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Thesis

**Recoverability of Mental Injuries in Carriage of Passengers by Air:
A Study on the Approaches of US and UK Courts**

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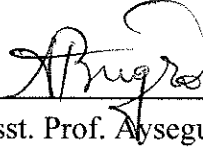
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Dedication

To my family for everything

THESIS TITLE: RECOVERABILITY OF MENTAL INJURIES IN CARRIAGE OF PASSENGERS BY AIR: A STUDY ON THE APPROACHES OF US AND UK COURTS


ALEXANDRA CHLOROU

Travelling by air is one of the most common ways of commuting in modern life which brings about many issues pertaining to passengers' rights such as recoverability of mental injury damages as well as physical injury damages. It is commonly accepted and supported by the legislative instruments as well as the case law of many jurisdictions and many international conventions that motor vehicle accident and rail accident victims can be compensated for their mental injuries. It is however the case that passengers travelling by air have consistently failed in their claims under the Warsaw and Montreal Conventions in respect of recoverability of mental injury damages.

This controversy is the reason behind this thesis which provides an analysis of the international conventions on carriage of passengers by air by reference to their preparatory works, examines the approach of the UK and US courts to the interpretation of the relevant convention provisions and attempts to shed light on the differences between earlier and later case law and the reasons thereof. This work also looks at the medical approach to post-traumatic stress disorder (PTSD) which is now accepted as a physical injury and gives an account of how the courts recently considered this type of injury in their decisions.

Keywords: Warsaw Convention, Montreal Convention, carriage of passengers by air, pure mental injuries, aviation, air carrier's liability, case law, United States, United Kingdom, Post-Traumatic Stress Disorder.

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**TEZ BAŞLIĞI: HAVA YOLUYLA YOLCU TAŞIMALARI VE MANEVİ
ZARAR: AMERİKA BİRLEŞİK DEVLETLERİ (ABD) VE İNGİLTERE
MAHKEMELERİNİN YAKLAŞIMLARI ÜZERİNE BİR ÇALIŞMA**

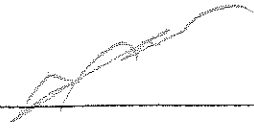
ALEXANDRA CHLOROU

Hava yoluyla yolculuk, modern yaşamda yolculuk etmenin en yaygın yollarından biridir ve yolcuların haklarına ilişkin olarak maddi ve manevi zararların talep edilebilirliği gibi pek çok sorunu beraberinde getirmiştir. Trafik kazaları veya demiryolu kazaları sonucunda manevi zarara uğrayan yolcuların tazmin edilmesi birçok mevzuat, yargı kararı ve uluslararası konvansiyon tahtında mümkün kılınmıştır. Bununla birlikte hava yoluyla seyahat eden yolcuların Varşova ve Montreal Konvansiyonları kapsamındaki manevi tazminat talepleri mahkemelerce istikrarlı bir şekilde reddedilmiştir.

Bu farklı yaklaşım bu tezin ortaya çıkmasının ardındaki neden olup tez, hava yoluyla yolcu taşımalarına ilişkin uluslararası konvansiyonları ilgili konvansiyonların hazırlık çalışmalarına atıfla incelemekte; Amerika Birleşik Devletleri ve İngiltere mahkemelerinin konvansiyonların ilgili hükümleri hakkındaki erken dönem ve yakın dönem kararları arasındaki farklılıklara ve bu farklılıkların nedenlerine ışık tutmaktadır. Tez aynı zamanda tıbbın travma sonrası stres bozukluğu (TSSB)'na bir fiziksel zarar olarak yaklaşımına ve yakın dönemde verilen kararların bu bozukluğa ilişkin zararları ele alışına değinmektedir.

Anahtar Kelimeler: Varşova Konvansiyonu, Montreal Konvansiyonu, hava yoluyla yolcu taşınması, maddi zarardan bağımsız manevi zarar, havacılık, hava taşıyanının sorumluluğu, karar hukuku, Amerika Birleşik Devletleri, İngiltere, Travma Sonrası Stres Bozukluğu (TSSB)

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ABSTRACT

Travelling by air is one of the most common ways of commuting in modern life. This brings about many issues pertaining to passengers' rights such as recoverability of mental injury damages as well as physical injury damages. It is commonly accepted and supported by the legislative instruments as well as the case law of many jurisdictions and international conventions that motor vehicle accident and rail accident victims can be compensated for their mental injuries. It is however the case that passengers travelling by air have consistently failed in their claims under the Warsaw and Montreal Conventions in respect of recoverability of mental injury damages.

This controversy is the reason behind this thesis which provides an analysis of the international conventions on carriage of passengers by air by reference to their preparatory works, examines the approach of the UK and US Courts to the interpretation of the relevant convention provisions and attempts to shed light on the differences between earlier and later case law. This work also looks at the medical approach to post-traumatic stress disorder (PTSD) which is now accepted as a physical injury and gives an account of how the Courts recently considered this type of injury in their decisions.

Keywords: Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention), Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), carriage of passengers by air, (pure mental injuries), aviation, air carrier's liability, case law, United States, United Kingdom, Post Traumatic Stress Disorder (PTSD).

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List of abbreviations

1. v. ----- *versus*
2. IATA ----- *International Air Transport Association*
3. WSC ----- *Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention)).*
4. MC ----- *Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)).*
5. TWA ----- *Trans World Airlines*
6. SGMW --- *Special Group of the Modernization and Consolidation of the 'Warsaw System*
7. ICAO --- *International Civil Aviation Organization*
8. FAA --- *Federal Airline Administration*
9. ECAC -- *European Civil Aviation Conference*

Legislation

1. *Convention for the Unification of Certain Rules for International Carriage by Air (the 'Montreal Convention') 1999*
2. *2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air*
3. *Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents*
4. *Edition 1 December 2010 Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999 Applicable with effect from 1 July 2006 CIT Edition*
5. *Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents*
6. *Vienna Convention on the law of treaties, concluded in Vienna on 23 May 1969*
7. *Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 October 1929 (The 'Warsaw Convention')*
8. *The Carriage by Air (Overseas Territories) Order 1967 (UK)*
9. *United Nations Convention on the Law of the Sea 1982*
10. *Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI)*
11. *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*
12. *The Carriage by Air Act (Application of Provisions) Order 2004 (UK)*
13. *Carriage by Air (Supplementary Provisions) Act 1962 (UK)*
14. *Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955 (The Hague Protocol 1955)*
15. *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, Signed at Guatemala City, on 8 March 1971 (1971 Guatemala City Protocol)

16. *Montreal Protocol No.4 to amend 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, Signed at Montreal on 25 September 1975*

17. *Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed in Guadalajara, on 18 September 1961*

18. *Article L6421-3 of the French Transport Code*

19. *Carriage by Air Act 1961*

Case Law

1. *Husserl v. Swiss Air Transport Company Ltd.*, 351 F. Supp. 702 S.D.N.Y 1972

2. *Eastern Airlines Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991

3. *Morris v KLM* [2001] 2 All ER (Comm) 153, [2001] EWCA Civ 790, [2001] 3 WLR 351, [2001] CLC 1460, [2002] QB 100, [2001] 3 All ER 126

4. *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7

5. *Abnett v. British Airways Plc. (Scotland)* 1996 SLT 529 House of Lords Opinions of the Lords of Appeal for Judgement in the Cause

6. *Carey v. United Airlines Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999

7. *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng* (No. 97-475) 122 F. 3d 99 (1999)

8. *Day v. Trans World Airlines Inc.* 528 F.2d 31 2d Cir. 1975

9. *Air France v. Saks* United States Supreme Court 470 U.S. 392 1985

10. *Weaver v. Delta Airlines, Inc.* U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999

11. *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994

12. *Terrafranca v. Virgin Atlantic Airways Ltd XYZ* United States Court of Appeals, Third Circuit. No. 97-5069 (1998)

13. *Ehrlich v. American Airlines Inc* United States Court of Appeals, Second Circuit Docket No. 02-9462 (2004)

14. *York Turturro v. Continental Airlines*, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. (2001)
15. *Palagonia v. Trans World Airlines Supreme Court Westchester County* 110 Misc. 2d 478 (1978)
16. *Rosman v. Trans World Airlines Court of Appeals of the State of New York* 34 N.Y. 2d 385 (1985)
17. *Block v. Compagnie Nationale Air France United States Court of Appeal Fifth Circuit* 386 F.2d 323 (1967)
18. *Monomeles Efetio Athinon* 4326/2015
19. *Ospina v. Trans World Airlines Inc Youssef Nos. 1134, 1155, Dockets 91-9245, 975 F. 2d 35 91-9247*
20. *In Re Air Crash at Little Rock, Ark., on 6/1/1999*, 118 F. Supp. 2d 916 E.D. Ark. 2000 U.S. District Court for the Eastern District of Arkansas - 118 F. Supp. 2d 916 (E.D. Ark. 2000)
21. *Richard Vanoni et al., Plaintiffs and Appellants, v. Western Airlines, Defendant and Respondent Civ. No. 23298. First Dist., Div. One. Jan. 18, 1967* 247 Cal. App. 2d 794.
22. *Croucher v. Worldwide Flight Services, Inc.*, 111 F. Supp. 2d 501 D.N.J. 2000 U.S. District Court for the District of New Jersey - 111 F. Supp. 2d 501 D.N.J. 2000 August 16, 2000.
23. *Bobian v. CSA Czech Airlines*, 232 F. Supp. 2d 319 D.N.J. 2002 U.S. District Court for the District of New Jersey - 232 F. Supp. 2d 319 D.N.J. 2002 October 30, 2002.
24. *Lee v. American Airlines INC United States Court of Appeals, Fifth Circuit No. 03-10178* (2004)
25. *Doe et al v. Etihad Airways, P.J.S.C., No. 5:2013cv14358 - Document 27* (E.D. Mich. 2015)
26. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M (1973)
27. *Plourde v. Sky Service F.B.O. Inc. (Skyservice) Number 500-09-016289* (2007)
28. *In Re Tel Aviv United States District Court, D. Puerto Rico* 405 F.Supp. 154 (D.P.R.1975, 439 F. 2d 1402 *MacDonald v. Air Canada*)
29. *American Airlines v. Ulen* 186 F.2d 529 D.C. Cir. (1949)
30. *Alvarez v. American Airlines Inc., S.D.N.Y. 1999 United States District Court, S.D. New York. No. 98 Civ. 1027 (MBM) S.D.N.Y. (1999)*

31. *Fishman v. Delta Air Lines INC. United States Court of Appeals, Second Circuit Nos. 1818, 2038, Dockets 96-9345, 96-9457 (1998)*
32. *Grey v. American Airlines United States Court of Appeal Second Circuit 227 F.2d 282 (1955)*
33. *Longo v. Air France, 1996 WL 866124 S.D.N.Y. (1996)*
34. *Kotsambasis v. Singapore Airlines, 148 ALR 498 (42 NSWLR 110).*
35. *Zicherman v. Korean Air Lines Co. 516 U.S. 217 1996*
36. *Ligeti v. British Airways PLC. S.D.N.Y. 2001 United States District Court, S. D. New York 00 CIV.2936 (FM) S.D.N.Y (2001)*
37. *Seshadri v. British Airways PLC et al, No. 3:2014cv00833 - Document 18 S.D. Cal. 2014*
38. *Bourhill v. Young United Kingdom House of Lords Decisions HL/PO/JU/4/3/971*
39. *Page v. Smith United Kingdom House of Lords Decisions HL/PO/JU/18/2558*
40. *R v. Chan –Fook England and Wales Court of Appeal (Criminal Division) Decisions Neutral Citation Number: [1993] EWCA Crim 1No: 92/1703/Y2*
41. *Burstow R v. Ireland, R v. [1997] UKHL 34*
42. *Tribunal de Grande Instance de Paris, Chambre 03, 11 mai 1984 1042217 CL24; CL25; CL26 Référence INPI: M19840619*
43. *Cass. soc. 27 janvier 1961, Bull. civ. 1961, IV, n° 134*
44. *Greek Cassation (Supreme) Court, Areios Pagos, 1369/2007, 39/2006 / Appeal Court of Athens, 1531/2006, Business & Company Law Review [a Greek law journal] 2011, 936*
45. *Multimember First Instance Court of Athens 7658/2009, 2229/2010; and County Court of Thessalia 7757/2001*
46. *Monomeles Protodikio Athinon 452/1998 (MIIP AΘ 452/1998 (2937230)). Only member Court of First Instance Athens*
47. *Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 3d Cir. 1977*
48. *Civ. 2, 9 décembre 2004, n° de pourvoi: 03-15962*
49. *Chendrimada v. Air-India, U.S. District Court for the Southern District of New York - 802 F. Supp. 1089 (S.D.N.Y. 1992)*

INTRODUCTION

This thesis project examines the role of the US, UK and EU case law in international aviation law and more specifically in the matter of recovery for pure mental injuries. The reason behind this limitation is, as for the US case law, its leading role in international aviation law, not only in the field of pure mental injuries but generally in aviation law. Furthermore, most of the relevant claims are raised in the US as a big number of the major air carriers are based on the US. The choice of the UK law was made as an opposition to the US law as well as because the cases mentioned in the relevant chapter have the same weight as the US cases. Although both are based on common law, differences are detected on their way of approach. Last, France and Greece were chosen as European Union jurisdictions to be examined as that would give a different perspective on this project, in whether certain civil law systems approach the pure mental injuries matter in separate ways or not.

One of the objectives of this project is to examine the process of recovery of pure mental injuries through the history of international aviation law. The first attempt towards the unification of rules on carriage of goods and passengers by air was in 1925 in Paris in the First International Conference of Air Law where the participants aimed for the unification of air law in an international level. The first attempt was fruitless as the participants did not agree on the main issues and introduced CITEJA “Comite International Technique d’Experts Juridiques Aeriens”, a body of legal experts in order to prepare a draft which was presented in the Second International Conference of Air Law in 1929 in Warsaw. The draft prepared by CITEJA included unification of state laws, liability of the carrier, rules about the documents of carriage and their connection to liability, rules of liability and its limitation and rules regarding jurisdiction. This later becomes the first official document of unified air law i.e. the first international Convention that is the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (hereinafter ‘Warsaw Convention’ or ‘WSC’).

It was signed by the majority of the states and it is still in force although several amendments were made through the years and all of the amendments are now known as the ‘Warsaw System’. More amendments were made at a later stage to WSC which resulted in a new International Convention, the “Convention for the Unification of Certain Rules for International Carriage by Air”, signed at Montreal on 28 May 1999” (hereinafter ‘Montreal Convention’ or ‘MC’). As it can be seen in the analysis of its drafting history below, there were a lot of voices asking recovery for pure mental injuries to be included in the text of the new Convention. Nonetheless, it was decided that it was still no time for that type of change thus the older version maintained.

Back in the 1920's the concept of pure mental injuries as unknown for a lot of the signatory parties and therefore it was not included in the Warsaw Convention. As the years passed by and with a series of events and changes taking place in the aviation industry, this issue reemerged. The 'explosion' of this kind of cases was made during the 1970's as a result of hijacking events around the world although there was a number of cases before that, mainly in cases where there were mechanical problems on air¹. A number of plaintiff in these cases claimed not only physical injuries but mental as well. As this was a new kind of claim, Courts were uncertain on how to react and what type of recovery to award, if any, thus complications arose. The first chapter starts with an analysis of the drafting of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (hereinafter WSC), analysis of the preparatory work of the Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter MC) and the reason this analysis is crucial for the present thesis. The way they were construed, arguments and counterarguments during their drafting period and their effect in the recovery of pure mental injuries are few of the matters discussed.

It should be noted that the prevailing view, even up to these days, is that pure mental injuries are not compensable (*Floyd*², *Jack*³, *Crouche*⁴, *Bobian*⁵, *Carey*⁶, *Longo*⁷, *Ospina*⁸, *Turturro*⁹, *Fishman*¹⁰, *Alvarez*¹¹, *Ehrlich*¹², and *Doe*¹³). Although there are some exceptions where pure mental injuries or mental injuries accompanying a physical injury were allowed (*Husserl*¹⁴, *Roselawn*¹⁵, *Zicherman*¹⁶, *Rosman*¹⁷,

¹ *Richard Vanoni et al., Plaintiffs and Appellants, v. Western Airlines, Defendant and Respondent Civ. No. 23298. First Dist., Div. One. Jan. 18, 1967. 247 Cal. App. 2d 794.*

² *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530,534 1991.*

³ *Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 N.D. Cal. 1994.*

⁴ *Croucher v. Worldwide Flight Services, Inc., 111 F. Supp. 2d 501 D.N.J. 2000 U.S. District Court for the District of New Jersey - 111 F. Supp. 2d 501 D.N.J. 200 August 16, 2000.*

⁵ *Bobian v. CSA Czech Airlines, 232 F. Supp. 2d 319 D.N.J. 2002 U.S. District Court for the District of New Jersey - 232 F. Supp. 2d 319 D.N.J. 2002 October 30, 2002.*

⁶ *Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165 D. Or. 1999 U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 D. Or. 1999 December 8, 1999.*

⁷ *Longo v. Air France, 1996 WL 866124 S.D.N.Y. 1999.*

⁸ *Ospina v. Trans World Airlines Inc Youssef Nos. 1134, 975 F. 2d 35 1155, Dockets 91-9245, 91-9247. United States Court of Appeals, Second Circuit.*

⁹ *Turturro v. Continental Airlines, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. 2001.*

¹⁰ *Circuit Fishman v. Delta Airlines Inc. United States Court of Appeals, Second Nos. 1818, 2038, Dockets 96-9345, 96-9457. Decided: January 05, 1998.*

¹¹ *Alvarez v. American Airlines, Inc., S.D.N.Y. United States District Court, S.D. New York. No. 98 Civ. 1027 (MBM) S.D.N.Y. Aug. 30, 1999.*

¹² *Ehrlich v. American Airlines Inc United States Court of Appeals, Second Circuit Docket No. 02-9462 Decided: March 08, 2004 .*

¹³ *Doe et al v. Etihad Airways, P.J.S.C., No. 5:2013cv14358 - Document 27 E.D. Mich. 2015.*

¹⁴ *Husserl v. Swiss Air Transport Company, Ltd., 351 F.Supp. 702 S.D.N.Y 197.*

¹⁵ *In Re Aircrash Disaster Near Roselawn, Indiana, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.*

¹⁶ *Zicherman v. Korean Air Lines Co. 516 U.S. 217 1996.*

¹⁷ *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

*Palagonia*¹⁸, *Burnett*¹⁹, *Little Rock*²⁰). The causal link with a physical injury seem to be a safer option although it is not always possible to have suffered a physical injury or it can be minor, thus not compensable.

It is evident through this thesis that the primary way of thinking in all different jurisdictions affected by WSC and the relevant discussions and interpretations, that recovery of pure mental injuries are allowed where mental injuries are accompanied by bodily injuries or mental injuries result in physical manifestations thereof. After the drafting of MC there was hope that Article 17 will cover pure mental injuries as well as the discussions and controversies around this matter were a lot. There were a few cases allowing pure mental injuries even before MC but this tense did not continue its signing. The pure mental injuries' claims changed content after the recognition of the Post Traumatic Stress Disorder (PTSD) which can be seen nowadays as a type of bodily injury by medical experts which may accordingly provide a ground for a claim for such injury.

Against this background, this thesis examines the history of pure mental injuries in the international aviation industry and showcases the progress and the changes made /not made through the years, based on case law from the USA, UK and Europe as well as international Conventions and related scholarly materials. It also tries to explain why in a lot of instances pure mental injuries were not covered. It discusses the changes made in the abovementioned Conventions in order to include pure mental injuries and how courts, scholars and states responded. Furthermore, it makes an attempt to approach the issue of quantification of pure mental injuries as it can be useful in the discussion of a future Convention covering for them as well. The aim of this thesis to present all the different view regarding the issue of pure mental injuries and whether they should be awarded or not and provide the relevant evidence and opinions about understanding how these injuries work and how to incorporate them in Courts' practice.

With the above aims, the first chapter starts with an analysis of the drafting of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (hereinafter 'Warsaw Convention' or 'WSC') and an analysis of the preparatory work of the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (hereinafter 'Montreal Convention' or 'MC').and the reason this analysis is crucial for the present thesis. The way they were constructed, arguments and counterarguments during their drafting period and their effect in the recovery of pure mental injuries are some of the matters discussed.

¹⁸ *Palagonia v. Trans World Airlines Supreme Court Westchester County* 110 Misc. 2d 478 1978.

¹⁹ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

²⁰ *In Re Air Crash at Little Rock, Ark.*, on 6/1/1999, 118 F. Supp. 2d 916 E.D. Ark. 2000 U.S. District Court for the Eastern District of Arkansas 118 F. Supp. 2d 916 E.D. Ark. 2000 October 27, 2000.

The second chapter begins with the definition of ‘accident’, the Courts’ views regarding the meaning of ‘accident’ in a nutshell and the prevailing view on mental injuries. It is about how the Courts started interpreting Article 17 through case law, mostly in the US. Then definition of injuries as stated in Article 17 including the cover of pure mental injuries follows, as well as definition of the term accident in order to clarify the ground upon which the Courts based their decisions.

In the third chapter the approach of the US Courts is being discussed, mainly through case law. Cases are divided into 4 different categories, the ones that allow recovery for pure mental injuries, the ones that disallow this type of recovery, the ones allowing recovery for physical manifestations of mental injuries and the ones allowing recovery for mental manifestations of physical injuries. The cases are also classified chronologically as well. The landmark case for the US law, *Floyd*²¹ is being assessed along with the progress, if any, made after this case. Moreover, the difficulties in allowing pure mental injuries faced by the Courts, these being the lack of evidence and the issue of quantification are also examined. Another important part of this chapter is the findings on Post Traumatic Stress Disorder (PTSD) and how it has affected/affects the approach of the Courts regarding the recovery of pure mental injuries. Medical developments regarding Post Traumatic Stress Disorder (PTSD) and its connection to the law of pure mental injuries is also discussed as well as the very important issue of body and mind dualism and its counterarguments.

The fourth chapter is about the UK law and discusses one of the major cases in the international air law field, the *King* case. This case is thoroughly analysed, providing a view of the UK Courts’ approach on pure mental injuries.

The fifth chapter is about examples from Greek and French case law and how these laws differ from the approach to the recoverability of pure mental injuries in US and UK.

²¹ *Air France v. Saks United States Supreme Court 470 U.S. 392, 397 1985 / Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530,534 1991.*

CHAPTER 1

Analysis of the Warsaw and Montreal Conventions

a. Overview

This chapter begins with the drafting history of the WC and the reasons behind its creation. It discusses why there was a need for an international air convention and its effects later on in the industry. Also, MC and its preparatory work is fully examined as it is very important to understand the processes through which the new Article 17 was formed and the reasons behind this decision. The chapter ends with all the discussions regarding MC and WSC and the reasons why pure mental injuries were not included in the MC.

It is noteworthy that in the present thesis the following phrases are used interchangeably: mental injuries, psychic injuries, emotional injuries, pure mental injuries, and mental anguish. Pure mental injuries are considered that do not have an obvious effect on the body. It can encompass the meaning of mental injuries as stated under tort law.

1. Warsaw Convention 1929-First attempt of unifying international carriage by air and the route towards Montreal Convention

History of WSC

The first Convention governing the above mentioned issues is the Warsaw Convention of 1929. The Warsaw Convention of 1929 that came into force in 1933, was created in order to protect the newfound industry of air travelling. WSC aimed to create a uniform international code for all contracting States without them having the need to enforce their domestic laws in a contingent failure of an air carriage. It introduced the monetary limits for the air carriers in any case of accident on board, the paper based ticket and set certain conditions regarding jurisdiction of lawsuits deriving from an incident on board of an international flight. WSC drafters chose the narrower draft regarding the liability of the carrier, presented by CITEJA and not the

draft developed in the Paris Protocol Conference held in 1925.²² Dieter Goedhuis, the official Reporter of WSC supported that the drafters' intention was that air carriers were not to be burdened with strict liability for the injuries of the passengers.²³

Scope of Application

In Article 1 of the WSC which presents the scope of the Convention, it is stated that in order for the WSC to cover a carriage by air the following conditions should be met: international carriage i.e. carriage from one place to another between States that have signed the Convention, the consent of the passenger to be carried on a particular flight, on a an aircraft, with reward (the carrier has to make some profit out of the carriage), agreement between the carrier and the passenger for the carriage. More than one carrier can perform the carriage without interrupting it. In paragraph 2 of Article 1 it is also mentioned "For the purposes of this Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention."

It should be noted that it is not necessary that the passenger himself has done the arrangement of the carriage. The important thing is that there is agreement on his behalf for the specific flight. Also, the reward of the carrier is not defined in the WSC. The key element is for the carrier to make profit. It is not important if the passenger makes the payment himself, a third party can pay for the carriage²⁴. Another issue that should be noted is that WSC may cover contracts that do not fall under the scope of Article 1 if the contracting parties to carriage agree between them to use it regardless. In the UK for example²⁵, WSC is adopted and used for non-international air carriage contracts too. This Convention provides protection to the air carriers over the

²² Alexa West 'Defining Accidents in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention's Accident Requirement [notes]' Fordham Law Review, Vol. 85, Issue 3 December 2016, 85 Fordham L. Rev. 1465.

²³ Dieter Goedhuis, National Air legislations and the Warsaw Convention 1937, 256.

²⁴ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention) Chapter I - Scope - Definitions Article 1.

²⁵ Carriage by Air Act, 1961 9 & 10 ELrz. 2 CH. 27 Section 1/ The Carriage By Air (Overseas Territories) Order 1967 Article 1/Clarke *Contracts of Carriage by Air* Chapter 2 Second Edition Lloyd's List 2002, 7.

passengers sets certain monetary limits for compensations provided under the Convention and establishes the limits of liability for the carriers. WSC has exclusive application based on Art. 32 of the Convention where it is mentioned that “Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, arbitration clauses are allowed for the carriage of goods, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.”²⁶. Thus where it applies the claimant can only rely on it and not on any domestic laws as well as the carrier cannot limit its liability under the WSC rules.²⁷

When it comes to the carrier’s liability Art. 17 WSC states as follows: “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.”²⁸ Furthermore, in a combination of Articles 20, 21, 22, 23 of WSC we can see that the carrier is not liable if he and his agents can prove they acted their best to avoid any damage or that it was impossible to take such measures. If the carrier can prove that the passenger demonstrated negligent behaviour that contributed to his damage, the carrier then can be fully exonerated. The limit of each passenger is 125,000 francs. Finally, any provision that may relieve the carrier from his liability for any reason not stated in WSC as well as setting lower monetary limits shall be considered null and void.²⁹

Interpretation of WSC – Tools and methods

WSC was drafted as an international Convention in 1929 thus the choice of the narrower language; it showcases the parties’ intentions to limit the types of injuries as at that time the concept of mental injuries was not that widespread. It is a logical assumption that pure mental injuries were not intended to be covered under Article 17, as compensation was not available under many common and civil law countries in

²⁶ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention) Chapter I - Scope - Definitions 32.

²⁷ *United Nations Conference on Trade and Development- Carriage of Goods by Air: A Guide to the International Legal Framework*, Report by the UNCTAD Secretariat UNCTAD/SDTE/TLB/2006/1 27 June 2006 .

²⁸ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention) Article 17.

²⁹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention) Articles 20, 21, 22, 23.

1929³⁰. Drafters of the WSC were aiming to cover two things when they were preparing the Convention.³¹ The first one was the uniformity in the procedure when claims arise out of international air transport. The second one was the limitation of the potential liability of the carrier for injury caused by an accident on board. There is no specific clue regarding their intentions on whether mental injuries are included as well.

Interpretation of international treaties is difficult as they are translated in many languages in order to cover the variations detected in several legal systems around the world. It is not always easy to correspond 100% to the meaning of each expression from one language to another, maybe because there are differences in the legal systems and it is hard to find the phrase that reflects the correct meaning as it might not exist at all and it has to be construed. Of course these processes mean that there is going to be a gap in the same phrase from the same international convention, in a different language.

This gap hinders the uniform application of the above mentioned international convention and up to some point makes the international convention null. Several rules have been applied in order to fix this problem like the general rules applied by the Vienna Convention mentioned above. When it comes to WSC the issue is the unofficial English version of the treaty, used by the US Courts which is not ratified by the rest of the parties and has created two diametrically opposite theories, first one being that French version is binding as it is the official language and the second is that the English translation should be applied, as it is more appropriate for the common law system which exists in the US. Under certain circumstances drafters designedly create vague terminology in order to for interpreters in other languages to be able to translate each term in their own language and make it fit and also to be open for future wider interpretations as there is always progress in these areas.³²

In order to interpret a Convention, the rules set in the Vienna Conventions on the Law of Treaties³³ should be followed. This method was also used by different Courts in order to decide whether Article 17 covers mental injuries.³⁴ Although it is not ratified by the US it is still used as a guide to interpret other international treaties in question. Article 31.1 of the Vienna Convention provides that “A treaty shall be interpreted in

³⁰ John F. Easton & Jennifer E. Trock & Kent A. Radford. *Journal of Air Law and Commerce* Volume 68 ‘*Post Traumatic Lesion Corporelle: A Continuum of Bodily Injury under the Warsaw Convention*’ 2003 665.

