AVIATION LAW—PERSONAL INJURY—THE WARSAW CONVENTION, AS MODIFIED BY THE MONTREAL AGREEMENT, DOES COMPREHEND, AND THUS SUPPLIES THE EXCLUSIVE RELIEF FOR, MENTAL AND PSYCHOSOMATIC INJURIES.

On September 6, 1970, plaintiff Greta Husserl boarded defendant Swiss Air's direct flight from Zurich, Switzerland, to New York City. Shortly after takeoff an Arab terrorist group, the Popular Front for the Liberation of Palestine, hijacked the plane[1] to a deserted airstrip near Amman, Jordan, where the passengers were forced to remain aboard the aircraft for 24 hours "under circumstances less than ideal for physical or mental health."[2] After several additional days of detention in the city of Amman, the passengers were allowed to resume their journey, arriving in New York City, their original destination, on September 13, 1970. A suit to recover $75,000 for plaintiff's bodily injury and mental anguish allegedly caused by the hijacking[3] was commenced in the Supreme Court of New York, New York County, and subsequently removed to the United States District Court for the Southern District of New York.[4] Plaintiff proposed three theories for recovery: application of the Warsaw Convention,[5] as modified by the Montreal Agreement;[6] negligence of the carrier before embarkation; and breach of implied contractual duty.[7] Swiss Air moved for summary

[1] Four separate aircraft, with a total of over 600 passengers on board, were hijacked by the Popular Front on the same day to underscore its political grievances against Israel and her allies. N.Y. Times, Sept. 7, 1970, at 1, col. 1.

[2] Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). Judge Tyler's sympathetic description of the uncontested facts involved must be viewed in light of his "substantial doubt that plaintiff will be able to prove both injury and causation." *Id.* (footnote omitted).

[3] Neither the complaint nor plaintiff's deposition indicates that she was injured by impact of any physical object on her body. But she does contend that the *mental trauma of the hijacking experience*, apparently including to some extent the detention in Amman and the trip back to Zurich, caused various mental and psychosomatic injuries, at least some of which involve demonstrable, physiological manifestations.

Id. (emphasis added).

[4] Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 703 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973). The federal court has jurisdiction under diversity of citizenship. 28 U.S.C. § 1332 (1970).

[5] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *open for signature*, Oct. 12, 1929, 49 Stat. 3000 (1935), T.S. No. 876, 137 L.N.T.S. 11 (effective for United States Oct. 29, 1934) [hereinafter cited as Warsaw Convention]. The English text is also reprinted in 49 U.S.C.A. § 1502 note (1974).

[6] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192 (effective for United States Oct. 14, 1971) [hereinafter cited as Montreal Agreement]. The Montreal Agreement, a combination of treaty, contract, and administrative approval, is composed of four documents: (1) an agreement, C.A.B. Agreement No. 18,900; (2) a tariff; (3) a notice to passengers; and (4) the order of the C.A.B. approving the tariffs, C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966). The Agreement may also be found in L. KREINDLER, AVIATION ACCIDENT LAW § 12A.03-.06 (1971 ed.). *See* notes 12-14 *infra* and accompanying text.

[7] The Warsaw Convention does not provide a cause of action; it merely creates a presump-

judgment on the ground that a hijacking was not an "accident" as required under the Convention,[8] but the motion was denied.[9] Defendant subsequently sought summary judgment on the theory that the Warsaw Convention provided the exclusive relief available for an injury sustained in international air transportation, and its coverage did not include the mental injury allegedly suffered by plaintiff. *Held*, motion denied. The Warsaw Convention, as modified by the Montreal Agreement, does comprehend, and thus supplies the exclusive relief for, mental and psychosomatic injuries. *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975).

The drafters of the original Warsaw Convention had two major goals in mind: uniformity in the procedure for dealing with claims arising out of international air transportation and, more importantly, limitation of the potential liability of the carrier for injury caused by accidents.[10] As the airline industry developed, its need for financial protection diminished; steadily mounting dissatisfaction with the low ceiling on compensation for passenger injuries ultimately led the United States to present the Polish Government with a formal Notice of Denunciation of the Convention to become effective on May 15, 1966.[11] The Notice was withdrawn, however, one day prior to its effective date when an agreement was reached among the majority of international and domestic carriers. The generally acknowledged interim solution provided that the carrier parties both waived the defense of due care[12] and raised the liability limitation to $75,000.[13] The

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tion of liability if the applicable substantive law provides a claim for relief. Plaintiff's alternate theories rely upon tort and contract causes of action that she asserts arose before embarkation, thus allegedly not covered by the Convention. *See* notes 31 and 32 *infra* and accompanying text.

