see* U.S. Dep't State Press Release Nos. 110, 111, 54 DEP'T STATE BULL. 955, 956 (1966). 351 F. Supp. 702,707 (S.D. N.Y. 1972).

The *Husserl* opinion purports to examine the "subsequent actions" of the parties to facilitate construction of the Warsaw Convention in regard to "accident."[24] Thus Judge Tyler's analysis of the proceedings at Montreal demonstrates that the intention of the parties there was to include "sabotage," and impliedly "hijacking," within the meaning of "accident" in order to give rise to the carriers' strict liability.[25] Throughout the *Husserl* opinion, there is a subtle hesitancy to accord significance to subsequent developments in the post-Montreal time period. The increased number of hijacking incidents since 1966, the resultant public concern, as well as the myriad attempts to control the problem of hijacking would seem to suggest that an examination of the most recent effort to adapt the Warsaw Convention to developments in air travel, *i.e.*, the Guatemala Protocol of 1971, would be beneficial.[26] Judge Tyler's *Husserl* opinion avoids giving the Guatemala Protocol any significant impact in the interpretation of the Warsaw Convention in terms of Article 17, ostensibly because the Montreal Agreement is deemed sufficient and because the Guatemala Protocol has yet to be ratified by the United States Senate.[27] While the fact that the United States has yet to ratify the Protocol is significant, an examination of the Protocol as "subsequent action" to the Warsaw Convention would serve to buttress the *Husserl* conclusion that "accident" includes hijacking because hijacking was a particular concern in the preparations for the Protocol[28] and because the Protocol was signed by *parties* to the Convention, not by the affected carriers.[29] Thus the Protocol should receive more than a token appraisal.

The Guatemala Protocol formally amended Article 17 by removing the word "accident" from the text.[30] Judge Tyler's refusal to find the substitution of

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For the view that the guiding force behind the Guatemala Protocol, the International Civil Aviation Organization (ICAO), likewise perceived no distinction between hijacking and sabotage, *see* Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421, 438-39 (1970).

[24]351 F. Supp. 702, 707 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[25]*Id.*

[26]*See* note 4, *supra*.

[27]351 F. Supp. 702, 707 (S.D. N.Y. 1972). For an explanation of the Senate's failure to yet consider the Guatemala Protocol because of a combination of bureaucratic conservatism and Senate unwillingness to further commit the United States to a liability limitation, see Boyle, *The Warsaw Convention*, 8 FORUM 268, 278 (1972) (Boyle is a consultant to the Federal Aviation Administration as well as Deputy Director of the Office of International Aviation Affairs, Department of Transportation.).

[28]Guatemala Protocol signatories specifically rejected hijacking as a defense to the carriers' liability, generally because of United States insistence that only contributory negligence should so serve as such a defense. Boyle, *The Warsaw Convention*, 8 FORUM 268, 269 (1972). *See also* Letter from Jared G. Carter, Ass't Legal Advisor for Economic Affairs, U.S. Dep't of State, to the *DePaul Law Review*, May 10, 1971, in 20 DEPAUL L. REV. 473 (1971).

[29]*Compare* Herman v. Trans World Airlines, Inc., 40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972) (dissenting opinion) with J. Kennelly, *Problems Regarding Aviation Litigation*, 20 DEPAUL L. REV. 436, 449 (1971).

[30]Article 17 now establishes the carrier's liability for "damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger upon conditions only that the *event* which caused the death or injury took place on board the aircraft or in the

"event" for "accident" to be indicative of any expansion of liability[31] appears to be in accord with most authorities.[32] While the better reading of the impact of the Montreal Agreement does seem to include hijacking within the Article 17 "accident," an examination of the Guatemala Protocol clearly corroborates such a view and would make the authority of *Husserl* more impressive. To analyze the "subsequent action of the parties within the Warsaw Convention system"[33] without an examination of the influence of the Guatemala Protocol leaves an incomplete analysis of the Convention's evolution.