³¹ Mundell Lee Carter ‘*Aviation Law-Personal Injury-The WSC as modified by the Montreal Agreement, Does Comprehend, and thus supplies the exclusive relief for mental and psychosomatic injuries*’ Vol. 6, Issue 1 Winter 1976, *The Georgia Journal of International and Comparative Law*, University of Georgia School of Law 1970, 339.

³² Stanculescu Dana ‘*Recovery for Mental Harm under Article 17 of the Warsaw Convention: An Interpretation of Lesion Corporelle [notes]*’ *Hastings International and Comparative Law Review*, Vol. 8, Issue 3 Spring 1985, 339.

³³ *Multilateral Vienna Convention on the law of treaties (with annex) Concluded at Vienna on 23 May 1969.*

³⁴ *Air France v. Saks United States Supreme Court 470 U.S. 392, 397 1985 / Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530,534 1991.*

good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Furthermore, any agreement made between all the parties and any instrument created by a party and accepted by the rest, related to the treaty, should also be taken into consideration.³⁵ Also, any subsequent agreement between the parties regarding the interpretation and application of a treaty as well as any international law rule relevant to the relations between the parties should also be considered.³⁶ Finally, if the parties intended to give a special meaning to a term, this shall prevail.³⁷ This Article is a guide for Courts, scholars and law practitioners to interpret any international treaty as well as the drafters’ intentions.

The revisions of WSC

There were 7 attempts made in order to modernize the WSC and an effort was made to include mental injuries as well. Among them an agreement called IATA Agreement as the International Air Transport Association was the initiator.³⁸ This Agreement could have been used as a tool to update WSC but this did not happen. In 1971 the Guatemala Protocol tried to amend WSC regarding the matter of mental injuries but it was absorbed by the 1975 Montreal Protocol. Based on that IATA and ATA (Air Transport Association of America) created private agreements between air carriers that could cover matters that were not covered by the updated Protocol. But of course these private agreements did not have the same effect as an international treaty.

Signatories must, besides enacting WSC rules into their domestic law, exclude any unilateral or contractual claims except the ones included in the Convention as WSC is a uniform treaty for international carriage by air. Its point was to reduce conflict of law issues, a prospect with wide acceptance. The wish of raising the limits of liability by USA led to the Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, Done at the Hague on 28 September 1955 (The Hague Protocol 1955).³⁹ In 1966 the dissatisfied USA prepared the Montreal Intercarrier Agreement in order to reset the limits of liability. The rest of the signatories of WSC and The Hague Protocol wanted a compromise which led to the Protocol to amend the Convention for the Unification

³⁵ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969 *Article 31.2*

³⁶ Vienna Convention on the law of treaties. Concluded at Vienna on 23 May 1969 *Article 31.3*.

³⁷ Vienna Convention on the law of treaties. Concluded at Vienna on 23 May 1969 *Article 31.4*.

³⁸ Unification of Certain Rules for International Carriage by Air S. Treaty Doc. No. 106-45, 1999 WL 33292734 at 16-17 / Cunningham Mckay ‘*The Montreal Convention: Can passengers finally recover for mental injuries?*’ *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008 1043.

³⁹ Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, Done at the Hague on 28 September 1955 (The Hague Protocol 1955).

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, Signed at Guatemala City, on 8 March 1971 (1971 Guatemala City Protocol).⁴⁰ In this Protocol the introduction of the term ‘personal injury’ was made. There was some frustration among the airlines’ attitude and governments after the Montreal Protocols which were construed in order to amend WSC and its liability limits among other issues.⁴¹

Mental injuries were not available for the majority of the civil and common law jurisdictions prior to 1929. In the Hague Protocol 1955 the French delegate suggested that emotional injuries should be recoverable. This did not happen and it is a proof that mental injuries were not covered at that time by Article 17 of the WSC. In 1999 ICAO (International Civil Aviation Organization) initiated a conference in order to modernize WSC. Most delegates supported the broader version of bodily injury. The International Civil Aviation Organization decided to redraft some of the highly discussed provisions of the WSC like Article 17 in which they wanted to add the term mental injury. In this way they wanted to separate physical and psychic injuries and not connect mental injuries to physical injuries as the practice was until that time.

They tried to cover both types of injuries under the term ‘personal injuries’ but ultimately the original term remained and no change was made.⁴² Only a slight change was made in the definition of Article 17 of the new Convention. The term ‘or wounding of a passenger’ was not included in the text of the MC. MC did not accept the term ‘event’ used in the Guatemala Protocol. It did also not clarify the term ‘accident’⁴³. Vijay Poonosamy, the Rapporteur of the Study Group appointed by the ICAO in 1995 for developing a mechanism within the framework of the ICAO to modernize WSC stated that “the expression personal injury would open the door to non-physical personal injuries such as slander, libel, discrimination, fear, fright and apprehension and this could be neither desirable nor acceptable. Use of bodily injury would be more acceptable but would exclude mental injuries such as shock. Recent Court decisions in the U.S. demonstrates how difficult an area this is and a clear statement must be agreed upon which is not limitless in scope. Since it would be clearly fair and equitable to compensate for impairment of health (i.e. both physical and mental/psychic injuries) it may be preferable to define personal injury as such.”⁴⁴

⁴⁰ 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, Signed at Guatemala City, on 8 March 1971 (1971 Guatemala City Protocol).

⁴¹ Cheng Bin ‘A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)’ *International and Comparative Law Quarterly*, Vol. 53, Issue 4 October 2004, 833.

⁴² Paul Stephen Dempsey ‘*Accidents and Injuries in Air Law: The Clash of the Titans*’ McGill University 2008, 260.

⁴³ Milde Michael ‘*International Air Law and ICAO*’ Hague, The Netherlands Eleven International Pub., Portland, OR: Sold and distributed in USA and Canada, International Specialized Book Services Second Edition, 2012, 150.

⁴⁴ Abeyratne Ruwantissa I.R. ‘*Mental Distress in Aviation Claims-Emergent Trends*’ *Journal of Air Law and Commerce*, Vol. 65, Issue 2 Spring 2000, 258.

2. Preparatory work of the MC

In the preamble of MC it is stated that it has the aim to “provide the most adequate means of achieving an equitable balance of interests.” Protection of the consumers is the main focus in MC, more specifically the importance of equal compensation based on the principle of restitution. There is the need for further codification and harmonization of the already existing rules through a new Convention, an international uniform law for all signatories to apply as their domestic law.⁴⁵

It was suggested that⁴⁶ the preparatory work and the discussions among the signatories regarding the Montreal Convention show that most of the parties intended to broaden the term ‘bodily injury’ to include mental injuries as well and in many of the signatory countries that term had already been interpreted in its broader form. Furthermore, USA and UK set it as a condition that bodily injuries should be broader in the new text, if not clearly adopting the pure mental injuries terminology.⁴⁷ In fact, the representative of UK agreed with the proposition made by the representatives of Sweden, but only if there was wide acceptance by the delegates, something that did not happen so Article 17 remained in its original wording. Still the question remains, are pure mental injuries covered under Article 17 of the new Montreal Convention? There is no provision granting compensation for pure mental injuries, PTSD, psychic injuries and injuries that do not flow from a bodily injury. The Special Group on Modernization and Consolidation of the “Warsaw System” (SGMW) prepared a solid draft Convention although it did not have any constitutional standing.⁴⁸ The Group followed the principles of IATA Passenger Liability Agreement of 1995 and of the 1997 EC Council Regulation. Most developed countries fully supported this draft of SGMW as they have strong aviation industry. However mental injuries were not included by SGMW in the draft.

Three versions of modified Article 17 of WSC were examined in order to decide its new form. First was the ICAO Legal Bureau’s submission to a Special Group which allowed pure mental injuries. The second was the submission by the Special Group on the Modernization and Consolidation of the Warsaw System in 1998 Montreal, where there was no cover for pure mental injuries. Third was the opinions expressed by the

⁴⁵ Cheng Bin ‘A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)’ *International and Comparative Law Quarterly*, Vol. 53, Issue 4 October 2004, 833.

⁴⁶ Cunningham McKay ‘The Montreal Convention: Can passengers finally recover for mental injuries?’ *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008, 1043.

⁴⁷ Cunningham McKay ‘The Montreal Convention: Can passengers finally recover for mental injuries?’ *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008, 1043.

Hanna Chouest ‘Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention’ *Issues in Aviation Law and Policy*, Vol. 9, Issue 1 Autumn 2009, 141.

⁴⁸ Milde Michael ‘Liability in International Carriage by Air: The New Montreal Convention’ *Uniform Law Review*, Vol. 4, Issue 4 1999, 833.

delegates of Sweden, Chile, Germany, Latin American Association of Air and Space Law, Norway, EU which were in favor of pure mental injuries during the discussion of MC.⁴⁹

A statement added to the working papers of the MC⁵⁰ held that ‘bodily injury’ is still included in Article 17 but acknowledging that in some countries damages for mental injuries are allowed in certain circumstances and the Convention is “not intended to interfere with this development”. Furthermore in the Explanatory Note of MC which has its roots in WSC, most of the provisions flow from the Warsaw Convention.⁵¹ According to Sean Gates⁵² this language can be interpreted to mean that individual States can interpret ‘bodily injuries’ to include pure mental injuries. Now, with the adoption of MC, the main focus has transferred to the protection of the passengers rather than the airlines like it was in the WSC thus the recognition and award of those types of injuries should become part of the discussion. On account of the WSC protectionist base towards the airlines, the Courts interpreted ‘bodily injury’ in a narrow way, excluding any type of mental, psychic or emotional injury. That interpretation left out a series of incidents that could happen on board of an international flight, but which, without having an obvious result on the passenger’s body could not be recovered under WSC.

US Courts started allowing recovery of mental injuries,⁵³ either because they understood the disparity between bodily-mental injuries or because of their common law system that does not really distinguish between the abovementioned injuries. Different types of decisions were given by the Courts, like the ones mentioned below, as there was no guidance by the WSC. The result was compensation awarded for mental injuries deriving/caused/connected/happened close to a bodily injury. Also, some types of mental injuries without any connection to a bodily injury were claimed. MC provides through its preparatory work a tool for the Courts in order to decide for pure mental injuries cases. Some experts’ advice that there is no need to examine the outdated WSC anymore⁵⁴, but as long as there are parties that have not ratified MC yet, it is only logical to examine both and in examining most relevant provisions of the Montreal Convention the following rules must be mentioned:

⁴⁹ Nase Vernon ‘*International Aviation and the Liability for Mental Injury: Is the Best Really an Enemy of the Good [article]*’ Finnish Yearbook of International Law, 1999, Vol. 10, 412.

⁵⁰ Rodriguez Blanca I. ‘*Recent Developments in Aviation Liability Law*’_ Journal of Air Law and Commerce, Vol. 66, Issue 1 Winter 2000, 21.

⁵¹ *Convention for the Unification of Certain Rules for the International Carriage by Air Done in Montreal* May 28, 1999 106th Congress 2nd Session Senate Treaty Doc. 106-45.

⁵² Rodriguez Blanca I., ‘*Recent Developments in Aviation Liability Law*’ Journal of Air Law and Commerce, Vol. 66, Issue 1 Winter 2000, 28. / Sean Gates, ‘*The Montreal Convention of 1999: A Report on the Conference and What the Convention Means for Air Carriers and Their Insurers*’, The Aviation Q. 186, 1999, 240.

⁵³ Cunningham McKay ‘*The Montreal Convention: Can passengers finally recover for mental injuries?*’ Vanderbilt Journal of Transnational Law, Vol. 41, Issue 4 October 2008 1043. / *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994. / *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.

⁵⁴ Abeyratne Ruwantissa I.R. ‘*Mental Distress in Aviation Claims-Emergent Trends*’ Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

Carrier is strictly liable for bodily injury or death of a passenger according to Art. 21 MC for damages up to 113,100 SDR. The liability of the carrier is not strict but fault-based for the amount of loss that exceeds the above-mentioned figure. So as to exonerate from liability in this case the carrier can prove that “(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.”⁵⁵

Similarities of WSC and MC – Why the old wording remained

There are three key concepts that remained in MC coming from the WSC.⁵⁶ First, the time period that the carrier is responsible for the injury. Second what is covered by the term bodily injury and third what is the meaning of accident. The exclusion of mental injuries in MC was conscious. There was no much support for the change to happen. WSC has 3 categories of traumas under which a passenger can claim compensation:⁵⁷ death, bodily injury and wounding. Bodily injury corresponds to ‘lesion corporelle’ of the French text. It is quite complicated to answer under this definition whether pure mental injuries are covered, as well as other emotional disorders like anxiety and depression. There is no uniform jurisdictional application so there are different views in different countries. It is up to the national law to determine whether an injury is compensable and the amount of that compensation if the international Convention does not cover for it. The question whether compensation for pure mental injuries should be given has been raised in USA and France, both of them being prominent parties of the air litigation. Exclusion of the terms “personal” and “mental” from the final version of MC gives to the Courts a clear direction to follow. The question is whether drafters wanted to exclude ‘the impairment of mental health’ which it could be included in the working papers of ICAO Studying Group.

The delegates of the MC did not incorporate any type of mental injuries unless connected with a physical injury under the concept of the term bodily injury. Although in the early drafts certain attempts were made,⁵⁸ in the final text of MC the version of bodily injuries adopted by the WSC predominated.

⁵⁵ *Convention for the Unification of Certain Rules for the International Carriage by Air Done in Montreal May 28, 1999 Article 21.*

⁵⁶ Field Andrew ‘*International Air Carriage, the Montreal Convention and the Injuries for Which There is No Compensation*’ *Canterbury Law Review*, Vol. 12, Issue 2 2006, 237.

⁵⁷ Weissberg Kenneth *La reparation du prejudice moral dans les accidents de transport aerien* Cabinet International Weissberg 2007 (<http://www.weissbergavocats.com/publications/prejudice-moral-accidents-aeriens.pdf>).

⁵⁸ *International Civil Aviation Organization, International Conference of Air Law (Convention for the Unification of Certain Rules for the International Carriage by Air) Montreal 10-28 May, Volume II Documents 1999 Advance Copy 20, 105, 106, 124, 1999 / The Montreal Convention: Can passengers*

There are two views regarding why the old wording remained. First is that the members of the MC delegation aspired to underline the -until then- commonly accepted view, both by scholars and judicial, that the term bodily injury includes only harm caused to the body and no broader definition can be accepted. Second is that mental injuries are included under the abovementioned term as they are connected to the physical injuries anyway and there is no need for further clarification. Those acceptations are opposed to each other as the delegates supported the same opinion based on different arguments.⁵⁹ As it is apparent from the decision made by the drafters, the narrow interpretation of the term ‘damage sustained’ remained. The original interpretation determines that harm i.e. damage is not so broad to cover every type of damage that can occur during a flight. They also decided that the measure of damage is left to the national courts as MC does not include any content regarding this matter. According to the words of Lord Steyn regarding the maintenance of the original terminology of the WSC in the MC as well, “The world was not ready for the psychic injuries to be included in the Conventions.”⁶⁰

According to a large number of scholars⁶¹ drafters of the MC wanted bodily injuries to be construed in a wider way and evolve along the medical changes. Some of them mention though that courts are still skeptical to non-visible traumas. The first draft of MC included mental injuries as well as ‘personal’ and ‘mental’ injuries. Although the abovementioned changes came after a long time of discussions not many things were changed regarding the passengers. The protection of passengers might be on the forefront now as the airline industry has significantly grown since 1929 and it did not need that much of protection anymore but still the original ideas remained. As the air travel industry evolved, courts worldwide stressed the language of WSC in order to make it fit to the new data, causing problems in the uniform application of the Convention.⁶²

finally recover for mental injuries?’ Mckay Cunningham Vanderbilt Journal of Transnational Law, Vol. 41, Issue 4 October 2008 1044.

⁵⁹ *Abeyratne Ruwantissa I. R Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 65 J. Air L. & Com. 225 1999-2000, 225 / Clarke Contracts of Carriage by Air Chapter 2 Second Edition Lloyd’s List 2002, 7.*

⁶⁰ *Clarke Contracts of Carriage by Air Chapter 2 Second Edition Lloyd’s List 2002, 7 / King v. Bristow Helicopters Ltd. (Scotland); In Re M 2002 UKHL 7 28th February, 2002 House of Lords para. 27, 123, 149.*

⁶¹ *Immel Jeffrey J. The Montreal Convention and Recovery for Free standing Emotional Distress Under Article 17 Issues in Aviation Law and Policy, Vol. 13, Issue 1 Autumn 2013, 75. / Abeyratne Ruwantissa I.R., Mental Distress in Aviation Claims-Emergent Trends, Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.*

⁶² *Rushing Don G. & Janicki William D. ‘Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention’, Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.*

Different views of the countries on Art. 17 during the MC discussions

In the UK, House of Lords allows recovery for physical manifestations of a mental injury as long as the mental injury causing the physical symptoms was itself caused by an accident. No recovery is allowed for mental injuries without any physical symptoms. It should be noted that the interpretation of mental injuries under both WSC and MC is different from the interpretation made in the common/tort law. The older view existing under the tort law was that the judges were hesitant to award compensation for pure mental injuries as they considered them difficult to prove and as they are invisible to the naked eye. This view on pure mental injuries which stems from tort law had affected the judges who examined cases of pure mental injuries which were governed by international conventions of carriage by air. If mental injuries can be verified by medical expert/medical evidence they can be compensated under tort law.⁶³ This is the view that has emerged in recent years in the field of tort law, as there are more solid evidences and medical progress made regarding this matter, that can prove the existence of a mental injury and that way it can be compensated. This is the reason tort law is mentioned, to showcase how its views and points have affected the award of pure mental injuries in cases where tort law does not apply.⁶⁴

At the draft work of MC it can be witnessed that the delegates were willing to include mental injuries in Article 17 as well. Nonetheless, the final text of the MC did not include any change regarding this matter. It is evident that MC drafters tried to incorporate, where possible, the original language of WSC and Courts in a series of cases interpreting and applying MC cited cases applying and interpreting WSC⁶⁵. Another view can be that either the drafters did not want to include mental injuries at all or that mental injuries are connected with bodily injuries thus there is no need to mention them separately.⁶⁶ But the Courts interpreting Article 17 should contend with the intention of the drafters of MC to include pure mental injuries in their verdicts as well.

Article 16 of the MC draft included a rejection of the eggshell skull tort- recovery rule, meaning that the carrier cannot be held liable for the death or injury of the

⁶³ Abeyratne Ruwantissa I.R. 'Mental Distress in Aviation Claims-Emergent Trends' Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

⁶⁴ Abeyratne Ruwantissa I.R. 'Mental Distress in Aviation Claims-Emergent Trends' Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

⁶⁵ Cotter Christopher E. 'Recent Developments in Montreal Convention Litigation' Journal of Air Law and Commerce, Vol. 79, Issue 2 Spring 2014, 291.

⁶⁶ Abeyratne Ruwantissa I.R. 'Mental Distress in Aviation Claims-Emergent Trends' Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

passenger if the death or injury is a result of the previous state of health of the passenger.⁶⁷

USA supported the draft document of Article 17 (Article 16 of the MC draft⁶⁸) which included compensation for pure mental injuries as long as both mental injury addition and rejection of the eggshell rule were retained.⁶⁹ They insisted that mental injuries should be compensated under the new Convention. Nonetheless that did not happen.⁷⁰ There were concerns about fraudulent⁷¹ claims if recovery for pure mental injuries were going to be allowed as any incident not being out of the normal trail of a flight could be used as a step to claim for pure mental injuries as it could cause some type of emotional distress/mental injury. It is curious that while many States like France and Greece recognize in their domestic law pure mental injuries and award damages based on them, MC did not include them in its provisions.

Some parties may see MC as an opportunity after the preparatory work and conversations, to widely interpret the term 'bodily injury' of Art. 17, in spite of the fact there is no such indication in the official text.⁷² European Civil Aviation Conference (ECAC) fully supported a uniform system 'with improved protection of victims of air transport accidents'.⁷³ The need to update and modernize WSC was urgent. The Draft Convention had to be compatible with 1) ECAC Recommendation Air Carriers' Liability with Respect to Passengers (ECAC/16-1)⁷⁴ 2) inter carrier agreements which proceeded from it 3) EU legislation (Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, EC No 2027/97). There were several drafts made by ICAO in order to cover and make compromises for all of the members. Regarding the one approved by the 30th Session of the ICAO Legal Committee as amended by the Special Group on the modernization and consolidation of the Warsaw System (SGMW) there were several comments made by the delegates.

⁶⁷ Chouest Hanna 'Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention' *Issues in Aviation Law and Policy*, Vol. 9, Issue 1 Autumn 2009, 165.

⁶⁸ *International Civil Aviation Organization, International Conference of Air Law (Convention for the Unification of Certain Rules for the International Carriage by Air) Montreal 10-28 May, Volume II Documents 1999*

⁶⁹ *International Civil Aviation Organization, International Conference of Air Law (Convention for the Unification of Certain Rules for the International Carriage by Air) Montreal 10-28 May, Volume II Documents 1999*

⁷⁰ Chouest Hanna 'Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention' *Issues in Aviation Law and Policy*, Vol. 9, Issue 1 Autumn 2009, 141.

⁷¹ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention', *Journal of Air Law and Commerce* 70 J. Air L. & Com. 2005, 429.

⁷² Mercer Anthony 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' *Air and Space Law* Vol. 28, Issue 3 June 2003, 147.

⁷³ *International Civil Aviation Organization, International Conference of Air Law (Convention for the Unification of Certain Rules for the International Carriage by Air) Montreal 10-28 May, Volume II Documents 1999 Advance Copy*, 79.

⁷⁴ ECAC Recommendation Air Carriers' Liability with Respect to Passengers (ECAC/16-1).

Some countries expressed their oppositions during the discussions of Montreal Convention about the part where the previous state of health of the passenger lifts the liability off the carrier thus the final sentence was removed. The reason was that it seemed like carriers were favored over passengers according to these countries. Furthermore, there was the “danger of increased litigation to determine whether the state of health of the passenger was a contributing factor to the injury.”⁷⁵ USA withdrew its opinion after that view was expressed. Most countries supported a definition for mental injuries to be covered with physical injuries (argument similar to the decision of the *Floyd* case⁷⁶). USA and UK delegates thought that a change in language could increase litigation especially in countries where bodily injuries incorporated mental injuries under certain circumstances.

Like the addition of the words or mental in the first sentence of Article 16, as the WSC was covering expressly ‘bodily injuries’.⁷⁷ This proposal was made by the delegates of Sweden and Norway. In the Guatemala City Protocol the broader term ‘personal injuries’ was used in order to cover for mental injuries as well. As this addition was not accepted by many of the signatories it was not adopted after all. The Legal Committee (LC/30) found a solution but it was altered by the Special Group on the Modernization and Consolidation of the ‘Warsaw System’. Norway and Sweden propose to adopt the solution of LC/30.

The main reason behind this solution is that a mental injury can have similar effects as a bodily injury. It is unfair to compensate a person for a bodily injury and not compensate another that was equally mentally traumatized. It will be a discrimination to hold on the older provision. Keeping this provision will create the need for a new Convention that will give different protection to different categories of passengers.

Exclusion of mental injuries is not promoting unification of legal systems which is the desired result as ‘bodily injury’ is not addressed the same way in every legal system.. As for the burden of proving the mental trauma which was a major concern of the drafters, this lies with the passenger as it can be difficult for Courts to decide whether a person has a psychic trauma or not. Carriers will be burden free regarding this matter. Latin American Civil Aviation Commission (LACAC)⁷⁸ wanted to reestablish mental injuries in Article 16 as in the proposal of LC/30 or by adding a qualification of mental injuries to avoid false claims. The two types of injuries will be linked. The International Union of Aviation Insurers⁷⁹ approved the removal of the term ‘mental

⁷⁵ ICAL ‘Comments on the Draft text approved by the 30th Session of the ICAO Legal Committee as amended by the Special Group of the Modernization and Consolidation of the ‘Warsaw System’ (SGMW), DCW Doc. No. 11.

⁷⁶ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

⁷⁷ Mercer Anthony ‘Liability of Air Carriers for Mental Injury under the Warsaw Convention’ Air and Space Law, Vol. 28, Issue 3 June 2003, 124.

⁷⁸ Mercer Anthony ‘Liability of Air Carriers for Mental Injury under the Warsaw Convention’ Air and Space Law, Vol. 28, Issue 3 June 2003, 124.

⁷⁹ Mercer Anthony ‘Liability of Air Carriers for Mental Injury under the Warsaw Convention’ Air and Space Law, Vol. 28, Issue 3 June 2003, 124.

injury’ from the draft document as they aimed to only keep bodily injury throughout the Convention text which will be strictly applied. According to them there was no room for mental injuries under this new Convention. On the other hand, Colombia⁸⁰ was one of the countries that supported the use of the term ‘mental injury’. According to its delegates there is a difference between mental and bodily injuries and WSC did not cover for both of them. The document presented by LC/30 provided all the reasons why mental injuries should be covered under the new Convention.

The Friends of the Chairman Group also supported the use of ‘mental injury’ in the text of the new Convention.⁸¹ The Group in its summary report from its first and second meetings held that mental injuries should be a different type of injury under the new Convention. Furthermore, the Group stated that the use and scope of application of this term should be made more clear based on the preliminary decisions made by the Commission of the Whole. The Group supported that based on the consensus in principle, recovery should be allowed for mental injuries flowing or associated with bodily injuries and also pure mental injuries should be recognized as a type of trauma that causes the same level of pain and inconvenience to a passenger as any physical trauma. The Group identified three different types of damages that should be covered under Article 16 and decided to refer this matter to the Drafting Committee which was in search of the appropriate wording, in order for the Commission of the Whole to consider those terms. The terms the Group concluded were ‘bodily injury, mental injury associated with bodily injury and mental injury which has a significant adverse effect on the health of the passenger.’

3. The situation after the entry into force of the Montreal Convention

By mentioning the discussions that took part before the final version of Article 17 of MC the writer of this thesis would like to emphasize why there were many differences between the two conventions regarding this article, despite all the different opinions expressed during the delegations of MC.

Has the WSC been left behind? Although MC has been ratified by many States, most of them dominant countries in the aviation industry, it still does not have the same number of signatures as WSC has. Until this happens, there cannot be modernization of WSC by MC.⁸²

⁸⁰ Mercer Anthony ‘*Liability of Air Carriers for Mental Injury under the Warsaw Convention*’ Air and Space Law, Vol. 28, Issue 3 June 2003, 124.

⁸¹ Mercer Anthony ‘*Liability of Air Carriers for Mental Injury under the Warsaw Convention*’ Air and Space Law, Vol. 28, Issue 3 June 2003, 124.

⁸² Neenan Peter ‘*The Damaged Quilt: Inadequate Coverage of the Montreal Convention*’ Air & Space Law 37, no. 1 2012, 51.

Besides the changes introduced by MC regarding Article 17 it should be noted that MC prevails in any case of international flight⁸³ thus if there are two countries that both have signed WSC and MC in case of an accident MC prevails. ICAO was against any language change in order to protect the legacy of the precedent decisions of the Courts, especially those of USA, as it is one of the biggest players in international flights sector. Although it was an attempt made by ICAO to unify all the different treaties signed until then.⁸⁴ Parties that were signatories to different treaties/protocols were not considered common signatories and there was no international treaty governing a future dispute between them. Meaning that if a country has, for example, signed the Guatemala City Protocol⁸⁵ but not The Montreal Protocol No 4 1975⁸⁶ and another country has signed both, if a dispute arises between them, they should decide if they will apply The Guatemala City Protocol in which they are both signatories or find another way to settle their dispute.

Final decision

Later though, in the Consensus Package presented by the President of the Conference,⁸⁷ the words or mental were not included. In the Draft Statement made for the purpose of interpretation of MC,⁸⁸ the Conference decided that 'bodily injury' is used on the basis that in certain States damages for pure mental injuries can be awarded under certain circumstances, jurisprudence regarding this matter is evolving and that there is no intention to stop this development. After what was discussed above, in respect of the Draft MC,⁸⁹ the State Parties decided that pure mental injuries should be included neither in the draft nor in the official document of the Convention. MC is considered as consumer (passenger) friendly as the philosophy in international conventions has considerably changed since 1929 and the main focus is now the

⁸³ Gienulla/Shmidt editors '*Montreal Convention* 'Annotated Wolters Kluwer Law and Business Kluwer Law International 2014, 2.