[8] Article 17 of the Warsaw 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." Warsaw Convention, *supra* note 5 (emphasis added).

[9] Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *see* 4 GA. J. INT'L & COMP. L. 481 (1974).

[10] *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-500 (1967).

[11] Dep't State Press Release No. 268, 53 DEP'T STATE BULL. 923 (1965). The position of the United States was amplified by the assurance that the Notice of Denunciation would be withdrawn if there was a reasonable chance for success of an international agreement establishing the liability limitation for international air transportation at a figure of $100,000 per passenger or establishing uniform rules without any liability limitation, and if, pending the effectiveness of any such international agreement, there was a provisional agreement among the principal international airlines waiving the limits of liability up to $75,000 per passenger. *Id.* at 924; *see* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 551-52 (1967); Note, *The 1966 Carrier Agreements: The United States Retains the Warsaw Convention*, 7 VA. J. INT'L L. 140 (1966).

[12] Before the Montreal Agreement, *supra* note 6, an injury comprehended under article 17 raised a presumption of the carrier's liability which could be overcome by proof that the carrier and its agents had taken all necessary measures to avoid the damage or that it was

provisions of this international intercarrier contract, known as the Montreal Agreement, thus effectively imposed strict liability upon the carrier in exchange for the continuation of a uniform limitation on compensatory liability.[14] Further efforts to amend the Warsaw Convention have been unsuccessful.[15]

American courts have consistently applied the Warsaw Convention, its amendments and agreements, but their experience with problems of construction has been limited to selected articles of the Convention.[16] Since victims of hijackings rarely suffer the physical impact injuries found in actual aircraft crashes, which are clearly compensable under the Convention, the relatively recent appearance of hijackings[17] has been accompanied by passenger lawsuits seeking recovery solely for mental anguish. After determining that hijacking falls within the coverage of the

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impossible for them to take such measures. *See generally* Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 350-56 (1972).

[13] *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 596-97 (1967). *See also* Note, *The 1966 Carrier Agreements: The United States Retains the Warsaw Convention*, 7 VA. J. INT'L L. 140 (1966).

[14] C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966); *see* note 6 *supra*.

[15] 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 on 28 September 1955," the Guatemala Protocol recognized the strict liability principle in the Montreal Agreement, *supra* note 6, 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).

[16] *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 Cubama De Aviacion, S.A., 102 F. Supp. 631 (S.D. Fla. 1952) (nationality of carrier, art. 1); 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); 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); 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* Lisi v. Alitalia-Linee Aeree Italiane, 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).

[17] From 1961 to November of 1972 there were 159 recorded hijackings of United States planes alone. N.Y. Times, Nov. 19, 1972, at 3, col. 1 (data reported by the Federal Aviation Administration). "All but a handful of these cases have occurred since 1967, when hijacking for pleasure, profit and political reasons first became a serious threat to air travellers." Comment, *Air Law—Warsaw Convention and Montreal Agreement*, 6 N.Y.U.J. INT'L L. & POL. 555 (1973).

Warsaw Convention, courts have been reluctant to find mental injuries as being comprehended by article 17.[18] While plaintiffs have been allowed to recover for the bodily injuries that resulted from mental anguish and the "emotional distress . . . directly precipitated by the bodily injury,"[19] mental harm has been uniformly held not compensable without precedent physical contact during the hijacking.[20] The New York Court of Appeals avoided recognition of mental harm alone by holding as follows:

> A claim for damages under article 17 [of the Warsaw Convention] arises "in the event of . . . bodily injury." The claim must therefore be predicated upon some objective identifiable injury to the body . . . .If the accident—the hijacking—caused severe fright, which in turn manifested itself in some objective "bodily injury," then we would conclude that the Convention's requirement of the causal connection is satisfied. For example, if plaintiff Herman's skin rash was caused or aggravated by the fright she experienced on board the aircraft, then she should be compensated for the rash and for the damages flowing from the rash. It follows that, if proved at trial, she should be compensated for *her mental anguish, suffered as a result of the rash* . . . .[21]

In an earlier opinion overruling a motion to dismiss made in the same court and case as that considered here, the court mentioned in passing that the wording of article 17 did not appear to include recovery for mental harm.[22] Only one case before an American court, *American Airlines v. Ulen*,[23] contains any language that would seem to allow recovery for mental harm alone, but its force is diminished by the fact that the relevant passage appears only in an unofficial report of the case.[24]

In a carefully structured examination of the problems involved with

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[18] *See* note 8 *supra*; notes 19-23 *infra* and accompanying text. Recovery for mental and emotional harm is in itself a new area of the law. *See* W. PROSSER, LAW OF TORTS, § 54 (4th ed. 1971).