The *Husserl* opinion rather cavalierly treats another issue in connection with Article 17, *i.e.*, whether the Convention permits recovery for mental anguish and suffering absent bodily injury. The court failed to definitively dispose of the question because it found an unresolved factual issue was involved.[34] As in the question of the scope of "accident," there has been little judicial interpretation of this phrase of Article 17,[35] and the available authority is ambivalent.[36] Judge Tyler's *Husserl* opinion recognized the factual problem and adroitly avoided any definitive resolution.

The dissenting opinion of Judge Hopkins in *Herman*[37] presents a possible approach for dealing with both the issues of "accident" and mental suffering. He argues that the nature of the Montreal Agreement is that of a private contract among the carriers, albeit formally sanctioned by the CAB. Arguably such an agreement is not entitled to the status of a treaty, but should be construed as any other private contract. Since "accident" and "wounding" might be considered ambiguities, under contract law, such words should be

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course of any of the operations of embarking or disembarking." (Emphasis added.)

[31]351 F. Supp. 702, 707 n.5 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[32]Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 352 (1972). FitzGerald, *The Guatemala Protocol to Amend the Warsaw Convention*, 9 CAN. YEARBOOK INT'L L. 217, 220, 223-225 (1971). Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335, 337 (1972). *But see* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12B.03 [3] (Rev. ed. 1971).

[33]351 F. Supp. 702, 707 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[34]*Id.*

[35]Although not reported in the official report of the case, the ICAO report of American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949) includes the following: "Plaintiff-passenger is entitled to recover such sum of money as . . . will fairly and reasonably and adequately compensate her for the physical injuries and the disabilities which she has sustained by reason of this accident, together with the pain and suffering and anguish which she has endured, *as well as the mental and nervous shock and any and all permanent injuries which you might find either physically or to her mental and nervous system.*" Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 353 (1972).

[36]Although there was New York precedent for allowing recovery for mental suffering without physical contact (Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961)), the lower court in *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972) read the Convention itself as allowing for such a recovery. Note, *Emotional Shock Suffered During Aerial Hijackings*, 36 MOD. L. REV. 303, 305 (1973) indicates that English courts would similarly construe the Convention. However, the Appellate Division in *Herman* found the official French text of Article 17 to present a triable issue of fact, and so reversed. 40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972).

[37]40 App. Div.2d 850, 337 N.Y.S.2d 827 (1972) (dissenting opinion).

construed against the authors of the contract, the carriers, and all inferences should be drawn in favor of the beneficiaries, the passengers.[38] The *Husserl* opinion does not address this question, although there is some indication that the plaintiff's allegation of a breach of contract of safe carriage raised it.[39]

The holding in *Husserl* that the Warsaw Convention, as modified by the Montreal Agreement, established the carrier's strict liabiity for a passenger's personal injury incurred during an aircraft hijacking made it unnecessary for the court to address the plaintiff's allegation of negligence on the part of the carrier or its agents.

The impact of *Husserl* upon the carriers is uncertain. While the decision clearly holds the carrier liable for physical injury suffered during a hijacking, such a conclusion could well have been reached under any reading of the Warsaw Convention, as modified by the Montreal Agreement. As the *Husserl* opinion demonstrates, any other conclusion is clearly inconsistent with the underlying policy rationale of the Warsaw Convention in terms of risk and loss distribution.[40] By not clearly disposing of the plaintiff's contract cause of action, the carriers may well be liable for amounts in excess of the Warsaw Convention's limitations of $75,000 ($100,000 upon ratification of the Guatemala Protocol). The avoidance of a determination of the scope of "wounding" likewise raises the probability of further litigation concerning the construction of Article 17. As *Herman* and *Husserl* seem to imply, there is a distinct possibility that air carriers may find themselves liable for mental anguish and suffering alone incurred during a hijacking incident, particularly if the enactment of the Guatemala Protocol effects its proposed absolute liability principle. From the minor physical injury of *Herman* and the questionable physical injury of *Husserl*, it is but a short step to holding mental anguish alone compensable.

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[38]4 WILLISTON ON CONTRACTS, §§ 621, 610(B) (3d ed. 1957).

[39]351 F. Supp. 702, 704 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[40]*Id.*, at 707.