⁸⁴ Field Andrew '*Air Travel, Accidents and Injuries: Why the New Montreal Convention Is Already Outdated*' Dalhousie Law Journal, Vol. 28, Issue 1 Spring 2005, 69.

⁸⁵ *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, Signed at Guatemala City, on 8 March 1971 (1971 Guatemala City Protocol).*

⁸⁶ *Montreal Protocol No.4 to amend 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, Signed at Montreal on 25 September 1975.*

⁸⁷ Chouest Hanna '*Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention*' Issues in Aviation Law and Policy, Vol. 9, Issue 1 Autumn 2009, 279.

⁸⁸ Chouest Hanna '*Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention*' Issues in Aviation Law and Policy, Vol. 9, Issue 1 Autumn 2009, 279.

⁸⁹ Chouest Hanna '*Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention*' Issues in Aviation Law and Policy, Vol. 9, Issue 1 Autumn 2009, 279.

passenger rather than the carrier as it can be seen in the MC's Preamble.⁹⁰ Air carriage industry has an interest to protect judicial precedent in order to maintain the protection they have been enjoying, the conservative view upon WSC was drafted.

Although from now on any judgment will not have to interpret Article 17 based in the French text of the original WSC, as in the MC English is one of the official languages, in the explanatory note of Article 17 in the MC upon submission to the US Senate, the legal framework developed under the WSC's 'lesion corporelle' language was left unchanged by the MC. "Following extensive debate, the Conference decided not to include an express reference to recovery for mental injury with the intention that the definition of 'bodily injury' would continue to evolve from judicial precedent developed under Article 17 of the WSC, which uses that term."⁹¹ The abovementioned abstract proves that the parties did not intend to change the language of Article 17 and the definition of 'bodily injury' as it was formed through the years of interpreting Article 17 of WSC by the Courts, allowing recovery only for mental injuries flowing from bodily injury.⁹²

MC provides that it shall prevail over any rules which apply to international carriage by air between contracting States to the MC which are also contracting States to any of the Warsaw System Conventions and the MC, the MC has priority. This Convention concentrates all the preexisting documents in one which provides great international uniformity. Lines set between mental and physical injuries started to mix as the medical science has been evolved along with the understanding of pure mental injuries.

It should be mentioned to this point that a series of international conventions covering for other types of transportation such as rail transportation which are of the same time like MC do cover pure mental injuries. A reason for that difference might be that it was less complicated for the state parties to decide upon the mental injuries matter when drafting the other international conventions. Moreover the *Convention on Compensation for Damage to Third Parties, Resulting From Acts of Unlawful Interference Involving Aircraft (Unlawful Interference Convention 2009)*⁹³ and the *Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention 2009)*⁹⁴ that have to do with air carriage cover for pure mental injuries. According to the text of those two Conventions⁹⁵ recovery for pure

⁹⁰ *Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention))*.

⁹¹ *Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention))*.

⁹² Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' *Journal of Air Law and Commerce* 70 *J. Air L. & Com.* 2005 429.

⁹³ *Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention 2009)*.

⁹⁴ *Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention 2009)*.

⁹⁵ *International Conference on Air Law (Montreal, 20 April to 2 May 1999) Convention on Compensation for Damage to third parties, resulting from Acts of Unlawful Interference involving*

mental injuries is allowed. Both of them provide that “*damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.* (Article 3)”⁹⁶ This definition allows pure mental injuries to be recovered. Although pure mental injuries are included, this move does not really help in the unification of international air law. That is because pure mental injuries are difficult to prove. Courts should rely on claimants’ statements about their health and evaluate their symptoms and as much advanced medicine is there is still no solid proof as a bodily injury in order to prove a pure mental injury.

According to MC preamble ⁹⁷ ‘Airlines have great difficulty in resolving mental injury claims owing to issues arising when it comes to proving causation between the condition diagnosed and the event’. There is a series of false claims which make the work of the Courts harder. Since there are not 100% fool proof tests in order to prove a pure mental injury, this lead to costly and lengthy litigations or settlements. Member States around the world have recognised that MC does not cover for pure mental injuries. It is not fair third parties to be treated better than passengers, in terms of recovering for those types of injuries. IATA and its airline members believe that inclusion of pure mental injuries will interfere with the certain and prompt compensation to passengers and third parties. Nonetheless, compensation for pure mental injuries was included in the official documents of the abovementioned Conventions.

b. Conclusion

In this chapter there was a full display of the preparatory work both of WSC and MC in order to fully understand how Article 17 was drafted, the reasons behind the choice of its final version and why pure mental injuries were not included in MC.

Aircraft (Unlawful Interference Convention), and Convention on Compensation for Damage caused by Aircraft to third parties (General Risks Convention) (Presented by the International Air Transport Association (IATA)).

⁹⁶ *Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention 2009).*

⁹⁷ *Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)).*

CHAPTER 2

Definition of 'accident' and 'injury' in Article 17

a. Overview

This chapter examines the definition of accident in Article 17 as it has been a major issue for a lot of the cases mentioned below. Limitations of recovery are discussed along with the definition of injuries as stated in Article 17 and as interpreted by the Courts and various scholars. The major issue in this part is the language difference spotted between the original French version of WSC and the translation made in English by Courts. This controversy has been going on for years until MC and the many official languages. Now English is among the official languages of the Convention and there is no need for researching and interpreting the French text anymore.

1. Article 17 of the WSC and MC: Definition of Accident

In this chapter definition of accident of Article 17 is broadly examined. This is because in most of the cases analyzed below (*Floyd*⁹⁸ etc.) definition of accident plays an important part and it is questioned a lot by the Courts. It was the first issue examining whether the original French language of the WSC text should define the interpretation made in English by scholars and Courts, something that expanded in the issue of the definition of pure mental injuries as well. Thus it is important as well as useful to have a thorough look at this matter and clarify any question arising in the cases below.

⁹⁸ *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530 1991.*

Interpretation of Article 17

Article 17 of the Warsaw Convention states as follows “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.”⁹⁹

As we conclude from Article 17, the air carrier in any case of bodily injury or death is responsible to compensate the passenger as a result of an accident. First what has to be determined is what an accident is.¹⁰⁰ According to the original text of the WSC and the preparatory work of both the WSC and the Montreal Convention as well as the interpretation of Article 17 by the jurisprudence, accident is any event that happens on board that is unusual or unexpected and that is external to the passenger.¹⁰¹ This is the first requirement in order for Article 17 to be fulfilled. It should be noted that the actual text of the MC does not give an answer to what can be described as an accident under Article 17. The second issue to be determined is that if the abovementioned accident took place on board. This includes the operations of embarking and disembarking too. There were some conflicts¹⁰² regarding this matter for example at which time exactly the process of embarking begins.

The lack of definition of the term ‘accident’ by the WSC drafters does not affect its meaning related to aircrafts only when it comes to the WSC definition. It was obvious for them that they indented to cover accidents happening in aircrafts only.¹⁰³ Under certain views, the way that MC renders air carriers liable for passengers’ injuries affects the uniformity drafters were aiming for as according to tort law probably those types of injuries would not be compensated by the defendant. Courts interpret

⁹⁹ *Convention for the Unification of Certain Rules for the International Carriage by Air Done in Montreal May 28, 1999, Article 17.*

¹⁰⁰ Magdovitz Joel “*Recovery in the Air, It Might be Harder than you Think*” *Travel Law Quarterly* 2013, 132.

¹⁰¹ *Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed in Warsaw on 12 Oct. 1929 (Warsaw Convention) Chapter I - Scope - Definitions Article 1. / United Nations Conference on Trade and Development- Carriage of Goods by Air: A Guide to the International Legal Framework, Report by the UNCTAD Secretariat UNCTAD/SDTE/TLB/2006/1 27 June 2006 / Unification of Certain Rules for International Carriage by Air S. Treaty Doc. No. 106-45, 1999 WL 33292734 at 16-17 / Convention for the Unification of Certain Rules for the International Carriage by Air Done at Montreal May 28, 1999 106th Congress 2nd Session Senate Treaty Doc. 106-45 / International Civil Aviation Organization, International Conference of Air Law (Convention for the Unification of Certain Rules for the International Carriage by Air) Montreal 10-28 May, Volume II Documents 1999 Advance Copy 20,105,106,124,1999 / ICAL ‘Comments on the Draft text approved by the 30th Session of the ICAO Legal Committee as amended by the Special Group of the Modernization and Consolidation of the ‘Warsaw System’ (SGMW), DCW Doc. No. 11 / Montreal Convention, supra note 4, at art 17(1) explanatory note.*

¹⁰² Clarke, *Contracts of Carriage by Air*, Chapter 2, Second Edition, Lloyd’s List 2002, 7.

¹⁰³ Weigand Tory A. ‘*The Modernization of the Warsaw Convention and the New Liability Scheme for Claims Arising out of International Flight*’ *Massachusetts Law Review* Spring 2000 175.

'accident' in a broader way thus not protecting air carriers.¹⁰⁴ The main goal of WSC was to impose liability to the carrier up to certain limit when he had taken all the necessary protective measures. With MC the limits for negligence were changed as Article 21 now held that "The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that: a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or b) such damage was solely due to the negligence or other wrongful act or omission of a third party."¹⁰⁵ In Article 21 of WSC it was held that "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." No substantial changes were made in the wording of Article 17 and its interpretation is made in the same way as in the WSC.

Case law regarding the interpretation of Article 17

In the *Evangelinos v. Trans World Airlines Inc.*¹⁰⁶ as well as in the *Day v. Trans World Airlines Inc.*¹⁰⁷ cases the Court ruled regarding the liability of the carrier for the injuries the passengers sustained before the actual boarding while that procedure had already started. Both of those cases were brought in front of the United States District Courts after the attack the passengers of TWA Flight 881/5 went under by two Arab terrorists. 7 out of the total 89 passengers of the flight had undergone the routine pre-boarding inspections and the rest were waiting the final boarding instructions in the airport transit lounge. The plaintiffs contented that the airline was fully liable for the incident under Article 17 of the Warsaw Convention. The defendants argued that even if the attack would be considered an accident by the Court, the incident did not happen on board of the aircraft or during the process of embarking or disembarking as it is stated in Article 17. The Court of the Western District of Pennsylvania decided in the *Evangelinos* case as follows. Judge Snyder granted the defendants' motion and ruled that the plaintiffs were not on board neither in the process of embarking on it. In that way the plaintiffs did not have the right to claim any compensation for their injuries under Article 17 WSC.

¹⁰⁴ West Alexa J.D. Candidate Fordham Law Review *Defining "Accidents" In the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention's "Accident" Requirement*, 2017, 1465 Fordham University School of Law; B.S.F.S., 2013, Edmund A. Walsh School of Foreign Service, Georgetown University.

¹⁰⁵ *Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), Article 21.*

¹⁰⁶ *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 3d Cir. 1977.

¹⁰⁷ *Day v. Trans World Airlines Inc.* 528 F.2d 31 2d Cir. 1975.

Moreover, the District Court broadly referred to the meaning of liability under Article 17 of the Warsaw Convention. The judges mentioned the 'legislative history of Article 17'¹⁰⁸ in order to interpret the term of liability. They examined preambles of the Warsaw Convention in which the liability of the carrier was extended in the same degree on passengers baggage and goods and airline's accountability was supposed to start the moment the abovementioned entered the airport of departure and end when they exit the airport of arrival. This suggestion was not accepted by the delegates and Articles 17 for the passengers and 18 for the baggage were formed.

The prevailed version of Article 17 in the WSC narrowed down the extent of the physical sphere of the carrier on the passengers. The carrier is only liable for every accident on board of the aircraft or in the course of any of the process of embarkation or disembarkation. This restriction was aiming to limit the liability of the carrier which was one of the main goals of the Warsaw Convention, given the time it was drafted. The Court was also affected by previous rulings of the First Circuit that came to the same conclusion regarding the issue of when the process of embarking or disembarking begins.¹⁰⁹

On the other hand, in the *Day* case,¹¹⁰ judges ruled otherwise. Judge Brieant of the Southern District of New York granted the motion of the plaintiffs' stating that the embarkation process was on since the passengers had completed 5 out of the total 11 steps the airline required during its pre-boarding procedure. According to him, those steps that the passengers had already taken ensured the beginning of the embarkation process, thus the airline was responsible of the passengers from that point on. . In this case, the Court of Appeal for the Second Circuit diverged from the traditional interpretation regarding the issue of liability of the carrier in case of accident. The key elements the Court based its verdict on were the location of the passengers at the time of the accident, the activities of the passengers and the level of control the airline had on those at the time of the accident. Furthermore the Court examined the process of embarkation the carrier used which was consisted of 11 steps in order for the boarding process to be fulfilled.

According to the Court, since the passengers had completed 5 of them already at the time the terrorist attack took place, the airline had full liability for it as the passengers were in the process of embarking as this is described under Article 17 WSC. The judges viewed those steps as mandatory; the passengers had no option but to follow them in order to embark and at that point the airlines' liability begun. As it is logical, to reach its decision the Court examined the legislative history of the Warsaw Convention and Article 17 as well. In their opinion, the until then perceived idea for the passengers' location which was translated in the passengers being either on board

¹⁰⁸ Helfand William 'Evangelinos v. Trans World Airlines: Aviation - Warsaw Convention - Liability of Airline Carrier' Maryland Journal of International Law, Volume 3 Issue 1, 299.

¹⁰⁹ *In Re Tel Aviv United States District Court, D. Puerto Rico 405 F.Supp. 154D.P.R.197), 439 F. 2d 1402 MacDonald v. Air Canada United States Court of Appeal First Circuit.*

¹¹⁰ *Day v. Trans World Airlines Inc. 528 F.2d 31 2d Cir. 1975.*

of the aircraft or at least in a place that was connected straight with the embarkation or disembarkation process. The terminal was not encountered as such. All the previous courts had adopted the abovementioned definition. The Court of Appeal decided that this definition should be broader as this was the intent of the delegates when drafting the said Article.

After a series of claims arising from Article 17's liability provision, Courts have set stricter limitations on recovery. Emotional distress claims were affected by this limitation. The ambiguity of this matter has stressed Courts for years and still is not resolved. Main issue is the availability of emotional distress damages.¹¹¹

Criteria in order to determine an "accident"

US courts interpret "accident" against the wish of the drafters of MC, rendering air carriers liable in a wider way. Since there were no substantial changes in the wording of Article 17 from WSC to MC, the Courts continued to interpret it in the same method they used to before. The definition of accident formed in the *Saks*¹¹² case created uncertainty both for air carriers and passengers. This definition is not clear enough and affects the interpretations that lower Courts make for "accident". Following *Saks* and the ambiguity its definition created, a series of criteria was added in order to determine an "accident". The first is the relation of the traumatic event to the normal airline/aircraft processes. Second is whether the crew was aware of the events around the incident as well as the incident itself. Third are the acts of the rest of the passengers. Next are the acts of third parties like terrorist etc. location of the accident follows as well as every detail related to the victim, which is the next criterion. Finally, risks of flying, meaning if the incident can be categorized under the risks of flying list which has been developed through the years of aviation industry. It means that there are certain events and behaviors that the passengers should have in their minds that might happen or not while they are on board and that cannot be characterized as accidents like the behavior of the flying attendants towards the passengers.

Usually, the first and last criteria are used in order to define an "accident".¹¹³ Nonetheless, judges cannot decide whether all of the above mentioned criteria, separately or all together, can be related to an accident. There are two different

¹¹¹ Alldredge J. Brent 'Continuing Question in Aviation Liability Law: Should Article 17 of the Warsaw Convention Be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?' *Journal of Air Law and Commerce*, Vol. 67, Issue 4 (Fall 2002), 1345.

¹¹² *Air France V Saks United States Supreme Court 470 U.S. 392, 397 1985 / Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530,534 1991.*

¹¹³ West Alexa 'Defining Accidents in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention's Accident Requirement [notes]' *Fordham Law Review*, Vol. 85, Issue 3 December 2016, 85 *Fordham L. Rev.* 1465 2016-2017.

approaches,¹¹⁴ the first is that the accident must be unusual or unexpected, not caused by the passenger, connected with the aircraft's operation and to be a risk connected to flying. The second approach involves again unusual or unexpected, external to the passenger incident. There is no need for connection to any of the operations taking place on board of an aircraft or being a flying risk. Broader definition is used by the Courts where air carriers are liable for injuries during embarkation or disembarkation.¹¹⁵

Even the narrower definition is used in a way that is against the MC drafters' intent, as the liability of the carriers is extended. *Saks*,¹¹⁶ WSC and MC clearly lead to the conclusion that in order to have an accident covered by Article 17, there is the need for causal connection between the incident and air craft's operation. The two main narrowing criteria for the abovementioned problem 1) causal connection to aircraft's operation, 2) inherent air travel risks are mixed as it is only logical that an inherent air travel risk can only be connected to air travel. The decision made in the *Saks* case, which is the most important in aviation law, did not adopt the "unintended" or "unintentional" view regarding the accident definition, although it comes against the intention of certain parties that adopted this exact definition. Also, it is against the definition of accident given by English dictionaries. Both WSC and MC drafters aimed for causal connection of the incident with the aircraft and its operations.

2. Article 17 of WSC and MC: Definition of Injuries

Bodily injury

The key points that should be taken into consideration in an international accident on air are whether there was death or bodily injury of a passenger, if this incident was caused by an accident, where the accident did took place (on board, during embarkation/disembarkation). If the answer to the first point is no, then there is no liability.¹¹⁷ The differences observed in different jurisdictions regarding the interpretation of the French terms used in the original WSC text have caused a series

¹¹⁴ West Alexa 'Defining Accidents in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention's Accident Requirement [notes]' Fordham Law Review, Vol. 85, Issue 3 December 2016, 85 Fordham L. Rev. 1465 2016-2017.

¹¹⁵ West Alexa 'Defining Accidents in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention's Accident Requirement [notes]' Fordham Law Review, Vol. 85, Issue 3 December 2016, 85 Fordham L. Rev. 1465 2016-2017.

¹¹⁶ *Air France V Saks United States Supreme Court* 470 U.S. 392, 397 1985 / *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

¹¹⁷ Tompkins George N. Jr. 'Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999 Aviation Law and Policy Series Kluwer Law International, March 10, 2010, 18.

of problems. USA and UK as mentioned before,¹¹⁸ interpret the term ‘lesion corporelle’ in a more narrow way in so excluding recovery for mental injuries under Article 17 WSC. On the other hand, the Supreme Court of Israel¹¹⁹ follows the opposite way, by stating that the Convention should adapt to the modern world’s needs and include mental injuries as well. Australia has codified WSC and the Hague Protocol in its domestic law.¹²⁰ According to it, mental injuries are not compensable when sustained on an international flight but they can be compensated when it is a domestic flight as the Australian domestic law version of the WSC covers for them.¹²¹

The term ‘bodily injury’ sets the limits of the carrier’s liability. Only damages deriving from an injury to the passenger’s body can be awarded by the courts. The majority of the courts applied this to the letter. All the cases after the signing of the WSC followed this interpretation.

One thing that stands out in Article 17 is the narrow definition of the injuries covered under it. It specifically allows remuneration only for the death, wounding or any other bodily injury that took place on board of an international flight. Bodily injury is the translation of the French term *lésion corporelle* that was used for the original text of the WSC. In French this term is interpreted to include mental damages as well as physical ones. That was attested by the French delegate during the preparatory work of the Montreal Convention. He verified that in the French legal system (which is that of civil law) the term *lésion corporelle* includes both physical and mental injuries and it can be proven through the study of the French case law. This statement of the French delegate is based on the French damage law under which pure mental injuries can be compensated.¹²² More information regarding this matter will be mentioned below.

In English the interpretation of the French term translates into strictly physical injury of a passenger. This interpretation connects with the status about psychic injuries in 1929, the year the WSC was signed. That being said, at that time science did not have the perception we have today about any kind of mental injury caused on board of a flight. Thus, according to that interpretation, psychic injuries are excluded from any kind of remuneration under WSC. However, in series of cases, mental injuries are

¹¹⁸ Tompkins George N. Jr. *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999 Aviation Law and Policy Series Kluwer Law International*, March 10, 2010, 18.

¹¹⁹ *Cie Air France v. Teichner*, 39 *Revue Francaise de Droit Aerien* at 243, reprinted in 23 *EuR TR.L.* 87, 102, 1988, and noting that the only published version of the Supreme Court of Israel’s opinion appears in French.

¹²⁰ Australian Civil Aviation (Carrier’s Liability) Act 1959.

¹²¹ McKay Jennifer Case *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, *Western Reserve Journal of International Law* Volume 34 Issue 1, 34 *Case W. Res. J. Int’l L.* 73 2002, 90.

¹²² *Eastern Airlines, Inc. v. Floyd*, *U.S. Supreme Court* 499 *U.S.* 530 1991. / M. Planiol & G. Ripert, *Traite elementaire de droit civil*, pt. 1, Nos. 10, 122, 127 12th ed. 1939 Louisiana State Law Inst. trans. 1959, 190. / F. Geny, *Methodologie d’Interpretation et Sources en Droit Prive Positif* Nos. 45-50 2d ed. 1954 (Louisiana State Law Inst. trans. 1963, 200 / R. David, *French Law: Its Structure, Sources, and Methodology* 154 M. Kindred trans. 1972, 114 / R. Mankiewicz, *The Liability Regime of the International Air Carrier* 146 1981, 299.

acceptable when they are connected/deriving from physical injuries. So we have two different situations. In the first one, pure mental injuries on board of an international flight cannot in any way be awarded. In the second, when the abovementioned injuries are a result of some physical injury, courts can award compensation for those too.

Domestic flights

France¹²³ and England¹²⁴ have codified WSC to cover domestic flights as well. At first sight this practice helps towards the uniform application of the WSC rules but since several provisions direct to local laws the way the Convention applies in each country is different.¹²⁵ As noted by Abeyratne “From its inception (the bodily injury requirement) has proved contentious in its application as Courts adjudicating claims under Article 17 have conservatively interpreted the phrase ‘bodily injury’ as either pure physical injury or mental suffering accompanied by physical injury where the latter was a causative factor in bringing about the former.”¹²⁶ Most Courts do not want to depart from the bodily injury requirement. French civil law does not distinguish between mental and physical injuries and interpreting this matter in a common law view overturns the whole concept of ‘lesion corporelle’. French law allows recovery for both of the above mentioned types of injuries.¹²⁷ Under English law, psychic damages in any other type of accident, like a motorbike or a car accident would be compensated.¹²⁸ But as the matter of accidents on air is governed by WSC, not many things are left to be done and Article 17 should be interpreted based on the intentions of the signatory parties as expressed in the WSC.

The consequence of the lack of uniformity when WSC covers domestic flights as well is that it limits liability and makes it difficult for the passengers to bring a claim under WSC/MC. There is a great uncertainty regarding which Convention covers for which accident as many States have not signed MC and for them WSC is still applying, adding an extra problem to the equation.

¹²³ Article L6421-3 of the French Transport Code.

¹²⁴ Carriage by Air Act, 1961 9 & 10 ELrz. 2 CH. 27 Section 1/ The Carriage By Air (Overseas Territories) Order 1967 Article 1/Clarke *Contracts of Carriage by Air* Chapter 2 Second Edition Lloyd’s List 2002, 7.

¹²⁵ McKay Jennifer *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, Case Western Reserve Journal of International Law Volume 34 Issue 1, 34 Case W. Res. J. Int’l L. 73 2002, 90.

¹²⁶ Abeyratne Ruwantissa I. R. ‘Mental Distress in Aviation Claims-Emergent Trends’ 65 J. Air L. & COM. 200, 225.

¹²⁷ Alldredge J. Brent ‘Continuing Question in Aviation Liability Law: Should Article 17 of the Warsaw Convention Be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?’ *Journal of Air Law and Commerce*, Vol. 67, Issue 4 Fall 2002, 1345.

¹²⁸ Gob Jeffrey ‘The meaning of “bodily injury” in International Carriage by Air’ *International Travel Law Journal* 2002, 139.

Pure mental injuries – Saks case

Article 17 is unclear in several points. The original French text was the first to be examined by the Courts. Each Court interprets it in a different way, even though the situation might be the same. The English translation (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) uses terms that are not ‘legal’,¹²⁹ making the article quite unclear and that create problems both to Courts and scholars. Furthermore, the damages covered under it are not specified. As for the mental injuries, there was no claim for that type of injuries until 1970’s when hijacking attacks begun. The question whether Article 17 covers pure mental injuries mainly arose at that time¹³⁰ as previous cases had only slight references to this matter and did not really concern regarding the issue of pure mental injuries.¹³¹

One of the most important cases not only for the US but for the rest of the world too as it is quoted frequently, is *Air France v. Saks*.¹³² In this case, Saks was a passenger in an *Air France* flight from Paris to Los Angeles. During the process of landing to the international airport of Los Angeles and after the landing, the passenger suffered from severe pressure and pain in her left ear. After consulting a doctor, he concluded that she became permanently deaf from her left ear. Then she filed a suit in a California State Court, claiming that her ear loss was caused by negligent maintenance and operation of the jetliner's pressurization system. The Federal District Court where the case was removed decided, after *Air France* move to for summary judgment based on the fact that the passenger could not prove the malfunction of the pressurization system, to grant the summary judgment. The Federal Court stated that the term accident under Article 17 of the Warsaw Convention demands an incident that is unexpected or unusual and according to its judgment certain alterations in the pressurization system of a plane do not constitute unusual or unexpected event.

However, the Court of Appeal reserved holding that “that the language, history, and policy of the Warsaw Convention and the Montreal Agreement (a private agreement among airlines that has been approved by the Federal Government) impose absolute liability on airlines for injuries proximately caused by the risks inherent in air travel;

¹²⁹ Abeyratne R.I.R., “Liability for personal injury and death under the Warsaw Convention and its relevance to fault liability in tort law”, *Annals of Air and Space Law*, Vol. XXI, 1996, 15.

¹³⁰ Thalin Christoffer ‘*The Air Carrier’s Liability for Passenger Damages –Article 17 of the Warsaw System and the new Montreal Convention Master Thesis*’ Faculty of Law University of Lund Air Law Spring 2002, 24.

¹³¹ *American Airlines v. Ulen* 186 F.2d 529(D.C. Cir. 1949. / *Grey v. American Airlines United States Court of Appeal Second Circuit* 227 F.2d 282 1955.

¹³² *Air France v. Saks United States Supreme Court* 470 U.S. 392 1985.

and that normal cabin pressure changes qualify as an "accident" within the definition contained in Annex 13 to the Convention on International Civil Aviation as meaning "an occurrence associated with the operation of an aircraft." The Supreme Court on the other hand upheld the judgement of the First District Court. Judges concluded that a passenger's own internal reaction to usual operation of the aircraft is not an accident under the meaning of Article 17 of the Warsaw Convention. Article 17 refers to an incident which caused passenger's injury and not to the injury itself as an accidental incidence to passenger's health. Focus must be on the cause of the injury. Judges also mentioned the history and preparatory work of the WSC as well as the delegates' intentions and the precedent history of application of Article 17 both in US and foreign courts. All of the above interpreted Article 17's accident as an unusual or unexpected event in course of an international flight.

It should be noted at this point, as it is going to be mentioned below as well, that most of the Courts in the cases mentioned in this text had in one way or another interpreted WSC or MC or the related Protocols and Agreements according to the knowledge they had. In order to do so they followed a standard procedure set for every international treaty. The first step is to read the treaty and examine the context in which the words are used. The authentic language of the treaty leads the examination and the legal meaning of the words used in the treaty text helps in order to determine the intentions of the parties. Evidently, the original language of the treaty prevails (WSC Article 36/Article 55 MC). When the text is not in their language, judges may consider an official translation of the legal terms used although sometimes dictionary definitions might be too broad in order to be used for a legal document. In that case, Courts examine legal material from the language's country in order to identify the legal meaning the term has in that country and the way it is applied in its legal system and spot the differences between the original term and the translated one. When the meaning is indistinct, Courts have to examine the history of the treaty, the negotiations and the meaning the parties intended to give to the particular term.¹³³

In the *Saks*¹³⁴ decision it was stated that accident is any event that is external to the passenger, out of the usual process on board of an international flight. They also mentioned that Article 17 of the WSC cannot be referred to the Montreal Agreement as WSC overshadows any other agreement. Thus, although the Montreal Agreement amended WSC it did not exclude any provision of the Warsaw Convention regarding the liability of the carrier, for example Article 17's accident requirements. The Montreal Agreement was aiming for speed settlements and to facilitate passenger recovery specifically connected to Article 20 (1) of the WSC and the signatories intentionally waived off the provisions of the abovementioned Article.