[19] Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1158 (D.N.M. 1973).

[20] *See, e.g.*, Herman v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1158 (D.N.M. 1973). N.E.2d 848 (1974); Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.M. 1973); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[21] Herman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 399; 358 N.Y.S.2d 97, 109; 314 N.E.2d 848, 856 (1974) (emphasis added).

[22] Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

[23] 186 F.2d 529 (D.C. Cir. 1949).

[24] The following language does not appear in the reported opinion of the court cited above, but is reprinted in INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), CASES ON THE WARSAW CONVENTION (1929-1955), at 87, ICAO Doc. 36 (1955):

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

recovery for mental harm under the Warsaw Convention, the court in *Husserl v. Swiss Air Transport Co.*[25] first examines the extent of the "exclusive remedy" feature of the Warsaw Convention,[26] finding that the drafters explicitly made the conditions and limits of the Convention "exclusively applicable to certain actions for damages based on the enumerated types of injury."[27] Judge Tyler acknowledges that article 17 is the provision that deals with personal injuries other than those caused by the carrier's delay[28] and establishes the standard of liability. The official English translation[29] of article 17 reads as follows:

> The carrier shall be liable *for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered* by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[30]

These provisions are construed to mean that if the passenger's injury occurs as described in article 17,[31] any relief available, regardless of the particular cause of action used to "found"[32] the claim, would be subject to

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[25] 388 F. Supp. 1238 (S.D.N.Y. 1975).

[26] Article 24 of the Warsaw Convention, *supra* note 5, provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply. . . .

The court points out that article 17 is the only provision that deals with personal injuries other than delay. 388 F. Supp. at 1245.

[27] 388 F. Supp. at 1245.

[28] To avoid confusion the drafters placed all delay injuries, whether to persons or property, in a separate article. *See* Warsaw Convention, *supra* note 5, art. 19.

[29] The Warsaw Convention provides: "[t]his convention is drawn up in French in a single copy . . . ." Warsaw Convention, *supra* note 5, art. 36. Thus the only official version of article 17 reads as follows:

> Le transporteur est responsable du dommage survenue en cas *de mort, de blessure, ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a *causé* le dommage s'est produit à bord de l'áeronef ou au cours de toutes opérations d'embarquement et de débarquement.

Id. art. 17 (emphasis added).

[30] Warsaw Convention, *supra* note 5, art. 17 (official English translation) (emphasis added). The English translation begins at 49 Stat. 3014 (1935).

[31] The court construes "on board the aircraft" to include "all of the time between embarkation at the origin of a flight and disembarkation at a scheduled destination of a flight." This construction precludes any claim that since plaintiff's injuries were caused during the time she was in Amman, they therefore would fall outside the provisions of article 17. 388 F. Supp. at 1247.

[32] The use of the phrase "however founded" in article 17 is seen to serve two purposes: (1) "to accommodate all of the multifarious bases on which a claim might be founded, whether under code law or common law, whether under contract or tort," and (2) "to include all bases on which a claim seeking relief for an injury might be founded in any one country." 388 F. Supp. at 1245.

the conditions and limitations of the Warsaw Convention. Although the court agrees with defendant that the Convention therefore provides the exclusive relief for any of plaintiff Husserl's alternative "causes of action" that are based on a type of injury comprehended by the Convention,[33] it refuses to hold that a type of injury not within the coverage would be denied recovery. Instead, Judge Tyler concludes, injuries not comprehended by the Warsaw Convention "may give rise to causes of action not subject to any of the conditions or limits of the Warsaw system."[34]