¹³³ Easton John F. & Trock Jennifer E. & Radford Kent A. 'Post Traumatic Lesion Corporelle: A Continuum of Bodily Injury under the Warsaw Convention' Journal of Air Law and Commerce Volume 68 2003, 665.

¹³⁴ *Air France v. Saks United States Supreme Court* 470 U.S. 392, 397 1985 / *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court* 499 U.S. 530,534 1991.

Having mentioned the above, Article 17 cannot be mixed with Article 20(1) after the amendment of WSC with the Montreal Agreement both because there are separate articles with different provisions and because although their provisions might look similar and applicable to comparable cases, nonetheless there is no change made to Article 27 that can justify their mixing. Furthermore the Court stated that no connection with Annex 13 to the Convention on International Civil Aviation regarding the definition of accident under Article 17 of the WSC can be made as Annex 13 concerns aircraft accident investigations and not the liability of the carrier towards the passengers on board of an international flight like Article 17 does. As it is logical, the interpretation of the term bodily injury that was made in the WSC was affected by the beliefs regarding the psychiatric injuries in 1929, the year WSC was signed. Scientists at that time could not foresee any such type of injuries therefore the strict interpretation of any harm caused on board only to body harms follows the tendencies of the time. Nevertheless, in the preparatory work of the WSC the French delegate strongly suggested that based on the French jurisdiction both mental and physical injuries should be accepted under Article 17 despite the fact that there was no legislation, judicial decisions or scholars that supported that opinion regarding international carriage by air. Most likely the French delegates were affected by the French law on damages of the time which allowed recovery for psychic injuries.¹³⁵

It is known that the French Law covers both physical and psychic injuries under the term *lesion corporelle* when it comes to tort law. Having said that, there are certain tort law cases where pure mental injuries were awarded by the courts. This point was debatable for many years to come, in a series of different cases in both sides of the Atlantic. Pure mental injuries were not accepted in most of the countries but when connected with physical injuries a wider interpretation is allowed.

b. Conclusion

In this chapter Article 17 and its definitions for accident and mental injuries were mostly discussed and the way Courts, mainly in US interpret it in their various decisions. It is clear that the Courts did not allow recovery for pure mental injuries based on the interpretation and the translation of Article 17 from French in the WSC or the preparatory work and different discussions of MC.

¹³⁵ Tamba Andrian Ph.D. Student, "Babes-Bolyai" University of Cluj-Napoca '*Lesion and its functional equivalents. A glance at France, Quebec, Louisiana and the United States Common Law*' (<https://studia.law.ubbcluj.ro/articol/585>)

CHAPTER 3

The approach of US Courts to the recoverability of mental injuries

a. Overview

This chapter is about the US approach on pure mental injuries in aviation law. There is a series of cases discussed to show the stance of the US Courts towards Article 17 and its interpretation. The cases in this chapter can be divided in 4 different categories: 1) those where pure mental injuries were allowed for different reasons (*Husserl*¹³⁶, *Palagonia*,¹³⁷ *Zicherman*,¹³⁸ *Roselawn*,¹³⁹ *Weaver*¹⁴⁰), 2) those that disallowed pure mental injuries which are the majority (*Burnett*,¹⁴¹ *Rosman*,¹⁴² *Fishman*,¹⁴³ *Croucher*,¹⁴⁴ *Bobian*,¹⁴⁵ *Carey*,¹⁴⁶ *Alvarez*,¹⁴⁷ *Longo*,¹⁴⁸ *Ospina*,¹⁴⁹

¹³⁶ *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F.Supp. 702 S.D.N.Y 1972.

¹³⁷ *Palagonia v. Trans World Airlines Supreme Court Westchester County* 110 Misc. 2d 478 1978.

¹³⁸ *Zicherman v. Korean Air Lines Co.* 516 U.S. 217 1996.

¹³⁹ *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.

¹⁴⁰ *Weaver v. Delta Airlines, Inc.* U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 D. Mont. 1999 June 30, 1999.

¹⁴¹ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

¹⁴² *Rosman v. Trans World Airlines Court of Appeals of the State of New York* 34 N.Y. 2d 385 1985.

¹⁴³ *Circuit Fishman v. Delta Airlines Inc. United States Court of Appeals, Second Nos. 1818, 2038, Dockets 96-9345, 96-9457. Decided: January 05, 1998.*

¹⁴⁴ *Croucher v. Worldwide Flight Services, Inc.*, 111 F. Supp. 2d 501 D.N.J. 2000 U.S. District Court for the District of New Jersey - 111 F. Supp. 2d 501 D.N.J. 2000 August 16, 2000.

¹⁴⁵ *Bobian v. CSA Czech Airlines*, 232 F. Supp. 2d 319 D.N.J. 2002 U.S. District Court for the District of New Jersey - 232 F. Supp. 2d 319 D.N.J. 2002 October 30, 2002.

¹⁴⁶ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 D. Or. 1999 U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.

¹⁴⁷ *Alvarez v. American Airlines, Inc.*, S.D.N.Y United States District Court, S.D. New York. No. 98 Civ. 1027 (MBM) S.D.N.Y. Aug. 30, 1999.

¹⁴⁸ *Longo v. Air France*, 1996 WL 866124 S.D.N.Y. 1996.

¹⁴⁹ *Ospina v. Trans World Airlines Inc Youssef* Nos. 1134, 975 F. 2d 35 1155, Dockets 91-9245, 91-9247. United States Court of Appeals, Second Circuit.

Ehrlich,¹⁵⁰ *Doe*,¹⁵¹ *Turturro*¹⁵²), 3) those that allow physical manifestations of mental injuries (*Burnett, Rosman*) and those where mental manifestations of physical injuries were allowed (*Little Rock*,¹⁵³ *Jack*¹⁵⁴). The landmark case is *Floyd* as it did not exclude any recovery for pure mental injuries as long as there is a physical injury. Until this case, the prevailing view was that there cannot be any compensation for pure mental injuries. After it, there were cases allowing compensation for mental injuries linked to physical injuries as well as for pure mental injuries as the medical technology helped towards this way. The PTSD category of mental injuries is examined as the way its advent changed the viewpoint regarding mental injuries. Up to a certain point it widened the frame of pure mental injuries, nonetheless the medical progress made regarding this matter did not impress the judges who mainly persisted on their no compensation for pure mental injuries perspective. The connection between medical technology and the law is also discussed as well as the medical side of PTSD which will help to understand why it is different from other types of mental injuries. Furthermore, the dichotomy between body and mind has evolved and it is now considered that they cannot be viewed apart.

1. Chronological evolution of Courts' approach

1.1 Early Years

Ulen case

The first reference for recovery of a pure mental injury was made in the *American Airlines v. Ulen*¹⁵⁵ case in 1949. Mrs. Ulen was a passenger on a flight that crashed and suffered severe injuries and she and her husband filed separate suits against the air carrier for these injuries and losses suffered due to the airline's and its agents negligence. Then they moved for summary judgment in their favor in reference to liability and damages would be determined in trial. Appellant carrier filed a motion including additional defenses. According to the Court's records Judge Morris entered a memorandum opinion holding that he intended to grant the summary judgment motions to the Ulen's, still allowing the carrier of an amended answer. The motions were granted and a judge would decide about the amount of the damages. Appellant's

¹⁵⁰ *Ehrlich v. American Airlines Inc. United States Court of Appeals, Second Circuit Docket No. 02-9462. Decided: March 08, 2004.*

¹⁵¹ *Doe et al v. Etihad Airways, P.J.S.C., No. 5:2013cv14358 - Document 27 (E.D. Mich. 2015).*

¹⁵² *Turturro v. Continental Airlines, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. 2001.*

¹⁵³ *In Re Air Crash at Little Rock, Ark., on 6/1/1999, 118 F. Supp. 2d 916 (E.D. Ark. 2000) U.S. District Court for the Eastern District of Arkansas 118 F. Supp. 2d 916 (E.D. Ark. 2000) October 27, 2000.*

¹⁵⁴ *Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 N.D. Cal. 1994.*

¹⁵⁵ *American Airlines v. Ulen 186 F.2d 529 D.C. Cir. 1949.*

motions were dismissed and certain amounts were given to the Ulens. Air carrier appealed to this judgment. The U.S. Court of Appeals for the District of Columbia Circuit found that the issue of negligence was well established and that the WSC applied as this was another question set by the air carrier. The reference made regarding pure mental injuries was in an unofficial report of the case, a fact that impoverishes its existence and its possible use in the present text¹⁵⁶. The USA Courts literally construe the definition of the term accident based in the treaty interpretation. They follow the federal law system where legislative history and intent of the contracting parties should be examined. The definition given in the *Husserl* case given below does not create much controversy, it is broadly applied.¹⁵⁷

Husserl case

One of the first cases addressing the issue of pure mental injuries was *Husserl v. Swiss Air Transport Company*¹⁵⁸ in 1972. G. Husserl was a passenger on a flight from Zurich to New York ran by TWA (Trans World Airlines). The plane was hijacked and it landed in a desert outside of Amman. Passengers were held hostages under strenuous conditions. The plaintiff presented three motions. First she claimed under WSC, secondly that the carrier had breached the contract as there was no safe carriage to New York as it was signed and thirdly that her injuries resulted from the carrier's negligence or that of its agents. The main question that the Supreme Court had to answer in this case was whether the WSC is applicable to a hijacking incident and the matter of mental anguish was examined as well.

Article 1 of the Warsaw Convention states that the Convention applies to any international carriage by air.¹⁵⁹ Thus the abovementioned carriage is covered by the WSC. According to the Court when it comes to the carrier's liability a combination of Articles 17, 20, 21, 25 of the Convention sets the limits of liability of the carrier. It is up to local laws to determine if there is a right of action. As far as if a hijacking can be considered an accident, the Supreme Court decided that after the Montreal Agreement this matter seems to be solved and hijacking is considered an accident under the updated WSC.

The Court finally made a note regarding the mental anguish the plaintiff and whether it can be compensated under Article 17 of the Convention. District Judge Tyler

¹⁵⁶ Mundell, Lee Carter '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 [decisions]' Georgia Journal of International and Comparative Law, Vol. 6, Issue 1 Winter 1976, 339.

¹⁵⁷ Loggans Susan E. 'Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective' John Marshall Law Review, Vol. 13, Issue 3 Spring 1980, 541.

¹⁵⁸ *Husserl v. Swiss Air Transport Company Ltd.*, 351 F.Supp. 702 S.D.N.Y 1972.

¹⁵⁹ Convention for International Carriage by Air (Treaty DOC. 106- 45) and Protocol to Amend the Convention for Unification of certain rules relating to International Carriage by Air (Treaty DOC. 107-14).

concluded that it is not accepted under the WSC that psychic and physical injuries to be awarded separately. He took into consideration the original French text and noted that the use of the word *corporelle* (bodily) overrules the use of the word *blessure* which besides meaning physical wound can also include any other injury or hurt. Based on the abovementioned, the plaintiff's motion was accepted.¹⁶⁰ According to certain scholars, the types of injuries recognized in the *Husserl*¹⁶¹ case should expand in so including mental injuries as well. Furthermore, mental injuries are now established in most jurisdictions as an independent type of compensable injury. Thus, it should be recognized as a type of 'wounding' as mentioned in Art.17 WSC.¹⁶²

Burnett case

*Burnett v. Trans World Airlines*¹⁶³ case was held in 1973, a year after the *Husserl* case and it's based on the same facts. In this case, a couple had signed a contract for a journey through Asia and some Mediterranean countries with TWA. They were boarded to a flight from Athens to New York where their journey would end. Another country was added to their itinerary without them knowing beforehand. Additional passengers were boarded in Frankfurt and the plane departed planning to land in New York. Soon the passengers were informed that the plane was hijacked and that they were traveling to Amman, where it landed. The plaintiffs along with the other passengers were held hostages on board of the plane for 6 days. They experienced severe emotional trauma from the whole experience as well as physical damages. Plaintiffs seek recovery for the mental anguish they suffered as well as for the bodily injury. Both sides agreed that Article 17 of the WSC should be applied as the incident in dispute took place on board of an international flight. The Court decided about two issues; whether pure mental injuries without any connection to a bodily injury could be compensated under Article 17 and whether mental damage deriving from a bodily injury could be compensated under Article 17 WSC.

The Supreme Court examined the history of the WSC, its preparatory work and the legislative history that followed its signature. Since WSC is an international Convention in which US is a signatory party it overruled against every state law. The Court took into consideration the original French text and examined whether pure mental injuries could be compensated under the meaning of the French term *lesion corporelle*. There is a sharp distinction in French Law between mental and physical injuries as in the US Law. In that way, there cannot be a doubt regarding the French text. It clearly states *lesion corporelle* i.e. bodily injury. Moreover, the term *blessure* used in the original French text could include mental anguish according to the

¹⁶⁰ Jérôme J., *Vocabulaire Francais-Anglais et Anglais-Francais de Termes et Locutions Juridique* 1953.

¹⁶¹ *Husserl v. Swiss Air Transport Company Ltd.*, 351 F.Supp. 702 S.D.N.Y 1972.

¹⁶² Abeyratne Ruwantissa 'The Economy Class Syndrome and Air Carrier Liability' *Transportation Law Journal*, Vol. 28, Issue 2 2001, 251.

¹⁶³ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

dictionaries, as it may refer not only to wounds but to hurt or injury. Nonetheless, when used along with the term *lesion corporelle* it may be safe to conclude that the drafters aimed to use only its physical sense.¹⁶⁴

Furthermore, the Supreme Court referred to the precedent of the WSC, The First International Conference on Private Air Law signed in Paris 1925 in order to emphasize how much the drafters of the WSC wanted to restrict the definition of bodily injuries. In this early text, there was no limitation on carrier's liability when it comes to damages caused to passengers. According to professor Mazeaud, who studied the French case law before 1925 and the signature of WSC, it was possible for passengers to be compensated only for mental injuries under the French Law¹⁶⁵. As some of the signatory countries of the WSC were not as forward as France was in this matter, it was decided that a limit should be set regarding carrier's liability when it comes to passengers damages. It becomes more and more clear that the intention of the WSC was to create a definite outline about the compensation a passenger can claim in case of an accident on board which would include only bodily injuries.

The Court also used the Berne Convention on International Rail Transport to support its verdict. In the original draft of this Convention only bodily injuries were foreseen. But in its later version the text was modified and the term 'ou mentale' was added. This term means 'or mental'. In that way mental injuries could be compensated along with the bodily injuries. This comparison used by the Court to underline the fact that *lesion corporelle* can in no way include mental injuries as well. As far as the possible recoverability of mental anguish caused by a physical injury the Court found that Article 17 comprises those types of injuries. In that sense, mental anguish that is directly linked to bodily injury is a '... damage sustained in the event of a bodily injury.' as Article 17 states. According to the Court this is the only way for a passenger to be awarded a compensation for psychic injury under Article 17 of the WSC.

Courts did not give a lot of decisions awarding emotional distress in a uniform way, although this was the main purpose of WSC¹⁶⁶. US Supreme Court has held that no plaintiff can claim any recovery for pure mental injuries under Article 17 WSC¹⁶⁷. But there is still the question whether it can be any recovery for another type of injury. Some scholars support that full recovery under certain circumstances is possible, others none at all. The outcome in most cases depends on how plaintiffs categorize their injuries and the power of the medical evidence they offer to the Court.

¹⁶⁴ Jérôme J., *Vocabulaire Francais-Anglais et Anglais-Francais de Termes et Locutions Juridique* 1953.

¹⁶⁵ Henri Mazeaud, Leon Mazeaud, and Andre Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, Montchrestien 5th ed. 1957, 416.

¹⁶⁶ *U.S. Supreme Court Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 532 1991.

¹⁶⁷ Easton John F. & Radford Kent A. & Trock E. Jennifer 'Post Traumatic "Lesion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention' *Journal of Air Law and Commerce*, Vol. 68, Issue 4 Fall 2003, 665.

In the past there was a more distinct relationship between physical and psychic injuries (it should be noted that this distinction does not mean that it was correct, it was simply the way brain and body association was viewed) which now, after the evolution of medicine have been altered, for example PTSD includes alterations e.g. in the nervous system and may also include headaches. Evidence has been offered in order to prove that PTSD is a physical injury. Medical doctors based on the new technology can witness the changes in the brain that can be caused by a near to death experience. With the technological developments, plaintiffs might be able to claim compensation for injury that has been categorised as purely mental until now. The meaning of the term 'lesion corporelle' will continue to evolve following the new medical advancements.¹⁶⁸

The *Palagonia*¹⁶⁹ case analysed below is one of the few cases in the US accepting the broader meaning the original French term might have.¹⁷⁰

Palagonia case – Rosman case

In *Palagonia v. Trans World Airlines*¹⁷¹ case, plaintiffs raised claims for physic or mental injuries arising from a hijacking on an international flight alongside minor physical injuries. The Court was affected by the definition of *lesion corporelle* given in the *Rosman v. Trans World Airlines*¹⁷² case which determines that the meaning of the above mentioned French term translated in English excludes any mental injury resulting from an accident on board an international flight and intended to dismiss the claim. The plaintiffs though brought an expert witness who made the Court delay its judgment. After hearing the expert witness the Court concluded that *lesion corporelle* includes psychic injuries too even in the absence of physical injuries. The Court in concluded that the term bodily injury is the exact translation of the French term and there was no need for further discussion whether mental injuries could be included as well. Attorneys of the *Trans World Airlines* insisted that expert witness who could prove that in the French jurisdiction *lesion corporelle* included mental injuries too. The Court in *Rosman* did not accept this submission. Yet, the Court in *Palagonia*¹⁷³ decided that a hearing like the abovementioned would be helpful for the process as the different meanings existing about the correct translation or even the content of the French term made the Court's work more complicated.

¹⁶⁸ Easton John F. & Radford Kent A. & Trock E. Jennifer 'Post Traumatic "Lesion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention' *Journal of Air Law and Commerce*, Vol. 68, Issue 4 Fall 2003, 665.

¹⁶⁹ *Palagonia v. Trans World Airlines Supreme Court Westchester County 110 Misc. 2d 478 1978.*

¹⁷⁰ Jarvis Robert M. 'The Warsaw Convention again: This time the issue is a carrier's liability for its passengers "psychic injuries"' *Preview of United States Supreme Court Cases*, Vol. 1990-1991, Issue 2 October 19, 1990, 37.

¹⁷¹ *Palagonia v. Trans World Airlines Supreme Court Westchester County 110 Misc. 2d 478 1978.*

¹⁷² *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

¹⁷³ *Palagonia v. Trans World Airlines Supreme Court Westchester County 110 Misc. 2d 478 1978.*

Professor Rene H. Mankiewicz was the expert that testified in front of the Court. He emphasized that the French text was the original and that the English translation was unofficial therefore only the French term should be taken into consideration. He underlined that the experts drafting Article 17 were coming from the civil law space so the Court should consider that as well. Furthermore, he mentioned that the minutes of the WSC could not help the scholars/judges decide about the intentions of the drafters on whether mental injuries should be covered along with physical injuries. This comment is important as the debate on this matter was long and fruitless. It is an answer to all of the decisions made by the Courts that there might be space for mental injuries to be covered by Article 17 and it is an opinion that the drafters of the Montreal Convention should had taken into consideration. Future Convention on this matter should regard this matter as well. Professor Mankiewicz further testified that there are written analyses which support the broader meaning of the French term used in the original text of the WSC.

The French Professor Dean Ripert used in his text, published shortly after the WSC, the term *dommage corporel* which derives from the French civil law. According to that, there is no distinction in what type of damages a person can claim, both physical and mental are covered. Moreover, there is a doctoral thesis supervised by Professor Ripert in which it is mentioned that the use of the term *lesion* after the words for death or wounding encompass any trauma or agitation which cannot be immediately shown i.e. at the same time the accident happened. German delegate of the WSC Otto Riese translated Article 17 not literally but as 'any other harm to the health of a person'. In one of his articles he mentions that the abovementioned German translation compared with the French term *blessure* (which is used in his article) showcases that any type of trauma is included even if there is not an obvious change to the body. In another article of his he mentions that 'The distinction made in the text between "la blessure" which means wounding, "and toute autre lesion corporelle" demonstrates that the convention shall apply not only to the blessure, strictly speaking, but also to all harm done to the healths of the passengers, such as a consequence of a psychic shock or air sickness.'

Then he gives reference to other authors in the same meaning.' Furthermore, Professor Mankiewicz proved that the text used in the *Rosman*¹⁷⁴ case in which the Court's decision was based, a translation by Henri P. de Vries of a text by H. and L. Mazeaud and A. Tunc, was misleading. The authors mentioned that the term *corporel* might at first be read strictly, including only physical injuries, but it could have other readings as well. There were opposing views regarding Professor Mankiewicz's standpoints during the judicial process. It should be mentioned that no matter what the exact translation of the term *lesion corporelle* is in English and what was the intention of the drafters in 1929, the mental aspect of an accident on board was not included in any modernization of the WSC. Professor Mankiewicz further mentioned that there

¹⁷⁴ *Rosman v. Trans World Airlines Court of Appeals of the State of New York* 34 N.Y. 2d 385 1985.

was no point in adding the word *mentale* as the original French term *lesion corporelle* included mental injuries as well.

Judge John C. Marbach examined other cases related to international carriage by air as well. Besides the *Rosman* case he also referred to the *Grey v. American Airlines*,¹⁷⁵ in which there was no evidence regarding the Court's decision. Another case was the *Husserl v. Swiss Air Transport Company*¹⁷⁶ which was mentioned above. *Block v. Compagnie Nationale Air France*¹⁷⁷ was also examined. In this case the judges mentioned that the contract of carriage is the significant element and that there should not be any kind of connection with tort law, only with WSC when it comes to an international carriage by air. Moreover the Court in *Block* said that the original French text is binding. Prior to *Floyd*¹⁷⁸ case, US Court did not have a uniform view regarding recoverability of pure mental injuries.

There were 2 main approaches in the USA jurisdiction. The first, after the *Burnett*¹⁷⁹ and *Rosman*¹⁸⁰ cases according to which only mental anguish resulting from a bodily injury can be compensated. The Court in *Rosman*¹⁸¹ adopted the ruling from *Burnett*¹⁸² and held that "...bodily injury only meant 'palpable, objective bodily injury' and the airline was liable for such injury caused by the trauma of the hijacking and for the damages flowing from those bodily injuries, but not for the trauma as such, or for the non-bodily or behavioural manifestations of that trauma." According to the Court of Appeal there was a need for objective injury to the body and causal link between the bodily injury and the accident. A psychic trauma alone or psychic trauma which caused the bodily injury are not compensable under WSC.¹⁸³ The second approach was affected by the decision on the *Husserl*¹⁸⁴ case. The Court held that 'the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colourably within the ambit of the enumerated types. Mental and psychological injuries are colourably within that ambit and are therefore, comprehended by Article 17.'¹⁸⁵ According to DR. Georgette Miller the interpretation in both *Burnett*¹⁸⁶ and *Husserl*¹⁸⁷ was not made based on the plain language of Art. 17 WSC. This Article does not literally require a causal link between the damage and the death/wounding/other bodily injury. But she concluded that there is no definite

¹⁷⁵ *Grey v. American Airlines United States Court of Appeal Second Circuit 227 F.2d 282 1955.*

¹⁷⁶ *Husserl v. Swiss Air Transport Company Ltd. 351 F.Supp. 702 S.D.N.Y 197).*

¹⁷⁷ *Block v. Compagnie Nationale Air France United States Court of Appeal Fifth Circuit 386 F.2d 323 1967.*

¹⁷⁸ *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530 1991.*

¹⁷⁹ *Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 D.N.M 1973.*

¹⁸⁰ *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

¹⁸¹ *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

¹⁸² *Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 D.N.M 1973.*

¹⁸³ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

¹⁸⁴ *Husserl v. Swiss Air Transport Company Ltd., 351 F.Supp. 702 S.D.N.Y 1972.*

¹⁸⁵ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003 147.

¹⁸⁶ *Husserl v. Swiss Air Transport Company, Ltd., 351 F.Supp. 702 S.D.N.Y 1972.*

¹⁸⁷ *Husserl v. Swiss Air Transport Company Ltd., 351 F.Supp. 702 S.D.N.Y 1972.*

answer in how 'lesion corporelle' is read by French Court. A literal use would exclude pure mental injuries but a wider one could include them and thus a carrier would be liable for them.¹⁸⁸ The contest between the 2 approaches culminated before the United States Supreme Court in 1990 in the *Floyd*¹⁸⁹ case. Nonetheless the decision on *Floyd* did not resolve the matter. Controversy went on as the final judgement of the Supreme Court did not answer whether mental injuries accompanied by physical injuries are compensable.

1.2 Floyd Case, a landmark case for mental injuries and its aftermath

Some commentators expected that the *Floyd* case will be the answer to the long term debate whether or not WSC covers pure mental injuries as well.¹⁹⁰ Lower Courts mostly dealt with the correct translation of 'lesion corporelle'. The question is not whether 'lesion corporelle' means 'bodily injury' but if under the French Law pure mental injuries are covered as well. This discussion led to different conclusions as it can be seen below, in the series of cases mentioned. There is no clear use of the phrase 'lesion corporelle' under the French Law thus Courts should understand that this term was used particularly in an international Convention. Nonetheless, there is no reason to suspect that it might mean something different than the meaning readers can perceive out of the first reading. English version clearly limits the French term and it is the one governing the meaning of the above mentioned term in Courts. The Protocol drafted in Paris in 1925 was quite broad, not excluding any type of injury. As stated in this Protocol "The carrier is liable for accidents, losses, breakdowns and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage..."¹⁹¹ But this definition changed in 1929 and WSC's version was revised by a committee of experts.

More recent than the abovementioned cases is the *Floyd v. Eastern Airlines*¹⁹² a landmark case. In this case US Courts rejected the concept of pure mental injuries without the occurrence of a physical injury as well. Rationality of the WSC was discussed after the claims for emotional distress on behalf of the petitioner. Mr. Floyd was on board a flight between Miami and the Bahamas that almost crashed. After the landing the passengers filed separate claims regarding solely mental distress. The District Court held that under Article 17 of the WSC recovery for mental anguish

¹⁸⁸ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

¹⁸⁹ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

¹⁹⁰ Sisk, Gregory C. 'Recovery for Emotional Distress under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle' Texas International Law Journal, Vol. 25, Issue 2 Spring 1990, 127.

¹⁹¹ Sisk, Gregory C. 'Recovery for Emotional Distress under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle' Texas International Law Journal, Vol. 25, Issue 2 Spring 1990, 127.

¹⁹² *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

alone is not allowed. The Court based its decision on the *Burnett*¹⁹³ Court's analysis of the original French text of the WSC.¹⁹⁴ The air carrier in an international flight is liable to compensate any damage that happens on board as long as it is a physical one. The Court of Appeals reversed stating that according to the French original text, pure mental injuries are compensable under Article 17 WSC.

The Supreme Court had the same opinion as the District Court. It did not answer the question whether emotional distress is compensable if accompanied by a bodily injury. It just held that in order to interpret a Convention there are some steps that should be taken. That in this case neither the WSC itself nor any other related document regarding international carriage by air allows that broader interpretation of the term bodily injury. Furthermore, there is no evidence that the broader meaning of the French term *lesion corporelle* that the French themselves accept is equally accepted by the other signatories too. The Supreme Court was very keen on stressing how the strict interpretation of the term bodily injury was what all the delegates of the WSC aimed at. Moreover, in none of the next Protocols or Agreements signed regarding international carriage by air a change of the 'bodily injury' term was made. Although it was suggested by the delegates and the newer Agreements and Protocols adopted the term 'personal injury' which can be interpreted in a broader way, compensation for pure mental injuries was not accepted. Eventually, the Supreme Court held in its decision that under the WSC compensation for pure mental injuries is not acceptable, regardless of what the French Law allows. Unless a passenger can prove that there is an unbreakable link between the deaths, physical injury or physical manifestation of injury and the psychic injury, compensation cannot be awarded.

The *Floyd* case gave an answer to the debate regarding mental injuries in the USA. The debate regarding whether WSC allows awards for emotional distress is quite big and important in the US as they were not an original party during the drafting process of the Convention. *Floyd* did not exclude any recovery for pure mental injury under Art. 17. A physical injury is a precondition for the carrier's liability. When there is liability and a physical injury, damages for pure mental injuries cannot be awarded¹⁹⁵. US Courts and scholars perceive 4 different approaches to the matter of emotional injuries under WSC. First one is that there is no recovery at all even if there is a bodily injury. This approach is really restrictive, favors airlines and although WSC was originally drafted in order to support airlines' rights, France and other countries recognize mental injuries alongside bodily injuries. The second one is that recovery can be awarded for all types of distresses as long as physical injuries occur, regardless the connection between mental and bodily injuries. This approach does not seem correct either as it makes emotional injuries have no basis as a cause of action.

¹⁹³ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

¹⁹⁴ Boulee Jean-Paul 'Recovery for Mental Injuries that are Accompanied by Physical Injuries under Article 17 of the Warsaw Convention: The Progeny of *Eastern Airlines Inc. v. Floyd*, *Georgia Journal of International and Comparative Law*, Vol. 24, Issue 3 1995, 501.

¹⁹⁵ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' *Air and Space Law*, Vol. 28, Issue 3 June 2003, 147.

Next one in line supports that emotional distress is a part of bodily injuries only if it happens at the same time or it comes after the bodily injury. The last one allows remuneration for mental injuries only if they are caused by a physical injury. This approach demands the distress to be caused from an injury that happened on board and not because of the accident on board. Also a causal link between the accident and the bodily injury is necessary. All the approaches mentioned above have been used by the US Courts in different cases like the ones mentioned above. Nevertheless it is one of the rare cases in which US Courts decided that at the time WSC was signed all forms of injury, including psychic injuries, were compensable.

*Floyd*¹⁹⁶ case stated the criterion under which an injury is recognized as a bodily injury by the Courts and did not provide anything for pure mental injuries. Following this case the *Jack v. Trans World Airlines*¹⁹⁷ allowed recovery for impact injuries - emotional distress deriving from a 'bodily injury' (other Courts followed *Floyd* and did not allow recovery at all)¹⁹⁸. In this case, on a flight from New York to San Francisco an aborted takeoff, crash and fire happened. The plane was destroyed by the fire but all of the passengers survived and suffered minor physical injuries. TWA held that there cannot be recovery for pure emotional distress for passengers that did not have physical manifestations of emotional distress. Furthermore, that this type of injury (mental injury) is not recoverable under WSC as decided in the *Floyd*¹⁹⁹ case mentioned above. The airline also claimed that impact injuries cannot be compensable as well unless accompanying physical manifestations. Plaintiffs claimed that in this case the issue is impact injuries and/or physical manifestations of emotional distress.

They claimed for physical injuries and emotional distress from the San Francisco Supreme Court. Plaintiffs based their motion on the Declaration of Dr Martin Blinder, who gave two opinions. The first is that "most, if not all of the accident victims would have suffered at least transient extrinsic physical impact/injury..." The second one was that the emotional distress the plaintiffs sustained had internal physical effects. He did not examine any of the victims of this specific flight. The Court did not find him qualified enough so it did not accept his opinion stating that probably most of the passengers had sustained 'lesion corporelle' or 'blessures'. The Court examined the decision of the *Floyd* case as well as the WSC and adopted the approach stating that only emotional distress flowing from the bodily injury is recoverable as it follows the decision from the *Saks* case.²⁰⁰ As the Court itself held "The court adopts the fourth approach. Plaintiffs with impact injuries may recover for their impact injuries and the emotional distress flowing only from the physical injuries. They may also recover for the physical manifestations of their emotional distress. Plaintiffs with physical

¹⁹⁶ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

¹⁹⁷ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

¹⁹⁸ Holland Michael J. "The Puzzle of Defining 'Bodily Injury' under the Warsaw Convention" Defence Counsel Journal, Vol. 70, Issue 4 October 2003, 424.

¹⁹⁹ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

²⁰⁰ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

manifestations may recover damages for the manifestations and any distress flowing from the manifestations, but may not recover damages for the emotional distress that led to the manifestations. In both instances, the emotional distress recoverable is limited to the distress about the physical impact or manifestation, *i.e.*, the bodily injury. Recovery is not allowed for the distress about the accident itself.”

In *Jack*, Court adopted the fourth approach encountered in the WSC cases, holding that only emotional distress flowing from the bodily injury is recoverable. “Plaintiffs with impact injuries may recover for their impact injuries and the emotional distress flowing only from the physical injuries. They may also recover for the physical manifestations of their emotional distress. Plaintiffs with physical manifestations may recover damages for the manifestations and any distress flowing from the manifestations, but may not recover damages for the emotional distress that led to the manifestations. In both instances, the emotional distress recoverable is limited to the distress about the physical impact or manifestation, *i.e.*, the bodily injury. Recovery is not allowed for the distress about the accident itself.”²⁰¹ There was conflict between *Floyd*²⁰² and *Rosman*²⁰³ cases. US Supreme Court granted certiorari in the *Floyd* case in order to resolve this matter. The Supreme Court gave an answer to this matter of compensating pure mental injuries. Air carriers are not liable for pure mental injuries. It did not answer the matter whether a passenger can claim compensation for mental injuries accompanied by bodily injuries. Supreme Court followed the regime from *Saks*²⁰⁴ case and examined the history, preparatory work, conversations and opinions of the drafting members.²⁰⁵

According to the French legal material ‘lesion corporelle’ was not widely used in France in 1929. There were no legislative provisions in force that contained the phrase or certain treaties/articles which used the term both for mental and physical injuries. No explanation of the term from French Court. Thus the Supreme Court concluded that “neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that “lesion corporelle” should be translated other than as “bodily injury”, a narrow meaning excluding purely mental injuries”.²⁰⁶ Based in the drafting history, the final Protocol of Paris Conference 1925 would include recovery for pure mental injuries. But CITEJA (Comité International Technique d' Experts Juridiques Aériens) revised the draft Convention and the official version of WSC did not include them. Many of the signatories in 1929 did not apply pure mental injuries

²⁰¹ *Jack v. Trans World Airlines, Inc.* U.S. District Court for the Northern District of California - 854 F. Supp. 654 N.D. Cal. 1994) April 25, 1994 2d.

²⁰² *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530 1991.

²⁰³ *Rosman V Trans World Airlines* Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.

²⁰⁴ *Air France v. Saks* United States Supreme Court 470 U.S. 392, 397 1985 / U.S. Supreme Court *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530,534 1991.

²⁰⁵ Thalin Christoffer ‘*The Air Carrier’s Liability for Passenger Damages - Article 17 of the Warsaw System and the new Montreal Convention Master Thesis*’ Faculty of Law University of Lund Air Law Springer 2002, 5.

²⁰⁶ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

so if they wanted them to be included they would have clearly stated it so.²⁰⁷ The Court also made an analogy of WSC with the Berne Convention, which was amended in order to include pure mental injuries. Based on that, the Court concluded that if the signatories of the WSC intended to do the same they could have done it in one of the many amendments of the WSC that followed. Signatories' conversations according to the Supreme Court gave no evidence that the previous Protocols intended to clarify Art. 17. Since those agreements and Protocols were not signed by all of the signatories of WSC their amended provisions could not substitute WSC. Furthermore, the purpose of uniformity, i.e. to avoid major conflicts of domestic laws and jurisdictions, could have been in danger as the recognition of pure mental injuries could affect uniformity as those are not recognised by certain States.²⁰⁸

The protection of the aviation industry would be endangered if pure mental injuries are covered. The history and decisions of WSC should be respected when it comes to interpreting 'lesion corporelle'. That is the reason why a passenger that has only emotional injuries cannot claim for recovery under WSC. This decision is followed by the majority of Courts in the USA as well as in other countries, members of the WSC. *Floyd* case did not answer whether there can be recovery for emotional distress accompanied with physical injuries.²⁰⁹ Thus it makes it difficult for Courts that follow Supreme Court's decision. Certain District Courts concluded that claims for physical injuries leading to physical injuries as a result of an accident on board an international flight are not enough under WSC.²¹⁰ *Alvarez*²¹¹ and *Carey*²¹² cases below had similar reasoning. In contrast with *Roselawn* case below where Court awarded compensation for mental injuries accompanied by bodily injuries but not caused by them, as long as there is a physical injury, damages can be awarded. According to the Warsaw Convention history the intention of the drafters was not to limit liability for specific injuries.²¹³ The Supreme Court each time interpreted the WSC tried to maintain the dual aim of WSC. The treaty interpretation way that the Supreme Court followed was based on the negotiating history of WSC, the intent of drafters, the subsequent ratification efforts and case law from other signatory parties.

Floyd supports the exclusion of every type of recovery for emotional distress even when there are bodily injuries. I do not agree that allowance for recovery for emotional injuries in relation with bodily injuries will disturb uniformity of the WSC

²⁰⁷ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

²⁰⁸ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

²⁰⁹ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

²¹⁰ Chester Max 'The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries Under the Warsaw Convention' Marquette law Review Vol. 84 Issue I Fall 2000 Article 5.

²¹¹ *Alvarez V American Airlines, Inc.*, S.D.N.Y. 1999 United States District Court, S.D. New York. No. 98 Civ. 1027 (MBM) S.D.N.Y. Aug. 30, 1999.

²¹² *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.

²¹³ Chester Max 'The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries Under the Warsaw Convention' Marquette law Review Vol. 84 Issue I Fall 2000 Article 5.

as many countries do not recognize compensation for pure mental injuries. Supreme Court's argument that the protection of the aviation industry, which was one of the main purposes of WSC, is going to be at stake since originally Article 17 does not cover for pure mental injuries is not correct. Extending Art. 17 in a way to cover pure mental injuries or mental injuries accompanied by a bodily injury is a much needed move in today's world. Air carriers' liability should rise and international jurisdictions should not insist in maintaining the wording and meaning of the original Art. 17 as the way people and aviation industry perceive an international flight and its consequences have been changed irrevocably.

There should be minimal pecuniary compensation for passengers if recovery for pure mental injuries is not allowed. Article 17 only sets the limits for carrier's liability and does not set any limits to the types of damages recovered. If all criteria are met, any damage can be compensated. Also, there should be recovery for all emotional distresses when there is a physical manifestation of that distress. No need for a causal link between the damage and the bodily injury according to this view. Drafters should have made it clear if they wanted it to be covered by Article 17 (wide approach). Others support that the meaning of Art. 17 are clear and do not require a link between the mental damage and the bodily injury/death/wounding.²¹⁴ This opinion can cause unequal treatment to the passengers. For example, a passenger with a minor body injury can get compensation for both. Instead, another passenger that did not suffer any physical injury but he was equally frightened will not get any compensation at all.

1.3 Later years: Progress made after Floyd

After the Floyd case, many Courts held that mental injuries can be recovered if they derive from a bodily injury. In the 1990's the most important cases were *Ospina*, *Jack* (that was mentioned above), *Zicherman*, *Longo*, *Roselawn*, *Fishman*, *Weaver*, *Carey* and *Alvarez* all analyzed below.

Ospina case: psychic damages accompanying physical injuries are allowed.

For example, in *Ospina v. TWA*²¹⁵ case (*In re In Flight Explosion on Trans World Airlines Inc., Aircraft Approaching Athens, Greece on April 2, 1986*) survivors of a bombing attack claimed for physical and psychic injuries. The Court examined the term 'dommage survenue' and while the judges accepted the term that several types of damages were included, pure mental injuries were not. Based on the decision from

²¹⁴ Sisk, G.C. "Recovery for emotional distress under the Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lesion Corporelle*", 25 *Tex. Int'l L.J.* 127, 1990, 127.

²¹⁵ *Ospina v. Trans World Airlines Inc* *Youssef* Nos. 1134, 1155, Dockets 91-9245, 975 F. 2d 35 - 91-9247, United States Court of Appeals, Second Circuit.

the *Floyd*²¹⁶ case, the Court held that ‘psychic damages accompanying physical injuries were recoverable’. In the *Ospina* case there was physical harm, contrary to the *Floyd* case. Mr Ospina had physical injuries causing his pain and suffering before his death contrary to the terror but no actual harm of the plaintiffs in the *Floyd* case. In this case, psychic injuries derived directly from the bodily injuries, both of them severe, in contrast with other cases where psychic injuries were first and then followed by physical injuries or death and others were bodily and mental injuries happened at the same time.

Since the *Floyd* case, different combinations of claims including mental injuries were accepted by the Courts. Recovery for pure mental injuries is not accepted by the majority of the Courts. Most of them agree that there is no compensation allowed when emotional injuries have physical manifestation like sleeplessness etc. But it can be allowed when it flows from a physical injury. In cases where the physical injury did not directly cause the psychic injury, it is usually up to each Court to decide based on its judges’ views. The tense though is for those cases to be dismissed, the Courts still insist for a causal link between those two injuries.

Next in the chronological order are the *Zicherman*²¹⁷ and the *Roselawn*²¹⁸ cases which will be analyzed below in a more appropriate part.

Longo case: Fear for minor injuries claims floodgate-no strong connection between emotional injuries and bodily injuries.

In *Longo v. Air France Inc.*,²¹⁹ there were bodily injuries (bruises during evacuation) and related emotional distress (fear of death) but without supporting enough that this fear of death derived from the bruises. This case followed *Jack*²²⁰ and the Court stated that plaintiffs’ bodily injuries were not related to their psychological injuries. It rejected them as they were asking recovery for pure mental injuries. It would not be fair for other passengers as well to get recovery for that type of injuries. Furthermore, the floodgates for claims for minor injuries would probably open.

Fishman case: No recovery for pure mental injuries.

In the *Fishman v. Delta Airlines* case²²¹ plaintiffs claimed for emotional distress under State law in order to retour WSC and the high possibility of the rejection of the

²¹⁶ *Eastern Airlines Inc. v. Floyd*, U. S. Supreme Court 499 U.S. 530,534 1991.

²¹⁷ *Zicherman v. Korean Air Lines Co.* 516 U.S. 217 1996.

²¹⁸ *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.

²¹⁹ *Longo v. Air France*, 1996 WL 866124 S.D.N.Y. 1996.

²²⁰ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

²²¹ *Fishman v. Delta Airlines Inc.* United States Court of Appeals, Second Circuit Nos. 1818, 2038, Dockets 96-9345, 96-9457. Decided: January 05, 1998.

claims. The Court held that even mental injuries of such type are compensable under Article 17 WSC as they were based on an accident on board an international flight. But after the Court relied upon *Tseng*²²² (where Mr. Tseng claimed for personal injuries i.e. assault and false imprisonment) and *Floyd*²²³ and held that recovery for pure mental injuries shall not be awarded.

Carey case: No recovery for pure mental injuries.

In *Carey v. United Airlines*²²⁴ plaintiff, his three kids and his female companion were in a return flight from Costa Rica to Portland. Plaintiff had two first class seats and three coach seats. He was informed upon take off that his kids were too young to sit in two of the coach seats as they were in the bulkhead (row 8). He suggested that he and his friend could sit on those seats during takeoff and landing which happened during the first leg of the flight from Costa Rica to Guatemala. After the takeoff from Guatemala plaintiff and his friend tried to change sits with two of plaintiff's kids that were sitting in the first class. A flying attendant informed them that the coach passengers could not enter first class, something that she had announced several times. Plaintiff explained that he was about to change sits with his kids but the flying attendant informed him that this type of exchange is unacceptable between coach and first class passengers. The flying attendant stated that plaintiff's kids could not sit at all in row 8.

He suggested that she could ask a couple sitting in row 9 if they could switch sits with his kids like she did and the situation was solved. She instructed plaintiff and his friend to stay in first class and not switch sits at any time with those in coach. During the same leg of the flight, two of plaintiff's kids started suffering from ear ache. One of them came to first class asking for medicine. The same flying attendant informed plaintiff that his kids could not come to first class and after informing her of the situation, she made a comment about FAA²²⁵ Regulations. Another of his kids came along asking for his help and the flying attendant reprimanded him again and informed him that a FAA representative was on board and he could arrest him as his kids kept coming from the coach cabin to the first class cabin. Plaintiff believed that his only choice was to send his kid back to coach although it was clear that the kid was in pain. Plaintiff had a heated conversation with the alleged FAA representative, including insults and profanity. He also mentioned that the flying attendant humiliated him in front of the other first class passengers. He described the events as very upsetting and claimed that the defendant's acts caused him severe mental and

²²² *El Al Israel Airlines Ltd. V Tsui Yuan Tseng* (No. 97-475) certiorari to the united states court of appeals for the second circuit 122 F. 3d 99, reversed.

²²³ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

²²⁴ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.

²²⁵ Federal Airline Administration.

emotional distress. He also stated that he “suffered physical manifestations including nausea, cramps, perspiration, nervousness, tension, and sleeplessness.”²²⁶

To begin with, District Court found that WSC was applicable as this was an international flight. Furthermore, it stated that the flying attendant’s actions constituted an accident based on the definition made in the *Saks*²²⁷ case. The Court further analyzed the *Floyd*²²⁸ case in order to determine whether the passenger could get compensation for his mental injuries. According to Supreme Court’s decision in *Floyd* “an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.”²²⁹ In this case the plaintiff made it clear that he did not suffer any physical injuries as a result of the incident. He stated that his physical symptoms appeared later as a result of his emotional distress, the direct result of the incident. The question here is whether these physical manifestations of emotional distress are compensable under WSC.

In order to answer this question, the Court examined cases from lower Courts like the *Terrafranca*²³⁰ case, where the Court stated that mere manifestations of emotional injuries are insufficient. Same, in the *Alvarez*²³¹ case the Court concluded that “in a case governed by Article 17, a plaintiff may recover compensation for psychological and emotional injuries only to the extent that these injuries are proximately caused by his or her physical injuries”.²³² Finally, based on United States Magistrate Judge Hubel “In the instant case, even if I were to adopt the reasoning of *Jack*, plaintiff could not recover because first, he cannot recover from the emotional distress leading to the physical manifestations and second, he disavows any emotional distress stemming from the manifestations. Rather, plaintiff’s injuries are, like the plaintiff’s in *Tseng*, purely psychic injuries for which recovery is unavailable. Following the reasoning in *Terrafranca*, *Alvarez*, and *Tseng*, I conclude that plaintiff has not stated the required “bodily injury” as that phrase has been interpreted in *Floyd*. Plaintiff does not assert compensable injuries under the Convention.”²³³

The Court of Appeal in *Carey* tried to answer the question left by the Supreme Court regarding the physical manifestation of emotional injuries and concluded that it

²²⁶ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999 Pltf’s Resp. at 15.

²²⁷ *Air France v. Saks* United States Supreme Court 470 U.S. 392, 397 1985.

²²⁸ *Eastern Airlines, Inc. v. Floyd*, 499 U.S. Supreme Court 530, 534 1991.

²²⁹ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530, 534 1991.

²³⁰ *Terrafranca v. Virgin Atlantic Airways LTD XYZ* United States Court of Appeals, Third Circuit. No. 97-5069. Decided: July 23, 1998.

²³¹ *Alvarez v. American Airlines Inc.*, S.D.N.Y. 199 United States District Court S.D. New York. No 98 Civ. (MBM) S.D.N.Y Aug. 30 1999.

²³² *Alvarez v. American Airlines Inc.*, S.D.N.Y. 199 United States District Court S.D. New York. No 98 Civ. (MBM) (S.D.N.Y Aug. 30 1999).

²³³ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999 Pltf’s Resp. at 15.

cannot be covered under WSC.²³⁴ The Court failed to distinguish between Carey's physical manifestations of emotional distress and mental injuries in other cases where plaintiffs did not sustain a physical injury nonetheless were compensated under the bodily injury requirement of WSC. Cary claimed for intentional infliction of emotional distress, negligent infliction of emotional distress and false imprisonment. Magistrate Judge Hubel agreed with airline's motions holding that WSC excludes plaintiff's state law claims;²³⁵ he had no right to claim under WSC, as he did not sustain any bodily injury. The Judge stated clearly that WSC governs plaintiff's claims and his injuries did not fulfill Art. 17 WSC. Carey appealed and claimed WSC was not his exclusive remedy and in case it was, his injuries fulfilled the requirements of Art. 17 WSC. The Ninth Circuit reviewed District Court's decision and further examined the *Tseng*²³⁶ case.

The Court underlined Supreme Court's view that WSC was an exclusive remedy. No exception is accepted and moreover no exception no exception is made even in case of willful misconduct. There is also ambiguity whether Carey's injuries met Article 17's requirements. In a series of case as mentioned above, no recovery for pure mental injuries was awarded. But in those cases there was no decision regarding physical manifestation of emotional injuries and whether these are covered under WSC. The conclusion was that as there was no palpable bodily injury no recovery can be awarded.

Allowing remedies for physical manifestation of emotional distress could lead to numerous unnecessary claims was the main concern of the Court. Nonetheless, there are cases allowing these types of psychic injuries like *Weaver*²³⁷ and *Roselawn*.²³⁸ But the Ninth Circuit held that there are differences between the above mentioned cases and *Carey*. The reasoning of the *Carey* Court for the *Roselawn* case was that plaintiffs correctly got a recovery as their psychic injuries were associated with the bodily injuries sustained by the crash. The Court ignores the fact that there was no link between those two types of injuries.²³⁹ In the *Weaver* case where the main issue was biochemical reactions, still the opinion of the Court was no different from Carey's claims for his emotional distress and its physical manifestation as a result of United Airline staff's reaction. Courts generally hesitate to compensate these types of

²³⁴ Alldredge J. Brent 'The Ninth Circuit holds that Physical Manifestations of Emotional and Mental Distress do not Satisfy the Warsaw Convention's "Bodily Injury" Requirement-Carey V United Airlines' (Comments) Journal of Air Law and Commerce, Vol. 67, Issue 3 Summer 2002, 1001.

²³⁵ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999 Pltf's Resp. at 15.

²³⁶ *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng* (No. 97-475) certiorari to the united states court of appeals for the second circuit 122 F. 3d 99, reversed.

²³⁷ *Weaver v. Delta Airlines, Inc.* U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.

²³⁸ *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.

²³⁹ Alldredge J. Brent 'The Ninth Circuit holds that Physical Manifestations of Emotional and Mental Distress do not Satisfy the Warsaw Convention's "Bodily Injury" Requirement-Carey V United Airlines' (Comments) Journal of Air Law and Commerce, Vol. 67, Issue 3 Summer 2002, 1005.

injuries as they can be quite tricking to prov. Medical science offers new tools in order to recognize and diagnose mental injuries and an actual physical reaction. Carey's claimed injuries were at the same level as in the *Weaver* and *Roselawn* cases. *Carey* Court did not exclude all mental injuries which are accompanied by a physical injury or not. According to the Court, stricter criteria of proof are the solution to the recovery of pure mental injuries or mental injuries accompanied by physical injuries, not their exclusion. It depends from the nature of the 'accident' that caused the mental injury. This Court failed to distinguish these claims from other similar claims and the reasoning used by those Courts. In my opinion, Courts should be a bit more flexible in allowing proofs for plaintiffs' mental injuries.

Alvarez case: Only physical injuries are compensable.

In *Alvarez v. American Airlines Inc.*,²⁴⁰ compensation for physical and mental injuries was claimed because of an emergency evacuation (bruises and pain) and anxiety attacks in situations that were similar to that before the evacuation. There was no causal connection between physical and mental injuries according to the Court. The Court decided that only the physical injuries were compensable. It followed the view of the majority and asked for a causal link between physical and mental injuries. The plaintiff's PTSD was caused by the evacuation process and not by his minor injuries so this is the reason why the Court held that there was no link. The Court held furthermore that passengers should be treated similarly under the same circumstances. Getting a bruise during evacuating the plane should not allow a passenger to ask for bigger recovery than a non-bruised passenger that was terrified as much as the former passenger. Under Article 17, a passenger can only claim for psychological and emotional injuries only to the extent that these injuries were proximately caused by his physical injuries."

At this point the problem of quantification should be mentioned. It is difficult for the Courts to perceive the concept of medical injuries. When they acknowledge it, it is hard to find the right way to compensate them. Which amount could be enough? This is the reason they prefer to have a bodily injury along with the mental. Nonetheless, it is quite unfair that a passenger suffering only bruises can claim compensation for bodily injuries under Article 17 and a passenger suffering emotional injuries that are not visible but more severe than a simple bruise cannot. This will be analysed further below. Furthermore, there are a lot of different types of non-physical injuries like PTSD, emotional distress etc. that fall under different categories and each one, although similar, has each own characteristics. Is it possible for all of them to be covered under Article 17? How they will be categorised? Who will decide that? A series of questions that should be answered in a new Convention, after taking into consideration all of the above so participants of the new Convention would have a fuller opinion and understanding on this matter.

²⁰⁵ *Alvarez v. American Airlines Inc.*, S.D.N.Y. 199 United States District Court S.D. New York. No 98 Civ. (MBM) S.D.N.Y Aug. 30 1999.

In the 2000's some of the major cases were *Croucher*, *Little Rock*, *Bobian*, *Ehrlich* and *Doe*.

Croucher case: No basis in law for pure mental injuries.

In the *Croucher v. World Wide Flight Services Inc*²⁴¹, claims for emotional distress after a passenger came in contact with biomedical waste in an air sickness bag that was allegedly left from a prior flight. He also claimed for emotional distress from the fear of contracting a disease from the waste. Since there was no claim for bodily injury the Court rejected the claims as according to it, there was no basis in law. Supreme Court has never stated anything regarding whether emotional distress that has a physical manifestation can be compensated under Article 17 WSC. Lower Courts though mostly agree that like pure mental injuries, emotional injuries that have a physical manifestation are not compensable under WSC.

Little Rock case: Emotional distress accompanied by a physical injury.

In one of the most recent cases, *In Re: Air Crash at Little Rock Arkansas, on June 1, 1999*²⁴² the Court allowed damage for pre impact fear and held that once the criterion for bodily injury is met and there is a physical injury or death, mental injury can be recoverable, in contrast with *Floyd*²⁴³ case. On appeal the 8th Circuit cited *Floyd* and *Jack*²⁴⁴ and concluded that emotional distress must flow from a bodily injury in order to be recovered. The Court found itself within the boundaries of WSC and *Floyd* and furthermore reversed the ruling of the District Court by stating 'A showing of any physical injury is sufficient trigger recovery from all emotional damages, regardless of the causal connection between the two.'²⁴⁵ The 8th Circuit underlined the distinction between the mental injury flowing from a bodily injury suffered in the crash and the mental injury directly caused by the accident (not allowed). The Court also stated that results of chronic PTSD like weight loss, sleeplessness etc are not covered by Art. 17 WSC (*Carey*²⁴⁶ and *Terrafranca*²⁴⁷ cases above). The Court also

²⁴¹ *Croucher v. Worldwide Flight Services, Inc.*, 111 F. Supp. 2d 501 (D.N.J. 2000) U.S. District Court for the District of New Jersey - 111 F. Supp. 2d 501 (D.N.J. 2000) August 16, 2000.

²⁴² *In Re Air Crash at Little Rock, Ark., on 6/1/1999*, 118 F. Supp. 2d 916 (E.D. Ark. 2000) U.S. District Court for the Eastern District of Arkansas 118 F. Supp. 2d 916 (E.D. Ark. 2000) October 27, 2000.

²⁴³ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530, 534 1991.)

²⁴⁴ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

²⁴⁵ Holland Michael J. "The Puzzle of Defining 'Bodily Injury' under the Warsaw Convention" Defence Counsel Journal, Vol. 70, Issue 4 October 2003, 424.

²⁴⁶ *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.

²⁴⁷ *Terrafranca v. Virgin Atlantic Airways LTD XYZ United States Court of Appeals, Third Circuit. No. 97-5069. Decided: July 23, 1998.*

examined the *Weaver*²⁴⁸ case (mentioned below) where the Montana Federal District Court decided that the expert affidavits provided by the plaintiff were sufficient²⁴⁹.

After examining all the relevant cases, Court ended up to the *Rosman*²⁵⁰ case (mentioned below) as well as the *King*²⁵¹ case from the UK case law in order to conclude that if there is no obvious bodily injury, even accompanied by a psychic distress, no recovery is allowed. Based on this decision, certain authors suggest that the aviation industry should maintain the existence of a palpable bodily injury as set in the *Rosman* case otherwise unrelated claims will make their appearance in front of the Courts.²⁵²

Bobian case: No solid evidence to support PTSD-Dismissal of mental injury claims.

In *Bobian v. Czech Airlines*²⁵³ emotional injuries and physical manifestations of emotional trauma during a flight through severe turbulence related to a hurricane were examined. Plaintiffs claimed that PTSD “causes ‘biochemical and structural changes’ in the brain”. Court divided the alleged injuries in different categories, none of them compensable under WSC.

Some of them were purely mental so according to the *Floyd*²⁵⁴ case non compensable. Others were physical or mental manifestations of motional injuries that were also excluded based on the *Terrafranca*²⁵⁵ case because there was no concrete bodily injury while there were evidence proving that severe turbulence can cause physical symptoms like nausea etc., plaintiffs did not claim that those symptoms were a direct result of the turbulence they sustained on flight. Plaintiffs also claimed that experiencing g-forces can be considered as a bodily injury under WSC, a view that the Court did not agree with as it held that experiencing those forces cannot be recognised as a bodily injury itself. Court also concluded that PTSD is a pure mental injury. Plaintiffs claimed that the effects of PTSD and other emotional disorders can be similar to the effects of physical injury but did not offer to the Court solid evidence like MRI’s of their specific injuries.