This leaves the problem of deciding whether mental harm, the particular type of injury in question, falls within the strict but limited liability of the Convention, or outside the provisions of article 17 and therefore subject to none of the restrictions of the Warsaw Convention. In a specific analysis of the problems of interpreting the original French text of the Convention,[35] the court in *Husserl* rejects the Fifth Circuit's conclusion that "[t]he binding meaning of the terms [of the Warsaw Convention] is the French legal meaning."[36] Neither the French legal meaning of the words nor the French interpretation of the treaty is seen as binding;[37] indeed, they are both considered less important than the intention of the drafters, the understanding of the President and the Senate when they ratified and adhered to the Convention, the subsequent behavior of the signatories, and the construction most likely to effectuate the purposes of the Convention.[38] The Warsaw Convention, Judge Tyler states, is now part of the federal law and should be interpreted in light of that law. The French text is ignored in the absence of any "convincing evidence that the French legal meaning of the phrase would be at all elucidating."[39] The English text, when divided into component parts, is interpreted expansively; with reference to "bodily injury," the mind is seen as part of the body, and mental reactions are "merely more subtle and less well understood . . . ."[40] It is remarkable

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[33] "Any action, however, founded, seeking recovery for injuries comprehended by Article 17 and caused by an accident occurring in a place specified by Article 17 can be brought *only* subject to the conditions and limits established by the Warsaw system." *Id.* at 1246 (emphasis added).

[34] *Id.* Such injuries would be sued on subject to the substantive law and procedures of the forum without regard to the problems associated with article 17 and the ceiling on allowable recovery, but also without the benefit of the Convention's strict liability. Judge Tyler at no time gives an example of such an injury, but rather threatens the defendant with unlimited liability if on appeal it should be determined that mental and psychosomatic injuries are not comprehended by article 17.

[35] *See* note 29 *supra*.

[36] 388 F. Supp. at 1248-49, *citing* its earlier agreement in Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), *citing* Block v. Compagnie Nationale Air France, 386 F.2d 323, 330 (5th Cir. 1967).

[37] *See* notes 49-52 *infra* and accompanying text.

[38] 388 F. Supp. at 1249.

[39] *Id.*

[40] *Id.* at 1250. The *Husserl* court examines the words "death," "wounding" and "bodily injury" individually to conclude that the words "in English or in French can be construed to relate to emotional and mental injury." *Id.* Viewed as an entire phrase, "death, wounding or

that after listing the various factors which should have an effect on the interpretation of the wording, the court dismisses them all as inconclusive.[41] With surprising candor, the court admits that the arguments and approaches it discusses have not been very helpful other than to determine the purpose and intent of the drafters, and to "integrate a new rule of law with the relevant, pre-existing law."[42]

In the effort to determine the original intent of the treaty drafters, the court in *Husserl* considers several contending possibilities: the framers may merely have chosen inappropriate words to effect their intent; they may have intended to exclude all injuries for which the Convention did not provide; or, they may have thought that they had included all the injuries for which there were remedies at law.[43] Rather than assigning mental and psychosomatic injuries to the "unfortunate vacuum" of neglected injuries,[44] Judge Tyler chooses to find them embraced by the phrase "death or wounding . . . or any other bodily injury" contained in article 17:

> [I]t is logical to infer that the drafters either believed that the phrase at issue comprehended all personal injuries involving the organic functioning of a human being or neglected to consider injuries not comprehended by the phrase. If they intended the former, Article 17 should be interpreted to comprehend mental and psychosomatic injuries. If they had no specific intention, Article 17 should be interpreted in the manner most likely to effect the purposes of the Convention.[45]

The *Husserl* decision thus effectively creates a new rule of law by finding that mental and psychosomatic injuries are "colorably within the ambit" of the enumerated types based upon purpose and intent rather than specific wording of the Warsaw Convention.

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other bodily injury" seems to exclude mental harm, since it does not qualify as another form of bodily injury. This problem may also be avoided by omitting the word "other" from the translation of the French text, a technique employed by an article repeatedly cited by the *Husserl* court: Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYR. J. INT'L L. & COM. 345, 348 (1973).

[41] Also discarded as useless are: the marginal note "personal injuries" for article 17 in the original English translation of the Warsaw Convention, *supra* note 5; passenger ticket limitation of liability in "death and personal injuries," 351 F. Supp. at 708; and the substitution of "personal injuries" in article 17 of the Guatemala Protocol. Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 356-57 (1972). *See generally* Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335, 337 (1972); 8 N.Y.U.J. INT'L L. & POL. 87 (1975).

[42] 388 F. Supp. at 1249.