²⁴⁸ *Weaver v. Delta Airlines, Inc. U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.*

²⁴⁹ Holland Michael J. “The Puzzle of Defining ‘Bodily Injury’ under the Warsaw Convention” Defence Counsel Journal, Vol. 70, Issue 4 October 2003, 424.

²⁵⁰ *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

²⁵¹ *King v. Bristow Helicopters Ltd. (Scotland) [2002] UKHL 7*

²⁵² Holland Michael J. “The Puzzle of Defining ‘Bodily Injury’ under the Warsaw Convention” Defense Counsel Journal, Vol. 70, Issue 4 October 2003, 424.

²⁵³ *Bobian v. CSA Czech Airlines, 232 F. Supp. 2d 319 (D.N.J. 2002) U.S. District Court for the District of New Jersey - 232 F. Supp. 2d 319 (D.N.J. 2002) October 30, 2002.*

²⁵⁴ *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530 1991.*

²⁵⁵ *Terrafranca v. Virgin Atlantic Airways LTD XYZ United States Court of Appeals, Third Circuit. No. 97-5069. Decided: July 23, 1998.*

Lee case: No recovery for pure mental injuries.

In *Lee v. American Airlines* case²⁵⁶ there were claims made under Article 19 WSC for damages occasioned by delay. The Airline stated that these claims were disguised mental injuries claims of Article 17 and thus not compensable under WSC. The plaintiff insisted that his damages were quantifiable and were the result of the delay according to Art. 19. The Court held that the claims fell under the mental injury category, were not easily quantifiable and had no real economic loss for the plaintiff; it was more of a mental anguish than an actual loss. After *Floyd*²⁵⁷ the uniformity in Courts' decisions that used to prevail started to diminish when it comes to claims for emotional injuries accompanied by physical injuries or manifested in physical injuries. In most cases there must be a bodily injury from which the mental injury flows from. The majority of the Courts agree that recovery is awarded only when the emotional injury flows from a physical injury²⁵⁸ (*Jack*²⁵⁹ case). Circuit Courts that have examined this matter thoroughly require compensation for emotional injury flowing from a physical injury²⁶⁰ (*Carey*,²⁶¹ *Ehrlich*²⁶² cases).

Ehrlich case: No causal link between bodily and mental injuries, no compensation.

*Ehrlich v. American Airlines*²⁶³ is an example. In this case, the Ehrlich couple while travelling from Baltimore to JFK airport, they had an abnormal landing. Their plane overshot the runway and was abruptly stopped by an arrestor bed. If it wasn't stopped it would probably end in the waters of nearby Thurston Bay. Plaintiffs claimed damaged for both physical and mental injuries under the WSC. According to the District Court there was no evidence connecting the couple's mental injuries to their bodily injuries. In the absence of the causal link between the two different types of injuries the Court held that they could not be compensated for their mental injuries under Article 17 of the WSC. The United States Court of Appeal, Second Circuit affirmed that conclusion.

²⁵⁶ *Lee v. American Airlines Inc. United States Court of Appeals, Fifth Circuit No. 03-10178. Decided: January 14, 2004.*

²⁵⁷ *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court 499 U.S. 530,534 1991.*

²⁵⁸ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

²⁵⁹ *Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 N.D. Cal. 1994.*

²⁶⁰ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

²⁶¹ *Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.*

²⁶² *Ehrlich v. American Airlines Inc. United States Court of Appeals, Second Circuit Docket No. 02-9462. Decided: March 08, 2004.*

²⁶³ *Ehrlich v. American Airlines Inc United States Court of Appeals, Second Circuit Docket No. 02-9462. Decided: March 08, 2004.*

Doe case: Psychic injury that does not derive from a physical injury cannot be compensated.

One of the most recent cases in aviation law regarding Article 17 is the *Doe et al. v. Etihad Airways*²⁶⁴ case. In this case, plaintiff Jane Doe, while on a flight from Abu Dhabi to Chicago, reached the seat back pocket and was punctured by a hypodermic syringe. The personnel provided a bandage and threw away the syringe. The next day, plaintiff's physician, after consulting an infectious disease specialist, ordered tests for HIV and hepatitis and prescribed anti-viral drugs for 30 days. Plaintiff was tested 3 times for HIV in the following year and she was not found to have developed HIV. She claimed to the Court injuries sustained as a result of the needle prick, emotional distress and mental anguish as a result of her injuries, more specifically fear of developing HIV or hepatitis. As a result of her situation, she did not have sexual relations with her husband who alleged a loss of consortium claim. Defendant argued that plaintiff cannot recover emotional distress under Article 17 MC as this Article covers cases of bodily injuries or death only. Psychic injury that does not derive out of a physical condition is not covered under WSC or MC. Also the defendant argued and Court agreed that the mental distress damages were not caused by the plaintiff's physical injuries. It was not the needle prick that caused the distress rather the possibility that she might have been exposed to an infectious disease, a possibility not covered under MC.

Based on the above mentioned it will be helpful to mention in a few words the most important cases which are used as leading cases, where the Supreme Court denied recovery for pure mental injuries which are *Jack*,²⁶⁵ *Terrafranca*,²⁶⁶ *Alvarez*²⁶⁷ and the ones where compensation was allowed which are *Weaver*²⁶⁸ and *Roselawn*.²⁶⁹ *Floyd*²⁷⁰ and *Weaver* cases set the criteria in order for a claimant to recover mental injuries damages. First is a connection with a physical injury or a physical manifestation of injury, second is an injury to the brain and its structure.

²⁶⁴ *Doe et al v. Etihad Airways*, P.J.S.C., No. 5:2013cv14358 - Document 27 (E.D. Mich. 2015).

²⁶⁵ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

²⁶⁶ *Terrafranca v. Virgin Atlantic Airways LTD XYZ United States Court of Appeals, Third Circuit*. No. 97-5069. Decided: July 23, 1998.

²⁶⁷ *Alvarez v. American Airlines Inc.*, S. D. N. Y. United States District Court, S.D. New York. No. 98 Civ. 1027 (MBM) S.D.N.Y. Aug. 30, 1999. / Mercer Anthony 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

²⁶⁸ *Weaver v. Delta Airlines, Inc.* U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.

²⁶⁹ *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997)February 5, 1997.

²⁷⁰ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

2. *Difficulties in allowing pure mental injuries*

2.1 Lack of evidence

Common law recognized pure mental injuries as intentionally inflicted only or accompanied by a physical injury. According to the Physical Impact Theory the 'actionability' of mental distress can be explained if inflicted only as a result of an actual physical impact. In the absence of physical impact, mental injuries can be seen as dependent upon the element of intention, meaning the negligence of the carrier. For many jurisdictions this intention is taken for granted. One of the most important criteria when it comes in awarding pure mental injuries is the way the plaintiff categorizes his injuries as well as the medical evidence provided.²⁷¹

Lack of evidence in supporting pure mental injuries claims is an issue encountered by the judges. The view that used to prevail that body and mind are distinct, which has affected a lot of judges' views, makes it difficult to find the right compensation for this type of injuries. The question whether mental injuries can be bodily injuries like in the case of PTSD has confused the Courts. Another issue is the lack of understanding on behalf of the judges. Of course they cannot be fully informed about any new discovery regarding this matter let alone the fact that the medical community is still making baby steps in exploring and understanding the way the brain functions. Even with the progress made in this section and the changes PTSD discoveries brought, it can be difficult to scientifically prove a mental injury without any physical manifestation or even with them. The lack of definition on behalf of the delegates of the two Conventions, as well as from the Courts, has led to this dead end. A new definition is necessary, no matter if pure mental injuries are included or not.

a. Difficulty in distinguishing between body and mind

Vanoni case

In the *Vanoni v. Western Airlines*²⁷² case held in California Court of Appeal, Judge Elkington stated that the close connection between body and mind makes it hard to distinguish them. In this case the plaintiffs claimed for nervous disorders after the negligent landing of the aircraft they were on board. The influence of the damage to one and its impact to the other is a situation that cannot be answered by the usual

²⁷¹ Easton John F. & Trock Jennifer E. & Radford Kent A. 'Post Traumatic Lesion Corporelle: A Continuum of Bodily Injury under the Warsaw Convention' Journal of Air Law and Commerce Volume 68 2003, 665.

²⁷² *Richard Vanoni et al., Plaintiffs and Appellants, v. Western Airlines, Defendant and Respondent Civ. No. 23298. First Dist., Div. One. Jan. 18, 1967 247 Cal. App. 2d 794.*

criteria. Moreover the change to the nervous system by a sudden/extreme fright etc. is a change that happens to the body. Considering this, that specific injury can be regarded as an injury to the body rather than to the mind as it can turn a physically strong individual to a weak one. The Court in this case clearly recognized mental injuries as something not as nebulous as it was viewed before.

The human nervous system is susceptible of 'lesion' from external causes and is liable to weakness and damage from causes related to the mind. Thus if the nervous system is affected in the way described below it is a physical injury.²⁷³ This decision judicially recognized mental distress as a separate type of injury under the common law although not under WSC or MC. It is certain that a series of criteria should be set in order to measure the physical harm caused by a mental injury. As it is not their field of expertise, it can be quite complicating for judges to fully understand all different aspects of a mental injury, an understanding that it is necessary in order to have a juridical basis for those types of injuries under WSC and MC now. Bodily injuries and wounding and lesion corporelle have been deranged by the understanding that there is a difference between mind and body injuries. That gap grew bigger after the interpretation of lesion corporelle as strictly bodily injury and thus not including mental injuries at all.

After any type of trauma both brain and body change. Some of those changes only last for a short time-few weeks. Other times, the changes sustained lead to symptoms which complicate an individual's life. It is difficult to understand the changes and interpret their effects and how they can be treated. Investigating the effect of traumas on brain and the symptoms created is a complicated task. The brain is divided in 3 parts 1) reptilian (brain stem) 2) mammalian (limbic, midbrain) 3) neomamalian (cortex, forebrain). After a traumatic incident, the reptilian part of the brain shifts the body in reactive mode and stops all the non-essential body and mind process. During this time, stress hormones are increased and prepare the body to fight, flee or freeze.²⁷⁴ Normally, when the incident that caused the trauma stops, the body turns into restorative mode. The hormone levels reduce and brain goes back to the normal structure of control. In cases of PTSD, which will be analyzed further below, the individuals develop symptoms related to it; the brain does not shift to the responsive mood. The reptilian part of the brain maintains the brain in the reactive state all the time.²⁷⁵

²⁷³ Rosental Michele "The science behind PTSD Symptoms: How trauma changes the brain", World of Psychology (<https://psychcentral.com/blog/the-science-behind-ptsd-symptoms-how-trauma-changes-the-brain/>).

²⁷⁴ Rosental Michele "The science behind PTSD Symptoms: How trauma changes the brain", World of Psychology (<https://psychcentral.com/blog/the-science-behind-ptsd-symptoms-how-trauma-changes-the-brain/>).

²⁷⁵ Rosental Michele "The science behind PTSD Symptoms: How trauma changes the brain", World of Psychology (<https://psychcentral.com/blog/the-science-behind-ptsd-symptoms-how-trauma-changes-the-brain/>).

In the *Burnett*²⁷⁶ case the original French text of WSC prevails and mental injuries are still not compensable under WSC. According to the *Hussert*²⁷⁷ case mental injuries are included in bodily injuries and WSC covered those injuries as well. The Court did not recognize any medical similarity between body and mind simply because it considered that body injuries mentioned in WSC were covered too. The issue is whether mental injuries are physical injuries in a medical sense. If it is, it is covered under bodily injuries mentioned in WSC and there is no need for a new Convention separating them and awarding recovery for pure mental injuries. Professor Mankiewicz in his paper stated that “The legislative history of Article 17 compels the conclusion that, at least as far as American Courts are concerned, the expression ‘lesion corporelle’ should be understood to mean ‘personal injury’”.²⁷⁸ There is a growing tense to dismiss the essential criterion of a physical trauma in order for mental injuries to be compensated, i.e. *Kotsambasis*²⁷⁹ case.

b. Brain being still an abstract issue for medicine, let alone law - Lack of medical evidence.

In the *Zicherman v. Korean Air Lines Co.*²⁸⁰ case the Supreme Court held that WSC did not include anything regarding not compensating mental injuries. It was obvious that the use of the English words “damage” or “harm”, equal to the French word “dommage” had wide application and was used by the WSC drafters based on the French law sense of legally cognizable harm. The decision in this case showcases that a legally cognizable harm is compensable thus mental injury is covered under Article 17.²⁸¹ Moreover, mind is an abstract issue for human kind including the law. Thus it is only logical that Courts demand an actual physical injury accompanying an injury to the mind, as it would be easier to compensate something visible and that anyone could understand. In *In Re Air Crash Disaster Near Roselawn, Indiana*²⁸² the plaintiff sustained moderate leg injury and later diagnosed suffering from PTSD and depression. In the First Degree Court she was awarded compensation. The defendant appealed against this decision arguing that there was no reasonable relationship with her injury. The Court of Appeal examined the testimony made by an expert psychiatrist for the physical injury to her brain due to chronic PTSD. He mentioned the academic articles based on which he formed his opinion but he did not actually

²⁷⁶ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

²⁷⁷ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

²⁷⁸ Mankiewicz Rene H. ‘The Application of Article 17 of the Warsaw Convention to Mental Suffering not related to Physical Injury’ in 4 Annals of Air and Space Law, 187.

²⁷⁹ *Kotsambasis v. Singapore Airlines*, 148 ALR 498 42 NSWLR 110.

²⁸⁰ *Zicherman v. Korean Air Lines Co.* 516 U.S. 217 1996.

²⁸¹ Abeyratne Ruwantissa I.R. ‘Mental Distress in Aviation Claims-Emergent Trends’ Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 257.

²⁸² *In Re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 N.D. Ill. 1997 U.S. District Court for the Northern District of Illinois - 954 F. Supp. 175 N.D. Ill. 1997 February 5, 1997.

testify that the plaintiff had certain abnormalities neither he performed any tests on her to determine the damage to her brain, if she suffered from any.²⁸³ The Court followed the decision in the *Zicherman* and *Jack*²⁸⁴ cases contrary to the District Court's decision stating that "Article 17 does not say that a carrier will only be liable for damage caused by a bodily injury, or that passengers can only recover for mental injuries if they are caused by bodily injuries." Furthermore, "Damages for mental injuries must flow from a physical injury caused by the accident" a view consistent with *Floyd*²⁸⁵ and within the boundaries of the WSC. There needs to be a physical injury in order to award compensation for a mental injury. The Court of Appeals examined the *King*²⁸⁶ case as well. The Court followed this path contrary to the mainstream decisions in case like *Jack*,²⁸⁷ *Longo*²⁸⁸ etc. Even on occasions where the effects of fear on human body and brain are witnessed and verified by medical authorities in order for them to be able to be recovered, the tort action can be really vague. Austere standards should be applied.

In the ICAO Study Group for the creation of Montreal Convention the Group thought of personal injuries to be quite vague and that the use of that term would imply that any type of mental injuries like fear, libel, freight etc. could be asked by a passenger, a situation neither desirable nor acceptable.²⁸⁹ Bodily injury is better as a term but mental injuries like shock would be excluded. US Courts' decisions showcase the difficulty in awarding pure mental injuries and for that reason a solid term that everyone agrees upon is the most beneficial. Members of the Study Group suggested the term 'physical injury' to be used in order to cover for impairments to health, both physical and mental/psychic. ICAO Rapporteur categorizes fear, fright and apprehension as non-physical injuries thus not covered by the Convention, although there are scientific data proving that they can provoke physical manifestations of mental injuries to an individual. ICAO Legal Committee examined the suggestion of the Study Group, preserved the 'mental injury' definition in Article 16 of the draft of MC 1999 but it was not contained in the official text of MC. As it was not included in the final version it became obvious that the parties did not wish for any change to happen regarding Article 17 and the types of injuries covered by it.²⁹⁰

²⁸³ Mercer Anthony, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention' Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

²⁸⁴ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

²⁸⁵ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530, 534 1991.

²⁸⁶ *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7

²⁸⁷ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

²⁸⁸ *Longo v. Air France*, 1996 WL 866124 S.D.N.Y. 1996.

²⁸⁹ ICAL 'Comments on the Draft text approved by the 30th Session of the ICAO Legal Committee as amended by the Special Group of the Modernization and Consolidation of the 'Warsaw System' (SGMW), DCW Doc. No. 11 / Abeyratne Ruwantissa I.R. 'Mental Distress in Aviation Claims-Emergent Trends' Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 257.

²⁹⁰ ICAL 'Comments on the Draft text approved by the 30th Session of the ICAO Legal Committee as amended by the Special Group of the Modernization and Consolidation of the 'Warsaw System' (SGMW), DCW Doc. No. 11.

c. Lack of definition regarding mental injuries

Although such a turn would be quite a help for the courts globally when deciding in cases involving mental injuries, it is not clear that besides the exclusion of mental injuries, the abolishment of the term ‘impairment of health’ as well, the use of which in the work of the ICAO Study Group was used as a way to categorize different types of mental injuries. According to certain authors it was quite wise from the drafters of MC not to answer fully this matter as it could create at least two opposite schools of approach. That view could leave open the way to read bodily injuries as “legally cognizable harm” like in the *Zicherman*²⁹¹ case. In that way that term could have been extended to cover mental injuries as well. Medical progress has proved that mental injuries do exist. It can be extreme, corresponding to the size and effect of a physical injury. A mental injury is caused not only by simple fright but by a type of neurosis.²⁹² A neurosis in its extreme form can be a psychogenic disorder that follows a psychic injury, not necessarily having a physical manifestation. It causes a great damage to the health and to the normal function of the body. The hesitation of the Courts and WSC delegates to define mental injuries led to this complicated view of those types of injuries. Only a few Courts shed some light and gave a more specific answer. Abeyratne²⁹³ suggests that in order for PTSD to be proven in accidents on board of an airplane three criteria need to be fulfilled: 1) the fact that the passenger is suffering from PTSD 2) that PTSD is caused by shock as a result of an accident or an event like it or other incident that can cause such a disorder 3) the proximity of the claimant to the accident. It is still doubtful if the Courts would connect PTSD with bodily injuries according to WSC and MC after the recent medical findings.

3. Findings on PTSD and how it affects the approach of Courts towards pure mental injuries

Physical and mental injuries’ distinction has been defined. Mental illnesses can cause physical changes as it is proven by the always evolving medical science. Recognizing mental injuries can unify aviation law with the rest of the transportation laws, like the international carriage by rail law where mental injuries are accepted and covered under the Convention concerning International Carriage by Rail (COTIF²⁹⁴). United Nations Convention on the Law of the Sea, Rail Conventions,²⁹⁵ Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI)

²⁹¹ *Zicherman v. Korean Air Lines Co.* 516 U.S. 217 1996.

²⁹² Abeyratne Ruwantissa I.R. ‘*Mental Distress in Aviation Claims-Emergent Trends*’ Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 257.

²⁹³ Abeyratne Ruwantissa I.R. ‘*Mental Distress in Aviation Claims-Emergent Trends*’ Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 257.

²⁹⁴ Convention concerning International Carriage by Rail (COTIF).

²⁹⁵ Convention concerning International Carriage by Rail (COTIF).

all of them allow compensation for pure mental injuries, the same should happen for air passengers.

A symptom cannot define an injury by itself. Trauma is used imprecisely by the Courts in its medical sense. The narrow view regarding mental injuries cannot be supported medically anymore. It cannot be supported that physical and psychic injuries have to be each other's precedent.²⁹⁶ A psychic injury can have physical base like other types of injuries. The size and effect a psychic injury can have on a person is widely recognized and understood nowadays even without physical symptoms.²⁹⁷ Mental illnesses have physical symptoms and the other way around.

5 points to be considered for a mental injury claim

Emotional distress is mainly psychological; it is hard to prove it at the Court, although the suffering is great-equal to bodily injury. There are 5 main points to be considered for a mental injury claim: 1) Intensity; the intensity of the mental injury can be decisive in order to prove that compensation should be awarded. In cases of negligence though, Courts typically would demand a connection with a physical injury as well. 2) Duration; Long-term, repeating and continuous pain like in some PTSD cases can be a criterion for a mental injury. 3) Connection to a bodily injury; it can be easier to prove a mental injury when it has a bodily expression like ulcerous, headaches etc. 4) Underlying cause of the mental injury; the more the damage is, the better it is in order to get compensation. The more severe the incident is, the more is the chances compensation will be awarded. 5) Medical evidence; Doctor/Psychologists' opinion for every relevant claim.²⁹⁸ A combination of the above is suggested in order to make one's claim stronger. The medical community recognizes PTSD as a physical injury as well as a psychic disorder that alters brain's structure.²⁹⁹ The Judicial system does not fully recognize it as a physical injury. The nature of PTSD has been debated a lot when in relation with WSC. Courts are asked to define 'bodily injury' and distinguish between bodily and mental injuries. Usually a mental injury is not a bodily injury, except for emotional injuries accompanied by

²⁹⁶ Harakas, Andrew J. 'Warsaw Convention: Mental Injury Unaccompanied by Physical Injury / Das Warschauer Abkommen: Seelische Schaden ohne Korperliche Verletzungen / La Convention de Varsovie: Lesion Psychique sans Lesion Corporelle [article]' Zeitschrift fur Luft- und Weltraumrecht - German Journal of Air and Space Law, Vol. 40, Issue 4 1991, 363.

²⁹⁷ Andrews Christopher Nase Vernon 'Psychiatric Injury in Aviation Accidents under the Warsaw and Montreal Conventions: The Interface between Medicine and Law' Journal of Air Law and Commerce, Vol. 76, Issue 1, 3 Winter 2011, 3.

²⁹⁸ Lu Andrew '5 ways to prove emotional distress' Injured, The FindLaw Accident, Injury and Tort Law Blog <http://blogs.findlaw.com/injured/2013/02/5-ways-to-prove-emotional-distress.html>.

²⁹⁹ Newland Gary & Pope Jonathan 'Doctor Knows Best: Medical and Legal Perspectives on PTSD' <https://www.newlandlaw.com>.

physical injuries where the claimant can be compensated for both. Few Courts have recognized PTSD as a pure physical injury.³⁰⁰

Mental injuries are difficult to prove

It should be noted at this point that emotional distress is mainly psychological and thus hard to prove it at court although the suffering is great and a lot of times equal to a bodily injury.³⁰¹ There are five main points to base a mental injury claim on. First is the Intensity; the intensity of the mental injury can be decisive in order to prove that compensation should be awarded. In cases of negligence though, court typically would demand a connection with a physical injury as well. Second is Duration, where long term, repeating and continuous pain like PTSD can be a criterion for the existence of a mental injury.

Next is connection to a bodily injury, which can be easier to prove when it has a bodily expression like ulcers, headaches etc. Underlying cause of the mental injury follows. In that case the bigger the better, meaning that the more severe is the incident the more are the chances for compensation. Last one is medical evidence i.e. doctor/psychologist's opinions for every mental injury claim. A combination of the above is suggested to make a mental injury claim stronger.³⁰² It should be noted at this point that emotional distress is mainly psychological and thus hard to prove it at Court although the suffering is great and a lot of times equal to a bodily injury. There are 5 main points to base a mental injury claim on. First is the Intensity; the intensity of the mental injury can be decisive in order to prove that compensation should be awarded. In cases of negligence though, Court typically would demand a connection with a physical injury as well. Second is Duration, where long term, repeating and continuous pain like PTSD can be a criterion for the existence of a mental injury. Next is Connection to a bodily injury, which can be easier to prove when it has a bodily expression like ulcers, headaches etc. Underlying cause of the mental injury follows. In that case the bigger the better, meaning that the more severe is the incident the more are the chances for compensation. Last one is medical evidence i.e. doctor/psychologist's opinions for every mental injury claim. A combination of the above is suggested to make a mental injury claim stronger.³⁰³

³⁰⁰ *Ligeti v. British Airways PLC. S.D.N.Y. 2001 United States District Court, S. D. New York 00 CIV.2936 (FM) S.DN.Y.NOV. 2 2001.*

³⁰¹ Lu Andrew '5 ways to prove emotional distress' Injured, The FindLaw Accident, Injury and Tort Law Blog <http://blogs.findlaw.com/injured/2013/02/5-ways-to-prove-emotional-distress.html> .

³⁰² Lu Andrew '5 Ways to Prove Emotional Distress' Injured-The FindLaw Accident, Injury and Tort Law Blog <http://blogs.findlaw.com/injured/2013/02/5-ways-to-prove-emotional-distress.html> .

³⁰³ Lu Andrew '5 Ways to Prove Emotional Distress' Injured-The FindLaw Accident, Injury and Tort Law Blog <http://blogs.findlaw.com/injured/2013/02/5-ways-to-prove-emotional-distress.html> .

PTSD as a new type of claim for pure mental injuries

Through the years of applying the WSC, US Supreme Court has decided about the meaning of the term 'accident' and 'bodily injury' and lower Courts have set the limits of recovery under the WSC. A recent new type of claim in the mental injuries field is PTSD. There was the question whether it can be a bodily injury under Article 17.³⁰⁴ New findings of the medical science have made a series of mental illnesses easier to be proven and considered as 'bodily injury' and give the Courts another perspective regarding mental injuries. For example PTSD is now recognized by the international medical community to cause alterations to the brain which can be shown through brain scans.³⁰⁵ That means that PTSD can be included in the meaning of 'bodily injury' without any connection to any 'traditional' physical injury. Diagnostic and Statistical Manual of Mental Disorders find the separation between bodily and psychic injuries anachronistic.

This view aligns with the opinion of the House of Lords which is mentioned below regarding the mind body dichotomy belief that used to be dominant. This abovementioned dichotomy helped the Courts to avoid the difficulties that arise when it comes to prove pure emotional distress and this the reason they adhere it and did not evolve for the judicial practice through the years.³⁰⁶ In PTSD cases airlines' interests have prevailed because there is no physical injury. That means that courts hesitate to award recovery for mental injuries as it is difficult to prove them. Thus any claim of that kind is usually doomed to fail.³⁰⁷

PTSD symptoms

The issue of emotional damages has troubled the courts all over the world for long time because 1) emotional damages can be faked or imagined 2) some harm is expected in an industrial society 3) emotional damages are difficult to measure 4) unlimited liability could become an obstacle. There are four categories of PTSD symptoms 1) intrusive thoughts 2) mood alterations 3) hyper vigilance 4) avoidance of the entire trauma related material. Several chemical and biological shifts can develop after trauma. These shifts can especially be observed when the amygdale

³⁰⁴ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' *Journal of Air Law and Commerce* 70 J. Air L. & Com. 2005, 429.

³⁰⁵ Cotter Christopher 'Recent Developments in Montreal Convention Litigation' *Journal of Air Law and Commerce*, Vol. 79, Issue 2 Spring 2014, 291.

³⁰⁶ Chouest Hanna J.D. 'Dualism, Science and the Law: The treatment of the Mind-Body Dichotomy Under Article 17 of the Montreal Convention' Georgetown University Law Center 2009, 141.

³⁰⁷ Dempsey Paul Stephen *Accidents and Injuries in Air Law: The Clash of the Titans* McGill University 2011, 5.

(part of the brain) is over stimulated, the hippocampus is underactive and there is ineffective variability. These traumas-shifts can be reversed although the process for each person varies and there is no universal treatment for everyone, time is important.³⁰⁸ In order to guarantee some uniformity and consistency in their diagnoses, mental health professionals use a standardized list of clinically observable symptoms.³⁰⁹ Standard criteria and symptoms for classification of mental disorders and PTSD are set by DSM which is the Diagnostic and Statistical Manual of Mental Disorders and is the most widely used, mainly in the USA, published by the American Psychiatric Association.³¹⁰

The most recent version is the DSM-V revised in 2013. It has raised a lot of discussions, mainly for being subjective and unscientific. Its validity, the reliability of the diagnostic categories, the relevance of the symptoms, the limits set between mental disorders and 'normal' behavior, the 'medicalization' of human distress are among the most important issues raised. Still Courts are using this system as a mean of awarding mental-PTSD related injuries.³¹¹

In Europe, ICD (International Classification of Diseases) created by the World Health Organization (WHO³¹²) is mostly used. Its most recent version is ICD-10. Both of them are not very precise but they set at least a list of symptoms that might help a person to explain what h/she is going through to an expert.³¹³ There is no separation in the DSM-IV between mental and physical disorders. Both categories contain characteristics from each other. For physicians it is clear that there is no separation between body and mind although it cannot be described. PTSD is difficult to be diagnosed and treated. It is the body's reaction to an injury, it is not the same as depression but sometimes it is accompanied by other mental disorders. A series of small incidents can lead to trauma as well. A long, extreme or repetitive trauma can cause actual injuries to the brain. Even after a long time has passed from the event, a person can develop symptoms. The body responds to the situation that caused the trauma although a long time might have passed. It becomes harder for the traumatized person to distinguish between the traumatic event and the everyday events that might trigger a similar reaction.³¹⁴

³⁰⁸ Rosenthal Michele , 'The Science Behind PTSD Symptoms: How Trauma Changes the Brain' World of Psychology <https://psychcentral.com/blog/the-science-behind-ptsd-symptoms-how-trauma-changes-the-brain>

³⁰⁹ Dr. Mulhauser Greg 'Mental Disorders: About the DSM and ICD Diagnostic Categories' Managing Editor of <http://counselingresource.com> .

³¹⁰ <http://www.apa.org/> .

³¹¹ Wikipedia, *Diagnostic and Statistical Manual of Mental Disorders* https://en.wikipedia.org/wiki/Diagnostic_and_Statistical_Manual_of_Mental_Disorders .

³¹² <http://www.who.int/en> .

³¹³ Dr. Mulhauser Greg 'Mental Disorders: About the DSM and ICD Diagnostic Categories' Managing Editor of <http://counselingresource.com> .

³¹⁴ Howard SETHANE and Crandall Mark W., MD US Naval Observatory, retired, Wash. DC Reisterstown, Maryland 'Post Traumatic Stress Disorder What Happens in the Brain?' Washington Academy of Sciences 2007, 1.

Early US cases related to mental injuries include railroad defendants. In those cases recoveries were based in the impact rule according to which unless there was an actual impact, plaintiffs could not recover pure mental injuries. Gradually that turned into the possibility a plaintiff could claim recovery even when he was almost injured. That was the 'zone of danger rule'. In order to avoid feigned claims some Courts were asking for a physical manifestation of emotional harm if there was no physical harm related to the emotional harm. Certain California Courts adopted an analysis focusing on the proximity of the plaintiff to the injured person in terms of time, space, relationship. Later they concluded that limitless liability is not a safe solution; there should be a limit in recovery for emotional distress. There is an interest for international uniformity as there is inconsistency between different jurisdictions. In the US it is clear that a connection between mental and bodily injury should exist when there is negligence on behalf of the carrier. When the act is intentional, damages can be awarded even without physical injuries. In the international civil law compensation can be awarded for grief / distress. In common law there is also a possibility for awarding pure mental damages. PTSD has become popular in litigation as it sets an unequivocal frame of behaviors and symptoms, a frame that makes it easier for judges to follow and understand. Furthermore, it secures the illusion of a measurable way of bringing justice.

3.1 Medical technology, PTSD and the law on pure mental injuries

Medical progress regarding PTSD

Developments in image technology and certain controls to war exposed militaries that have been diagnosed with PTSD and other similar disorders as well as neuropsychological and neuroimaging tests are providing enough evidence to diagnose, still the two testing methods need to be more individualized³¹⁵. PTSD was introduced as a new basis for the insanity defense³¹⁶. It can also affect the traditional legal and factual decisions and the conservative tort doctrines and has really innovative effect on law and social justice. It can give more credibility to people that brought related claims to the Courts as it is now more and more accepted by them as it has been proved quite effective against traditional legal liability restrictions. "Serious

³¹⁵ Brenner Lisa A., PhD 'Neuropsychological and neuroimaging findings in traumatic brain injury and post-traumatic stress disorder' Dialogues in Clinical Neuroscience 2011 Sep; 13(3), 311.

³¹⁶ Stone Alan A. M.D. 'Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier' Bull Am Acad Psychiatry Law, Vol. 21, No. 1, 1993, 23.

problems with the diagnosis of PTSD render it vulnerable to legal challenge and subject to abuse.³¹⁷

In civil law PTSD has been the tool in order to support a variety of claims related to psychopathology. It presumes a direct causal link, a solution to the causation. Too vague issues are now been seen in a more scientific and objective way and it is easier to be resolved by the Courts. There are standards set based on PTSD definition helping civil litigation. Still all those data need more time in order to be understood by doctors and Courts as it will be mentioned below. "Since PTSD has been recognized as a mental disorder that can be isolated and diagnosed, it has become a legitimate legal and factual issue with regard both to establishing liability and to defining damages in personal injury cases."³¹⁸ PTSD diagnosis is used in order to overturn the present ruling views regarding recovering damages of tort law. Generally, not only in international aviation cases, Courts are not eager to award pure mental injuries without a palpable physical injury as it is quite difficult to prove them and because of their fear of opening the floodgates of unfounded litigations. Nonetheless PTSD can cause physical symptoms as well. Medical scientists can offer proof and valuation of the effect that PTSD has on individuals thus allowing Courts to examine liability and award compensation.

The criteria that are used in order to decide whether a post-traumatic stress disorder exists are 1) psychologically traumatic event which promotes the beginning of chronic symptoms, 2) whether the individual's reaction was fear, helplessness, horror etc. There are two categories of symptoms 1) re-experiencing the traumatic event 2) avoiding trauma related stimuli and/or emotional numbing and hyper arousal.³¹⁹ PTSD has been categorized as the disorder of fear i.e. over the top fright response along with inability to control that fear. It is also known as the disorder of memory as people relive their traumas in a vivid and long lasting way. Those reliving symptoms along with cognitive disturbances gave space to examine the neuropsychological and neuroimaging aspect of PTSD.

Its symptoms are believed to be related to a person's unusual reaction to stress, besides other factors like gender and medical history. "During traumatically stressful situations, neurotransmitter systems and neuroendocrine axes are activated",³²⁰ as well as hypothalamus-pituitary-adrenal axis (HPA) and sympathetic-adrenomedullary system (SAM).³²¹ Their chronic activation might be proved an

³¹⁷ Raifman LJ: *Problems of diagnosis and legal causation in courtroom use of post-traumatic stress disorder*. Behav Sci Law 1 (3) 115.

³¹⁸ Scrignar CB: *Post-Traumatic Stress Disorder: Diagnosis, Treatment, and Legal Issues* (ed 2). New Orleans. Bruno Press. 1988, 63.

³¹⁹ American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*. 4th ed, Text Revision. Washington, DC: American Psychiatric Association; 2000.

³²⁰ Langeland W, Olf M "Psychobiology of posttraumatic stress disorder in pediatric injury patients: a review of the literature" *Neurosci Biobehav Rev*. 2008; 32(1), 161.

³²¹ Gunnar M, Quevedo K 'The neurobiology of stress and development' *Annu Rev Psychol*. 2007; 58, 145.

issue for a person's psychic and physical health. Furthermore neurobiological findings showcase that they contribute to the development of PTSD. Researches regarding learning, processing speed, intelligence visual recall exhibits that pre-trauma performance on neuropsychological measures is related to PTSD symptoms. The areas of impairment like response inhibition and attention regulation are a factor that can trigger PTSD and they can be exacerbated by a traumatic incident. Pre-trauma deficits might lead to unexpected reaction when a traumatic event happens and then to PTSD symptoms.³²² Among the most common symptoms are attention, learning and memory issues.

The impact of the stress may vary according to the time. It may not be obvious, it can be observed only through neuroimaging.³²³ This method uses an image of the brain after the incident that caused the trauma in order to decide in what degree PTSD has affected the individual's ability to process, encode experience etc compared to a healthy individual. Traumatized people process the traumatic material selectively as they need more time than the regular people. Evidences show actual physical alteration to the brain as well as intense activity. The affected areas are sensitive and involved in different activities thus making it easy to develop lifelong neurogenesis and are vulnerable to external insults. Moreover, this method is important in order to improve diagnosis of PTSD in order to make it more personalized as this is the main argument of the opposite party, the vagueness that at this time neuroimaging has. The element of personalization will be quite an asset to use at the Courts as well. So far it is difficult to transfer all of the findings into every day practice as they are limited and conflicting³²⁴. Through medical development and scientists' ability to understand and use the data neuroimaging can offer a more concrete diagnosis and better use of its findings. PTSD equals with exploration of neurobiology and neuropsychology of symptoms thus the need to be individualized. Until that day, measures of functioning should be taken into consideration like family interviews to access everyday life of the patient.³²⁵

Body-Soul dichotomy

³²² Vasterling JJ, Duke LM, Brailey K, Constans JI, Allain AN Jr, Sutker PB 'Attention, learning, and memory performances and intellectual resources in Vietnam veterans: PTSD and no disorder comparisons' *Neuropsychology*. 2002 Jan; 16(1), 5.

³²³ Vasterling JJ, Duke LM, Brailey K, Constans JI, Allain AN Jr, Sutker PB 'Attention, learning, and memory performances and intellectual resources in Vietnam veterans: PTSD and no disorder comparisons' *Neuropsychology*. 2002 Jan; 16(1), 5.

³²⁴ Peskind ER, Petrie EC, Cross DJ, Pagulayan K, McCraw K, Hoff D, Hart K, Yu CE, Raskind MA, Cook DG, Minoshima S 'Cerebrocerebellar hypometabolism associated with repetitive blast exposure mild traumatic brain injury in 12 Iraq war Veterans with persistent post-concussive symptoms' *Neuroimage*. 2011 Jan; 54 Suppl 1: S, 76.

³²⁵ American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*. 4th ed, Text Revision. Washington, DC: American Psychiatric Association; 2000.

After the progress of medicine, specialists have agreed that PTSD is a recognized mental disorder and questions have been raised regarding the body-soul dichotomy, which previously were answered by the Courts in favor of the dichotomy, meaning no recovery for pure mental injuries. Plaintiff can now bring lawsuits supporting that the accident caused PTSD and that had physical effects on them, i.e. modification of the physiology of the brain. That is the reason why they should be compensated under Article 17. What the US and several other jurisdictions have assumed from WSC is that there is a body-soul dichotomy and it can be seen in the Court practice as well. There were different opinions throughout the years regarding this matter as it was mentioned above until the advent of PTSD. Since PTSD was recognized and had its own individual symptoms, the question whether it is a 'bodily injury' under Article 17 remains.

Trying to fulfill the physical injury criterion set by the *Floyd*³²⁶ case, the imported claims regarding PTSD support that it leads to physical symptoms like nausea, sleeplessness etc. Courts most probably deny recovery for these damages as they held many times that those damages are physical manifestations of a mental injury that is not compensable under WSC. Another approach claimants have tried is to offer proofs that PTSD is itself a physical injury since it causes changes and physical alterations to the brain. Courts either reject this approach, that PTSD is a physical injury itself or support that there is not enough evidence for a connection to be formed between a plaintiff's symptoms and an injury to the brain. Both of those views analyze PTSD as an injury or a physical manifestation of a mental injury. The majority follows the distinction made in the *Floyd* case and most of the lower Courts recognize that there is no recovery for mental injuries and physical manifestations of emotional injuries unless they derive from a bodily injury. To conclude, PTSD claims are allowed by the majority of the Courts only when it is the result of an actual bodily injury.³²⁷

Turturro Case

In the *Turturro v. Continental Airlines*³²⁸ the claimants asked for physical injuries of PTSD as a result of an employee's treatment symptoms like nausea, intense heartbeat etc. the Court held that "New technology has allowed doctors to perceive that extreme stress events, such as a near to death experience or being taken hostage can actually change brain cells' structure and cause a specific area of the brain to atrophy."³²⁹ The Court did not award any recovery as the plaintiff could not adduce enough evidence

³²⁶ *Eastern Airlines, Inc. v. Floyd*, U. S. Supreme Court 499 U.S. 530,534 1991.

³²⁷ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

³²⁸ *Turturro v. Continental Airlines*, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. 2001.

³²⁹ *Turturro v. Continental Airlines*, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. 2001 2d at 178.

of “either a brain-lesion theory of PTSD or individualized proof of such lesions”.³³⁰ Not enough evidence to prove that PTSD is a physical injury. There is an opinion expressing that the Courts correctly supported that pure mental injuries cannot be compensated under WSC and should continue supporting that view under MX as well. That is because it is safer not to use disputation theories when enforcing Article 17, more importantly because pure mental injuries are hard to prove. USA has been advancing the main goal of WSC, protection of the airline industry, hence the narrow read of Article 17 and the stance of the Courts and scholars. That viewpoint can be seen in a series of cases like *Saks*,³³¹ *Floyd*,³³² *Tseng*³³³ etc. from which the conclusion is that only physical injuries can awarded under Article 17.

Upon that basis passengers can claim under Article 17 only when there is a link between the accident and the recovery sought. Since the *Floyd* case a question remained unanswered, whether mental injuries deriving from physical injuries can be compensated. There should be examination regarding the existence of the abovementioned link.

Different categories of cases-Neurosis following a trauma

There are four different categories of cases. First there are some cases dismissing this argument. In the second category, there are cases where the ‘link argument’ is the favorite one of the plaintiffs, not so much for the Courts though, because if they followed that view the WSC as well as the *Floyd* case which is a landmark for the US Courts would be undermined, just by alleging scratches and nausea. The third category includes cases where this argument is not widely used by the plaintiffs. The fourth category includes cases where the decision from *Jack*³³⁴ case is quite persuasive. That is the link between mental and physical injuries should exist.

Medical research of today indicated that legal theory lacks physiological support. There should be balance between passenger’s relief and airline’s interest. Philosophy and medicine should not dictate the legal outcome. PTSD is a type of neurosis. Neurosis is a complex psychiatric disorder caused by a psychological reaction to a trauma, both physical and psychic. Its effects sometimes are more important from other types of mental distresses. A traumatic neurosis is treated as a mental disturbance. This is the reason why plaintiffs should follow the rules covering those types of disturbances in order to get any compensation. Negligently inflicted mental

³³⁰ *Turturro v. Continental Airlines*, U.S. District Court for the Southern District of New York 128 F. Supp. 2d 170 S.D.N.Y. 2001 2d 17.

³³¹ *Air France v. Saks* United States Supreme Court 470 U.S. 392, 397 1985.

³³² *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530,534 1991.

³³³ *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng* No. 97-475 certiorari to the United States court of Appeals for the second circuit 122 F. 3d 99, reversed.

³³⁴ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

disturbance should have its own independent tort according to a newer point of view regarding actions in international aviation law. Until this happens it should be used in order to decide whether neurosis following trauma can be used in an independent tort and if it can be handled successfully by the Courts.

Neurosis following trauma is a recent term, used instead of the term traumatic neurosis. It includes a series of psychological disorders. Neurosis is not a physical injury or caused by such an injury. It derives from pure psychological reaction to an incident. There are 2 phase in these types of reactions 1) traumatic syndrome appearing in a brief time that can last from few days to some months. It includes a series of symptoms like nightmares, sweating, sleeplessness etc. Although those symptoms are physical, they are purely psychiatric and they do not have any physical origin. 2) Pure neurosis that develops when the person cannot balance himself after the traumatic syndrome. It can be manifested as one of the many neurotic states and its length cannot be determined. The healing process of a neurosis can be analogized to the healing process of a physical injury. Mental trauma alters the balance of the mental world of the passenger. The result is serious anxiety which in case the normal defensive mechanisms of the body do not work, can lead to a traumatic syndrome in order for the body to return to its balanced mode.

When a neurosis can start

A neurosis begins if the traumatic syndrome cannot cope with the anxiety and frustration a mental injury can cause. This neurosis begins usually 3 to 6 months after the traumatic event or in some cases even earlier. Trauma is an event which causes a neurosis. It can be really any incident, not only one that it is generally accepted as traumatic. Trauma is an incident easily recognizable. The way that the person perceives the trauma is quite important. The incident must cause an overwhelming fear to the person. It does not matter if it does not seem like a big event to others, as far as it affects the individual in a solemn way. Neuroses follow a trauma caused by psychiatric incidents. Stress and predisposition levels of a person are important when it comes to legal liability. It has to be proven that the incident causing the neurosis was out of the normal, in order to cause this reaction to the person. Types of neuroses following a trauma vary a lot; the most common one is neurosis which is a situation where a person cannot react in a rational way. The person under this situation has serious limitation of his abilities. The situation is painful to him as he realizes his behavior being unreasonable.

Neurosis can be attributable to anxiety as well. It has serious and different effects from other types of disorders. It is not always certain that a neurosis can be treated. In any case it is very disturbing for an individual. Even when treated, there are chances to recurrent in the future. Physical injuries might have happened as well but it does

not cause the neurosis or affect its advance. Individual's predisposition to a mental disorder should be taken into account too. Stress and predisposition levels are reciprocally connected. Mental disturbance is the term that courts use in order to describe all types of mental or emotional disorders or illnesses. Neurosis following a trauma is under the mental disturbance or nervous shock category and it does not have a more specific name. In these cases, plaintiffs have to prove physical injuries like in other types of disorders such as fright or nervous shock. Neurosis though is totally different from the above mental illnesses and this is the reason Courts should reexamine their persistent tense to demand a physical injury accompanying the mental trauma, in order to award compensation. It can be viewed as an unfair and ineffective practice to request, in order to decide on a specific matter, the fulfillment of criteria rather irrelevant to the situation under crisis.

Courts as it has been stated before are quite strict with the allowance of actions involving mental injuries. That is because they claim that an open way for those types of actions would lead to a large number of litigations. It is fairly demanding to pinpoint the fake actions from the real ones. Mental distresses can be really indistinct and it is hard to award a certain amount of compensation. Also their results are remote and vague sometimes. Professor Prosser in one of his articles in 1961 states that those arguments cannot be used anymore. More and more opinions support the view that the physical injury precondition should be rejected and mental injury cases have their own tort concept. Regardless of those views, Courts did not really apply this regime. According to certain authors³³⁵ there should be a distinction between neurosis following a trauma and of mental disturbance in general as to their legal treatment. More specifically in the first case, the physical injury criterion should be abolished. Having said that, it is obvious that fake accusations should not be allowed in any way under this new view of neurosis following trauma. Tort law regime states that the one that wrongfully injures another person is obliged to compensate that person. A mental injury is as painful and undesirable as a bodily injury thus the individual should have the same right in compensation in both cases. It does not matter how difficult, complex or puzzling such a case is, Courts should deliver justice in any way. The physical injury prerequisite is important as it serves as a frame in which the originality of the complaint can be determined as well as the type of compensation fitting. But it cannot always be effective as a proof that the plaintiff is not lying for his injury. Neuroses are a psychic phenomenon so it only makes sense to use similar criteria in order to decide about them.

Nonetheless, a series of mental disturbances can have certain physical symptoms as well, and in that way the mental injury can be verified easier. It is used as a confirming element. In ordinary sensible person's predisposition cannot be a factor used to exclude compensation. A neurosis is a mix of stress (trauma) and predisposition so a standard of a normal person with a reasonable degree of

³³⁵ Chouest Hanna J.D. 'Dualism, Science and the Law: The treatment of the Mind-Body Dichotomy Under Article 17 of the Montreal Convention' Georgetown University Law Center 2009, 141.

preexisting susceptibility should be adopted. In this way, boundaries of whom and for what type of injuries deserves recovery would be easier set. Neuroses following trauma are easier proved than other not so severe mental disorders, like nervous shock. They are followed by physical symptoms, are more enduring, they are more obvious. Their effect on a person's health is usually deep and the contrast between the before and the after is apparent. A psychiatrist's testimony has always a special weight as he is able to determine the differences of the individual's health. Also he can predict any possible effects on the individual's future health. In that way the 'normality' of the person is decided. Nonetheless, beside the great attribution those medical testimonies have, it should be noted that they are evidence not judgments.

3.2 Body and Mind dualism and its Counterarguments³³⁶

Drafters of the WSC intended to keep the dichotomy in aviation litigation. Persistence by the law on the dualism theory helps avoid difficult evidentiary problems. International unification is complicated for those matters. For example, which claims are admissible, how they should be proven or what amount of compensation should be awarded. There were certain efforts made in order to prove through psychosomatic-psychobiological tests that there is a chance that a certain incident can cause a psychic injury rather than only physical.³³⁷ Nowadays serious traumatic incidents are encountered as a possible reason to cause PTSD. It is a psychic disorder that may follow a traumatic event. It was first introduced in 1980 by the American Psychiatric Association (APA) in the DSM-III (Diagnostic and Statistical Manual of Mental Disorder).³³⁸ Its current diagnostic elements are featured in the DSM-IV and PTSD is defined as a mental disturbance that originates in response to an overwhelming encounter with severe trauma. Since its first appearance a lot of researches regarding psychic injuries caused by a traumatic event begun. Although PTSD is recently recognized by the medical community there have been data regarding the effects of extreme stress, such as the effects of war.

³³⁶ Chouest Hanna J.D. 'Dualism, Science and the Law: The treatment of the Mind-Body Dichotomy Under Article 17 of the Montreal Convention' Georgetown University Law Center 2009, 141.

³³⁷ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

³³⁸ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

PTSD cases

Cases where PTSD was used and failed are *Terrafranca v. Virgin Atlantic Airways Ltd*,³³⁹ *In re Air Crash at Little Rock Arkansas*,³⁴⁰ *Bobian v. Czech Airlines*.³⁴¹ Case where Court was more receptive to new medical results is *Weaver v. Delta Airlines Inc*³⁴². The claims brought were only about emotional distress and PTSD. The Montana Court accepted that the plaintiff had PTSD which had a physical ground and compensated her, as her claim had a physical injury involved as well and she presented sufficient medical evidence (recent scientific research) that PTSD establishes palpable trauma to the brain cells.³⁴³ *Weaver*³⁴⁴ was the first case where trauma, fright, extreme stress can cause an obvious injury to the brain i.e. a bodily injury supported by PTSD.

Weaver case

According to the Court in *Weaver* “fright alone is not compensable but brain injury from fright is”. The Court did not envisage the award of pure mental injuries based on PTSD as a chance for excess of appeals. It concluded that “the plaintiff’s PTSD evidences an injury to her brain”, without controlling any expert clinical evidence of actual injury to her brain or central nervous system.³⁴⁵ After *Weaver* certain Courts accepted recent medical evidence about PTSD and its physical effects. In this way lawsuit claiming recovery under WSC can be accepted.³⁴⁶ Cases like *Carey*³⁴⁷ and *Turturro* mentioned that there is possibility that PTSD can cause physical alterations to the brain thus award recovery for them under WSC Article 17. This view did not affect the Courts in the two abovementioned cases as the claimants did not ask for a brain injury as described in the *Weaver* case. After the *Daubert* case³⁴⁸ which was a

³³⁹ *Terrafranca v. Virgin Atlantic Airways Ltd XYZ United States Court of Appeals, Third Circuit. No. 97-5069. Decided: July 23, 1998.*

³⁴⁰ *In Re: Air Crash at Little Rock Arkansas, on June 1, 1999 United States Court of Appeals, Eighth Circuit No. 01-1047 Decided: May 29, 2002.*

³⁴¹ *Bobian v. CSA Czech Airlines, 232 F. Supp. 2d 319 D.N.J. 2002 U.S. District Court for the District of New Jersey - 232 F. Supp. 2d 319 D.N.J. 2002 October 30, 2002.*

³⁴² *Weaver v. Delta Airlines, Inc. U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.*

³⁴³ Mercer Anthony, ‘Liability of Air Carriers for Mental Injury under the Warsaw Convention’ Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

³⁴⁴ *Weaver v. Delta Airlines, Inc. U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.*

³⁴⁵ Mercer Anthony, ‘Liability of Air Carriers for Mental Injury under the Warsaw Convention’ Air and Space Law, Vol. 28, Issue 3 June 2003, 147.

³⁴⁶ *U.S. District Court for the Southern District of New York Turturro v. Continental Airlines, 128 F. Supp. 2d 170 S.D.N.Y. 2001 459.*

³⁴⁷ *Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165 (D. Or. 1999) U.S. District Court for the District of Oregon - 77 F. Supp. 2d 1165 (D. Or. 1999) December 8, 1999.*

³⁴⁸ *Certiorari to the United States Court of Appeals for the Ninth Circuit Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 1993.*

lawsuit against a pharmaceutical company, there were certain criteria set for a plaintiff to go through. First is a hearing in order for the Court to decide whether the view that PTSD causes physical changes to the brain is accepted. The second step is for the claimant to prove that there is a connection between the abovementioned view and a physical change to his brain, with solid scientific data.

Medical methods of proving PTSD

MRI's, PET's scans and SPECT's are acceptable methods of proof as they can show the physiology of the brain as well as any changes sustained. Furthermore, blood tests can be a good indicator of an abnormality to the hypothalamus as they can present high hormone levels. Those techniques though are more of a scientific research tools than diagnostic. In order to prove the changes to the brain, there is the need of a previous brain scan in order to compare the two, as a scan can only capture a view of the brain at a certain time. It is also worth to mention that a brain scan can be affected by other factors as well and not be a true imaging of the brain, injured or not.³⁴⁹ It should be examined what happens when a plaintiff can demonstrate a physical change to his brain caused by PTSD if the Court will compensate him based on Article 17. The 8th Circuit Court has rejected such an argument and supports that physical changes to the brain were caused by the emotional distress and was subsequent to the accident itself. Guaranteed recovery and almost unlimited liability of carrier is reserved for the passengers in the USA, only for physical damages. When it comes to mental damages there are quite high set standards by the Courts, for the same accident. Courts insist on the dualistic vision. The arguments used in the *Floyd*³⁵⁰ case are persuasive enough to be used even today.

Firstly, plaintiffs that claim for mental injuries that have caused physical injuries have collectively failed to prove brain changes due to PTSD. PTSD has to have resulted to a change in brain, not the accident itself. It is reasonable after the international growth of aviation industry and the adoption of potentially unlimited liability that Courts adhere to physical injuries liability for the carrier and the 'fear of flying phenomenon, which is new but widespread.' By rejecting those new medical researches USA Courts set a limit over which plaintiffs have to have competent arguments in order to just have a chance to get compensation for psychic injuries. It can be said that there is a balance between plaintiffs' rights to get compensation for pure mental injuries and industry's interest not to allow compensation for that type of injuries to become a phenomenon.

³⁴⁹ Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' *Journal of Air Law and Commerce* 70 *J. Air L. & Com.* 2005, 429.

³⁵⁰ *Eastern Airlines, Inc. v. Floyd, U.S. Supreme Court* 499 *U.S.* 530,534 1991.

Although there is progress made regarding the recognition of PTSD by the Courts as a physical injury itself, there is no judicial precedent to support this view. Furthermore, claimants have to have solid medical evidence to support their claims as there are many obstacles to overcome through the whole procedure. Medical science will continue to offer new techniques in order to identify PTSD and its effects to the body and mind. It will probably be more precise. The distinction between mind and body still remains, despite the medical developments. The main trend now is mental injury must derive from bodily injury, following the *Floyd*³⁵¹ case and within the boundaries of the WSC³⁵².

Judges are not yet convinced about PTSD being a new category of injury, neither pure mental nor pure physical nor the effects it can have on people. They are hesitant in accepting medical evidence regarding PTSD like in the *Weaver* case mentioned above. Also, the way that the claim is formed is important. Some claimants do not ask brain injury like in the *Carey* case thus their claim is dismissed. Other Courts like in the *Bobian* case mentioned above, see PTSD as purely mental injury thus not recoverable under Article 17. All in all, judges should be better informed regarding this matter and be more susceptible to medical evidence supporting a claim.

b. Conclusion

At this chapter it was made clear that PTSD changed the approach towards mental injuries and became the main claim in a series of cases as it was widely recognized and there could be strong evidence supporting it as the medical technology is much evolved. The description of its symptoms and the way they affect the patients is a useful tool to understand how these types of injuries affect a person and that it is time to treat them differently, by recognizing them and allowing recovery for them, of course in the right frame for all the parties involved. A lot of US cases were examined in order to show the progress made in the States regarding pure mental injuries. At the beginning they were not allowed but through the years different combination of claims including mental injuries were recovered as well as claims for pure mental injuries. Still the prevailing view is that pure mental injuries are not compensable.

³⁵¹ *Eastern Airlines, Inc. v. Floyd*, U.S. Supreme Court 499 U.S. 530, 534 1991.

³⁵² Rushing Don G. & Janicki William D. 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' Journal of Air Law and Commerce 70 J. Air L. & Com. 2005, 429.

CHAPTER 4

The approach of UK Courts to the recoverability of pure mental injuries

a. Overview

In this chapter the UK point of view regarding pure mental injuries is analyzed. UK Courts were highly affected by the US Courts and as it can be seen most of the judges were against the recovery of pure mental injuries. UK has ratified WSC and MC and the EU Directives³⁵³ regarding this matter.

Introduction to the rules applicable in the UK law

UK has ratified 1) the Warsaw Convention 1929 2) the Hague Protocol 1955 3) the Guadalajara Supplementary Convention 1961 3) the Tokyo Convention 1963 4) Montreal Protocols Nos. 1-4 1975 5) the Montreal Convention 1999. As a member of the EU UK has also ratified all the relevant Regulations³⁵⁴.