[43] All available evidence indicates that the participants at the Warsaw conferences and the Montreal Agreement discussions actually never thought of the possibility of suit for mental and emotional harm. *See* Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYR. J. INT'L L. COM. 345, 347-48 (1972); 8 N.Y.U.J. INT'L L. & POL. 87, 105 (1975).

[44] The court expresses the belief that the purpose of the Convention "could more appropriately be effected by construing the types of injury enumerated expansively to comprehend as many types of injury as possible for which there is normally legal redress," 388 F. Supp. at 1247 (footnote omitted).

[45] *Id.* at 1248.

Since the Convention does not create a cause of action,[46] a plaintiff must allege a legal theory which would allow him to recover for the injuries alleged. The court notes that, sitting as a federal court in New York, it is probable that at trial it will apply New York substantive law. Under New York law a cause of action for such injuries is recognized.[47] Thus, the only barriers remaining to recovery are the requirements that the plaintiff prove causation and actual injury.

Using the *Husserl* reasoning, a hijacking victim may recover for mental and psychosomatic injuries only in those states which recognize a cause of action for this type of injury, a qualification which greatly narrows the impact of the holding. The decision to include mental and emotional harm without an impact requirement within the coverage of the Warsaw Convention seems in line with the general growth of the law and the expanding protection afforded airline passengers.[48] Yet the method used by Judge Tyler is offensive to international law,[49] which suggests the use of either of two approaches to the interpretation of treaties. The "textual" school would concentrate upon the document in question and the ordinary meaning of the words used,[50] while the "contextualists" seek to determine the intent of the parties from the treaty itself and the other available materials.[51] Instead of placing primary emphasis on the official text of the Warsaw Convention as required under either approach, the *Husserl* court looks

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[46] Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); Komlos v. Compagnie Nationale Air France, 111 F. Supp 393 (S.D.N.Y. 1952), *rev'd* on other grounds, 209 F.2d 436 (2d Cir. 1953), *cert. denied* 348 U.S. 820 (1954).

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

[48] *See* Preston v. Hunting Air Transport Ltd., 1 Q.B. 454 (1956)(infant plaintiffs awarded damages for loss of the care of their mother); W. PROSSER, LAW OF TORTS § 54 (4th ed. 1971); 36 Mo. L. REV. 303, 305 (1973) (speculation that English courts would also allow recovery for emotional shock).

[49] Reliance upon the English translation may well lead to interpretations contrary to the text of the official version; despite Judge Tyler's assurances that the French text is not controlling, it is controlling between signatories to the treaty under international law. Todok v. Union State Bank, 281 U.S. 449, 454 (1929). Article 27 of the Vienna Convention on the Law of Treaties provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, *open for signature* May 23, 1969, UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 289, U.N. Doc. A/CONF.39/27 (1971) [hereinafter cited as Vienna Convention]. The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 140 (1965) clearly agrees:

> The duty of a state to give effect to the terms of an international agreement to which it is a party . . . is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement.

See also id. § 147 for a list of criteria to be used for interpretation.

[50] A textual approach, with some modification, is used in the Vienna Convention, *supra* note 49. The Vienna Convention may also be found in 8 INT'L LEGAL MAT'LS 679 (1969).

[51] The contextualists also put primary reliance upon the text, but allow the admission of evidence of all kinds. For a short, informative description of the different schools see 8 N.Y.U.J. INT'L L. & POL. 87, 92-97 (1975).

to the unofficial English translation as controlling federal *statutory* law; the criteria for interpreting an international convention, however, are the same whether the treaty is self-executing or enacted into domestic law by legislative approval.[52]

In an effort to speed the resolution of plaintiff Husserl's claim, Judge Tyler relied upon his own understanding of the purpose of the Warsaw Convention rather than the meaning of the original text, a method which is less likely to compel the concurrence of other courts. Far from disposing of the question of application of the Convention, *Husserl* invites future conflicting opinions based upon the official French text or even on another interpretation of the English translation. The decision thus detracts from the uniformity of application of the Convention, and, ultimately, its usefulness to both the air carriers and the victims of hijackings.

Lee Carter Mundell

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[52] Under the law of the United States, the rules stated in §§ 146 and 147 [criteria for interpretation of internationsl agreements] are applicable to the interpretation by a court of an international agreement for the purpose of determining its effect as domestic law . . . .

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 151 (1965).