The Warsaw Convention 1929 as amended by the Hague Protocol 1955 has force of law in the UK as set out in Schedule I to the Carriage by Air (Supplementary Provisions) Act 1962³⁵⁵, while the Warsaw – Hague Convention as further amended by MAP No. 4 has force of law as set out in Schedule IA of the same Act. The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed in Guadalajara, on 18 September 1961 (Guadalajara Convention 1961)³⁵⁶ continues to have force of law in relation to carriage governed by the Hague Protocol and MAP No 4.³⁵⁷

³⁵³ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents. / Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

³⁵⁴ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents. / 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) Official Journal L 194, 18/07/2001 P. 0038 – 0038.

³⁵⁴ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation; (EC) No 2027/97 on air carrier liability in the event of accidents.

³⁵⁵ Carriage by Air (Supplementary Provisions) Act 1962.

³⁵⁶ Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed in Guadalajara, on 18 September 1961.

³⁵⁷ Carriage by Air (Supplementary Provisions) Act 1962.

The most recent Convention has force of law according to the 1961 Act Schedule I 1³⁵⁸ which means that MC has the force of law as well. Regulation 2027/97³⁵⁹ as amended by Reg. 889/ 2002³⁶⁰ and in respect of any other carriage to which it applies by reason of Section 1 of the Carriage by Air Act 1961 as amended (1961 Act) and as Schedule 1B to that Act states that the liability of a community air carrier is governed by MC for the purposes of English law, no matter if the carriage is domestic or international. Any other domestic carriage is governed by Schedule I to the 2004 Order modified version of MC. The liability of air transport undertakings (= non community carrier) performing domestic carriage will be governed by the Carriage by Air Act (Application of Provisions) Order 2004 (which applies MC to domestic carriage).³⁶¹

As it was mentioned above, UK courts allow compensation for mental injuries only when accompanied by physical injuries caused by an accident on board³⁶². Under English domestic law there are no limitations or caps on damages. Punitive damages are not allowed under MC but exemplary damages are permissible in non-commercial aviation personal injury claims.³⁶³ The Court may allow interest. The claimant can ask for 1) general damages for pain, suffering and loss of amenity accompanied by medical evidence 2) past and future financial loss based on the UK domestic law.³⁶⁴

Case Law – King Case

One of the most important cases in the UK Law is *King v. Bristow Helicopters Ltd.*³⁶⁵ This is a milestone case as it gives the light under which bodily injury should be interpreted for the UK Courts, based on the Warsaw Convention, its preparatory work, views of the delegates, international jurisdiction as well as similar cases under the UK Law. Furthermore, in this case, Lord Steyn has given a quite accurate explanation regarding the prevalence of the original text of Article 17 of WSC in the Montreal Convention as well. He held that the world was not ready to incorporate pure mental injuries in the new Convention. This view has been used by a number of writers and scholars when it comes to the annotation of MC.³⁶⁶

³⁵⁸ *Carriage by Air Act 1961.*

³⁵⁹ Regulation (EC) No 2027/97 of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air

³⁶⁰ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002.

³⁶¹ The Carriage by Air Act (Application of Provisions) Order 2004.

³⁶² *King v Bristow Helicopters Ltd. (Scotland) [2002] UKHL 7*

³⁶³ Carriage by Air (Supplementary Provisions) Act 1962 / Abeyratne Ruwantissa I.R., *Mental Distress in Aviation Claims-Emergent Trends*, Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

³⁶⁴ Abeyratne Ruwantissa I.R., *Mental Distress in Aviation Claims-Emergent Trends*, Journal of Air Law and Commerce, Vol. 65, Issue 2 Spring 2000, 225.

³⁶⁵ *King v Bristow Helicopters Ltd. (Scotland) [2002] UKHL 7*

³⁶⁶ Clarke *Contracts of Carriage by Air* Chapter 2 Second Edition Lloyd's List 2002, 7.

In the *King* case, Mr. King was a passenger on board a helicopter operated by Bristow Helicopters Ltd. It took off from a floating platform in the North Sea during bad weather. It ascended and hovered for a short period while its two engines failed. Right after, it descended and landed on the helideck. Smoke inundated the helicopter and panic was manifested on board and passengers feared that it might crush into the sea. The door was opened and they disembarked. Mr. King developed post-traumatic stress disorder and as a result he suffered an onset of peptic ulcer disease. Lord Ordinary allowed the claim to go to proof only for the peptic ulcer part. The First Division allowed the appeal and ordered that the entire claim should go to proof.

The passenger claimed damages for psychiatric injury after accident that happened in the aircraft. House of Lords held that the Warsaw Convention restricts liability to bodily injuries only. The term did not include mental injuries and this is the reason why there was no compensation awarded. Brain is capable as a body organ to be traumatized and it cases that injury had a physical manifestation awards were given. There is nowadays wide medical support for the fact that a major depressive disorder can be a manifestation of physical changes in the brain and its chemistry. Those physical changes can lead to an injury and in that sense they are bodily injuries. PTSD cases that have been shown to have a physical change in the brain are also compensable. The rights of a claimant are defined in the WSC. Since it does not provide any compensation for those types of injuries no compensation is allowed under the Warsaw Convention. What is crucial is to examine the different opinions of the Lords as this case is of high importance. House of Lords in this case discussed also another similar case the *KLM v. Morris*³⁶⁷. In that case, a 16 year old girl travelling as an unaccompanied minor woke up during the flight by the passenger next to her, caressing her thigh. She informed the airhostess. After the landing, she visited a doctor. According to his findings she was suffering from clinical depression amounting to a single episode of a major depressing illness. She fully recovered.

Lord Nicholls supported the extension of Article 17's bodily injuries.

Lord Nicholls of Birkenhead held that there was no occasion for limiting Article 17 of WSC only to bodily injury. He was not persuaded by the others regarding this matter. According to him, injury to the passenger's brain is injury to his body as the brain is part of the body. Since science was not that advanced in 1929, probably this is the reason why mental injuries were excluded at the original text. Today, this cannot be a valid argument so as not to include mental injuries in Article 17. Furthermore, he mentioned a case from the USA, *Weaver v. Delta Airlines*.³⁶⁸ This case dealt with similar matters and the conclusion according to the Judge was that 'freight alone is not compensable, but brain injury from freight is.' He also expressed his desire for

³⁶⁷ [2001] EWCA Civ 790

³⁶⁸ *Weaver v. Delta Airlines, Inc.*, 56 F. Supp. 2d 1190 (D. Mont. 1999) U.S. District Court for the District of Montana – 56 F. Supp. 2d 1190 (D. Mont. 1999) June 30, 1999.

international uniformity of Article 17. Furthermore, he believed that his opinion was aligned with the decision in *Floyd*³⁶⁹ (it was mentioned above) as this case was a landmark for the USA, one of the most important parts in international carriage by air. Finally he agrees with Lord's Hobhouse analysis regarding the authorities that will be mentioned later.

Lord Mackay in favor of Lord Hope's opinion about awarding damages under Article 17 for physical manifestations of mental injuries.

Lord Mackay of Clashfern agrees with the opinion of Lord Hope, which will be mentioned below. He too underlined the importance of the *Floyd*³⁷⁰ case as well as the *Tseng v. Al El Israel Airlines*³⁷¹ which was ruled by the United States Court of Appeal for the Second Circuit. Mrs. Tseng was travelling from New York to Tel Aviv. Before boarding the plane, the airline company subjected her to an intrusive security search. In this case the plaintiff claimed for, inter alia, assault and false imprisonment but no bodily injury. According to the Court WSC does not allow compensation for personal injuries that are not linked to an accident on board. Furthermore, the preparatory work of the Convention although it seems to show a way to resolve this matter by allowing the plaintiff to file claims under domestic law when there is a non-accident case, it is not explicit enough in order to be applied. So the claim was dissented. It should be noted that the plaintiff asked alternatively to be compensated under the State Law, an option that is explicitly excluded by MC, which states that there is no recovery awarded to damages for an international infliction of emotional distress under a State law.³⁷² This was concluded in the *Seshadri v. British Airways PLC* case as well.³⁷³ Lord Mackay thought of those cases to be of great weight as they are useful for the State parties in order to address the matter of an accident on board and consequently the discrepancy between bodily and mental injury claims in a uniform way. According to him, if an injury to the brain is proven it should be compensated under Article 17 of the WSC and not persist on the narrow view the drafters of the Convention had in 1929.

Lord Hope found that Mr. King's claim for psychiatric injuries on board a plane was valid.

Lord Hope of Craighead began his suggestion by wondering about the meaning of the phrase 'bodily injury' in the WSC which is a very important question. He examines

³⁷⁰ *Floyd v. Eastern Airlines, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.*

³⁷¹ *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng (No. 97-475) certiorari to the united states court of appeals for the second circuit 122 F. 3d 99, reversed.*

³⁷² Tompkins George N. Jr. '2015 Summary of the MC99 Court Decisions' Air and Space Law 41, no. 2 2016: 129.

³⁷³ *Seshadri v. British Airways PLC et al, No. 3:2014cv00833 - Document 18 S.D. Cal. 2014.*

both *King*³⁷⁴ and *Morris*³⁷⁵ cases as the other Lords did as well. Regarding the *King* case he mentions that although it was not an international flight, as this is a key factor in order for WSC to be applied, according to Schedule 1 to the 1967 Carriage by Air Act Order which is domestic law regarding international carriage by air and has incorporated the WSC provisions, it can be allowed. Moreover, he mentioned Lord Philip's act of excluding all the elements regarding King's psychic injury as well as the actions of other plaintiffs which were heard at the same time at a debate on the procedure roll. He only allowed the peptic ulcer disease claim to go to proof. Mr. King made a reclaiming motion in order to be allowed to proof before answering all of his statements. Bristow marked a cross claiming motion to ask for dismissal of the action. First Division allowed King's motion, refused cross claiming and allowed proof for the parties before answer their averments.

Regarding the *Morris*³⁷⁶ case, based on the abovementioned history of the case, Lord Hope mentioned that the plaintiff claimed damages from the Bury County Court under Article 17 of the WSC as incorporated in the English Law by Schedule 1 to the 1961 Act. The claim for her mental injury was based on the report of Dr. N J Cooling, consultant psychiatrist. According to him plaintiff was emotionally shocked, she had shown characteristics of clinical depression and the diagnosis according to DSM-IV criteria '...was one of a single episode of a major depressive illness for which her general practitioner, recognizing the very dramatic change in her mental change, had started her on anti-depressant treatment.'

The Court of Appeal, after an appeal made on behalf of KLM, discussed the meaning if 'accident' and 'bodily injury' and allowed the appeal. Morris appealed against that order. Court of Appeal made a distinction between bodily and mental injury. Lord Philips underlined that the claimant admits that she did not suffer any physical injury.

Lord Hope stated for both of the case that no attempt was made in order to prove that the mental injury or illness derived from a bodily injury. The only physical injury that he could recognize was the claim by Mr. King regarding his peptic ulcer which was better defined as a physical manifestation of a mental injury. In both case passengers wanted to prove that they sustained a mental injury and not draw a line between mental and physical injuries according to Lord Hope. Furthermore, it is not possible to strictly distinct between body and mind and any distinctions made did not have a scientific base.

He referred to two cases of the UK House of Lords, *Bourhill v. Young*³⁷⁷ and *Page v. Smith*³⁷⁸ both of which deal with not obvious body injuries that can be recovered. The

³⁷⁴ *King v Bristow Helicopters Ltd.* [2002] UKHL 7

³⁷⁵ [2001] EWCA Civ 790

³⁷⁶ [2001] EWCA Civ 790

³⁷⁷ [1943] AC 92

³⁷⁸ [1995] UKHL 7

sector of medicine that is concerned with psychiatric disorders and disturbances is still developing. Nonetheless, physical conditions deriving from psychic conditions are identifiable like Mr. King's peptic ulcer case. Moreover, psychiatric illnesses that are not product of a physical injury are recognized as well, for example PTSD. Still the distinction between mental and bodily injuries is unclear. Science can prove that a mental illness is caused by a physical injury and treated with medicines as it is observed by some recent case law from USA Courts mentioned above.

Regarding the Morris case, her injury cannot be attributed to any kind of physical injuries; it might be in the future according to Lord Philips. Her point was to prove that she was suffering from a recognized mental disorder not that it derived from a physical injury.

In the UK law the term 'bodily' used in the WSC is similar to the 'bodily harm' term. There are domestic cases accepting that although it did not include emotions it is capable of including psychiatric injuries like the *R v. Chan-Fook*³⁷⁹ case in which the Judge held that the phrase 'bodily harm' can include any damage to the brain as well. The same happened in the *R v. Ireland*³⁸⁰ case where it was decided that bodily harm should be interpreted as to include recognizable psychiatric illnesses. Certainly it is obvious that when it comes to an international treaty domestic law should not be followed when construing the Convention.

Yet, Lord Hope could not help but wonder if the wording of Article 17 of the WSC could be construed according to the UK domestic law. He continued his suggestion by examining the Convention. It should be mentioned that in the Act incorporating the WSC in the English Law there is a provision stating that the French text, being the original, is prevailing over the English text. As it was mentioned above that in the King case the flight was not an international one but it is covered under Schedule 1 to the 1961 Act. Both parties in this case agreed that it was proper to look on the original French text of the WSC when construing the Articles in Schedule 1. There was no issue regarding Mrs. Morris' case as it was without any doubt an international flight.

WSC, according to Lord Philips of Worth Matravers MR in the Morris case, intended for a uniform set of circumstances in which a carrier by air would be obliged to pay compensation for damage sustained to a passenger. But the question is what type of damage would that be?

Lord Hope moved on with examination of the wording and Articles of WSC. He mentioned the conclusions made in *Saks*³⁸¹ case regarding liability under Article 17

³⁷⁹ [1993] EWCA Crim 1

³⁸⁰ [1997] UKHL 34

³⁸¹ *United States Supreme Court Air France V Saks* 470 U.S. 392, 397 1985 / *U.S. Supreme Court Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530,534 1991.

adopted by WSC which was used by the *Morris*³⁸² Court as well. In this case, according to the wording of Article 17, no accident happened. But the Court of Appeal held that it did. In the *King*³⁸³ case there was no question regarding this matter. He also held that there are certain principles when interpreting an international Convention. First, a Convention should be considered as a whole. Especially for WSC, comparison should be made between the English and French text, as the latter prevails.

Moreover, it should not be interpreted according to the idioms of English Law. The common meaning the parties gave to the provisions should dominate. Broader construction of the language would also be useful in those cases of interpretation. Preparatory work examination can be useful but it should be done cautiously as members may not share the same opinions. Also, subsequent application of the WSC can be a useful tool. And finally case law from other jurisdictions that can give an interpretation which is generally accepted in those jurisdictions. An important question is whether WSC is an “always speaking” document i.e. that is applied according to the recent scientific evidences, whether drafters had that intention. Especially than today the physical basis used in the original text can be used to demonstrate mental injuries. According to Lord Hope, at first glance ‘bodily injury’ equals death or wounding. The ‘bodily’ term shows intent of restriction on behalf of the drafters. Even in the 1929 it was possible for people to develop emotions of fright etc on board of a flight, something that could be recognized by the drafters and thus included in the text of WSC. Consequently, the exclusive use of the term ‘bodily’ showcase that they wanted to exclude psychic injuries as they probably were familiar with reactions like fear etc.

In the *King*³⁸⁴ case, Lord President thinks that ‘any other bodily injury’ should not be considered in a narrow way. It should cover any type of injury affecting the body. Lord Reed as it will be mentioned below was of the same opinion.

Back to Lord Hope, who held that the phrase ‘bodily injury’ points to some injuries to the body and not to some mental injury as it is imprecise. The French text phrase seems to have the same meaning as the English one, and that is only body injuries. If the delegates’ intention was to use ‘bodily injury’ in a broader way they would not have used the word “corporelle” in the original French text. Lord Hope sees the use of the word “corporelle” as a restriction to the word “lesion” rather than the wider definition that Lord President supported. There was no evidence that there was any discussion made about the term ‘and other bodily injury’. According to Lord Hope there is no clue in the preparatory work that the use of the term ‘bodily injury’ is not a restriction. About this point Lord President stated that the preparatory work indeed

³⁸² [2001]EWCA Civ 790

³⁸³ *King v Bristow Helicopters Ltd. (Scotland); In Re M 2002 UKHL 7*

³⁸⁴ *King v. Bristow Helicopters Ltd. (Scotland); In Re M 2002] UKHL 7*

gave no help regarding this matter and both Courts in *King* and *Morris*³⁸⁵ cases accepted that there was no discussion about psychological injuries in there. Lords Reed and Cameron agreed with this opinion as well. Furthermore, Lord Philips regarding the *Morris* case stated that the preparatory work of WSC was not clear enough in order to be used. As for the subsequent practice after WSC, Lord President held that German speaking countries interpreted Article 17 as to include mental injuries from the early days of the Convention, mentioning the opinion of Pr. Dr. Otto Riese that was mentioned above regarding the *Palagonia*³⁸⁶ case.

Lords Reed and Philips regarding the *Morris* case disagreed and held that the official German translation does not have the same weight as the original French text, exactly like the English text. When it comes to the Montreal Convention, it was not yet signed when this decision was published. Lord Hope mentioned that the matter of whether mental injuries should be included under the new Convention was discussed and presented a document produced under the protection of the chairman including this statement regarding Article 17: “*With reference to article 17, paragraph 1 of the Convention, the expression 'bodily injury' is included on the basis of the fact that in some states damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air.*”²²

Lord Hope made a large reference in a series of international cases. First was *Rosman* and he cited Rabin J’s conclusion regarding the complicated relationship between mind and body and that it was not a matter that the Court had to answer. (See above) Furthermore he referred to the *Floyd*, *Tseng*, and *Jack* cases, stating that generally US Courts dismiss those claims and only award when mental injuries derive from physical injuries.

The decision from the *Floyd*³⁸⁷ case was followed by the New South Wales Court of Appeal in the *Kotsambasis v. Singapore Airlines Ltd*³⁸⁸ case and Lord Hope is aligned with that and wants the House of Lords to follow it as well. Following that opinion, he held that there was no uniform approach from the State parties in 1929. Many of them would not have recognized such a motion for pure mental injuries as it was held in the *Floyd* case decision. Parties may want to take into account future medical evidence when it comes to bodily injuries. It is expected from a ‘bodily injury’ to be obvious but it is a matter to be examined further in the future. Moreover, especially for the cases examined, plaintiffs did not manage to prove that the mental injuries they sustained fall within the scope of the term ‘bodily injury’ as stated in

³⁸⁵ *England and Wales Court of Appeal Morris .v KLM* [2001] 2 All ER (Comm) 153, [2001] EWCA Civ 790, [2001] 3 WLR 351, [2001] CLC 1460, [2002] QB 100, [2001] 3 All ER 126.

³⁸⁶ *Palagonia v. Trans World Airlines Supreme Court Westchester County* 110 Misc. 2d 478 1978.

³⁸⁷ *Floyd v. Eastern Airlines, U. S. Supreme Court* 872 F.2d 1462 11th Cir. 1989.

³⁸⁸ *Kotsambasis v. Singapore Airlines, 148 ALR 498 (42 NSWLR 110).*

Article 17 of WSC. Eventually, Lord Hope concluded that the House of Lords should follow the example of USA cases like *Floyd*. Furthermore, he held that awards given by the Courts in the *Rosman*³⁸⁹ and *Jack*³⁹⁰ cases regarding physical manifestations of mental injury is the only way a passenger can claim damages for mental injury under WSC. Pure mental injuries are not allowed under any circumstances under Article 17. He approved the appeal on behalf of Mr. King.

Lord Steyn supported the view that a clear line was drawn in Article 17 and there could be no compensation for pure mental injuries.

Lord Steyn made an elongated suggestion as well. The main question for him was whether a passenger suffering a mental injury as a result of an accident on board a plane could claim compensation under Article 17 of the WSC. In his analysis he cited *Sidhu v. British Airways*³⁹¹ regarding the effect of the Convention and complying with the conclusion of the Court stating that Article 17 should be examined as a whole and not separated from the Convention. Furthermore, he mentioned the decision in the *Tseng*³⁹² case agreeing with the analysis made there. According to him “*The correct inquiry is to determine the autonomous or independent meaning of "bodily injury" in the Convention: R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477. And the premise is that something that does not qualify as a "bodily injury" in the Convention sense does not meet the relevant threshold for recovery under it.*”

He continues by mentioning that in 1929 compensation for mental illnesses could be awarded only in a few State members. Consequently it makes sense that if the delegates intended for them to be covered under the Convention, they would do so. There is no proof either in the Convention itself or in the preparatory work that this matter was of a great importance for them. If they had made the choice of covering the then known possible cause for mental illnesses like in flight turbulence or missing approach to the airport due to the weather, it would be extremely easy for passengers to rise claims against airlines for those types of injuries, something that could cause a wound to the new found, at the time the Convention was signed, aviation industry.

Furthermore, Lord Steyn made a reference to Malcolm Clarke’s book *Contracts of Carriage by Air*. Malcolm Clarke mentions that the decision of the First Division in *King’s* case was a shock as it is reasonable that if WSC drafters would want to include psychic injuries as well, they would do so. Since they did not ‘bodily injury’ in the English text and ‘lesion corporelle’ in the original French text should be interpreted as

³⁸⁹ *Rosman v. Trans World Airlines Court of Appeals of the State of New York* 34 N.Y. 2d 385 1985.

³⁹⁰ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

³⁹¹ [1996] UKHL 5

³⁹² *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng (No. 97-475) certiorari to the united states court of appeals for the second circuit* 122 F. 3d 99, reversed.

restrictions. Moreover, the choice of the word 'bodily' showcases the antithesis between body and mind injuries.

Lord Steyn also mentioned that the preparatory work did not reveal further evidence regarding the intentions of the drafters. Silence on behalf of the parties during the official discussions of WSC underlines their positive stance in narrowing the types of injuries caused to passengers on board as in many contradicting States mental injuries were not covered and this could cause certain objections on behalf of them. He referred to the Convention for International Carriage by Rail 1980 in connection with WSC, similar to the comment made in the *Burnett*³⁹³ case (see above).

This comment supports further the argument that WSC drafters intentionally made this demarcation between bodily and mental injuries. Claims for psychic injuries first started in 1970's as the ruling view until then in the commercial world was that pure mental injuries were not covered under WSC. Nevertheless, until that point when Courts, scholars and the commercial world in general talked about mental injuries they mostly referred to fright etc. Nowadays this perspective has changed. PTSD is now recognized as well as physical manifestations of mental injuries due to an accident on board a plane like clinical depression. According to Lord Steyn it is quite clear that there was a line drawn in Article 17.

He as well mentioned a series of cases that dealt with this matter. *Floyd*,³⁹⁴ *Tseng*³⁹⁵ and *Kotsambasis*³⁹⁶ were some of them. He agrees with their conclusions and believes that the House of Lords should follow their example but according to his opinion Lords should not exclude suffering caused by physical injury so the types of mental injuries mentioned in the cases above may be covered. There should not be an exception made to the rule of Article 17. Moreover, in cases where the accident causes mental injury or illness which later causes physical symptoms like strokes, peptic ulcer etc the requirement of Article 17 is satisfied. Quoting the decision from *Rosman*³⁹⁷ "...as we read article 17, the compensable injuries must be 'bodily' but there may be an intermediate causal link which is 'mental' between the cause - the 'accident' - and the effect - the 'bodily injury'. And once that predicate of - liability - the 'bodily injury' - is established, then the damages sustained as a result of the 'bodily injury' are compensable including mental suffering" mentions that in his opinion this judgment is faithful to the WSC and it should be adopted by the Court. In this way, he supports his view on the *Morris*³⁹⁸ case stating that it should be dismissed as it falls outside the scope of the Convention in contrast with the *King*³⁹⁹

³⁹³ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

³⁹⁴ *Floyd v. Eastern Airlines*, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.

³⁹⁵ *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng* (No. 97-475) certiorari to the united states court of appeals for the second circuit 122 F. 3d 99, reversed.

³⁹⁶ *Kotsambasis v. Singapore Airlines*, 148 ALR 498 (42 NSWLR 110).

³⁹⁷ *Rosman v. Trans World Airlines Court of Appeals of the State of New York* 34 N.Y. 2d 385 1985.

³⁹⁸ *England and Wales Court of Appeal Morris v. KLM* [2001] 2 All ER (Comm) 153, [2001] EWCA Civ 790, [2001] 3 WLR 351, [2001] CLC 1460, [2002] QB 100, [2001] 3 All ER 126.

case where plaintiff's claim regarding his suffering from peptic ulcer pain can be considered compensable. He also mentioned the *Weaver*⁴⁰⁰ case as according to him the new point made by this case that psychic injuries can cause changes to the body and this is the reason why an injury to the brain can fall under the meaning of the term 'bodily injury' should not be followed. The reason for this argument are that the reasoning in the *Weaver*⁴⁰¹ case cannot undermine the distinction made in WSC and are different from the two exceptions he mentioned above which could be accepted under Article 17. Furthermore, amendments in the WSC should be the ones bringing the changed, not the judges as extension in WSC is a controversial issue for a number of reasons. Law has already been set by the *Floyd*⁴⁰² and *Tseng*⁴⁰³ cases. He agrees with Hope and allows the appeal of Mr. King, dismisses the one from Mrs. Morris.

Lord Hobhouse suggests that the original meaning of Article 17 has not changed thus pure mental injuries are not covered.

Last but not least, Lord Hobhouse's suggestion. He too analyzed the French text, highlighting the limitation on the incident that can be characterized as an accident. He mentioned the confusion existing internationally and in the UK regarding the legal meaning of 'bodily injury'. His view is that bodily injury does not import visibility, palpability or externality and it is a change in a body part, not mere emotional upset like fear, distress, grief etc. Furthermore he referred to the *Rosman*⁴⁰⁴ case where the passenger proved a bodily injury in order to be compensated for his psychic injury. He agrees more or less with findings of the rest of the Lords regarding the analysis of the Warsaw Convention and he makes a comment regarding the new findings of the medical science. Those findings did not change the original meaning of Article 17. The ability of the plaintiffs to bring their case within it is the only thing that has changed. According to his opinion, the sum of unpleasant experiences linked to the mind/conscious cannot be a bodily injury and of course it cannot be covered under Article 17.

He stressed the meaning of the term 'mental injury' and thinks it is a fault made from the Court of Appeal and this definition should not be followed as it creates a false antithesis with bodily injury and is not what the delegates in 1929 were thinking. Furthermore, in his view the right reading of the US cases should be that they exclude more than emotional upset. He too refers to case law, stating that international

³⁹⁹ *King v. Bristow Helicopters Ltd. (Scotland); In Re M 2002 UKHL 7 28th February, 2002 House of Lords.*

⁴⁰⁰ *Weaver v. Delta Airlines, Inc. U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 D. Mont. 1999 June 30, 1999.*

⁴⁰¹ *Weaver v. Delta Airlines, Inc. U.S. District Court for the District of Montana - 56 F. Supp. 2d 1190 D. Mont. 1999 June 30, 1999.*

⁴⁰² *Floyd v. Eastern Airlines, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.*

⁴⁰³ *El Al Israel Airlines, LTD. v. Tsui Yuan Tseng (No. 97-475) certiorari to the united states court of appeals for the second circuit 122 F. 3d 99, reversed.*

⁴⁰⁴ *Rosman v. Trans World Airlines Court of Appeals of the State of New York 34 N.Y. 2d 385 1985.*

jurisdiction on those cases is influenced by domestic law and there is no uniform view on this matter. He mentioned the *Rosman, Burnett*,⁴⁰⁵ *Floyd* and *Jack*⁴⁰⁶ cases as well as Australian case law.

Nonetheless, he prefers the reasoning in the *Weaver* case as according to his words “*To summarise, there is clear support in the overseas authorities for the view I have expressed. I believe that these authorities show an international acceptability for giving a natural meaning to the words bodily injury without imposing any artificial or restrictive gloss upon them. This is the direction in which the jurisdiction which has to deal with the greatest volume of air passenger litigation, the United States, has moved. It is supported by the decisions of the Courts of New South Wales. If your Lordships adopt the same view as I have of the effect of Article 17, you will be promoting international uniformity rather than creating a risk that the law of the United Kingdom will be at odds with that elsewhere. The decision in Weaver was, given the evidence there before the court, wholly unexceptionable. It is in line with the US law and the natural meaning of the words bodily injury. I accept that the judgment of the Court of Appeal in Morris is inconsistent with it. I prefer the reasoning in Weaver.*”

There is not enough evidence in order to read Article 17’s definition of ‘bodily injury’ as personal injury instead, based on the *Floyd*⁴⁰⁷ case arguments. Passenger has to make a claim of injury consequent upon the accident on board and support it with expert evidence. He also referred to another issue regarding the use of the term ‘mental injury’. According to him there is no useful purpose of the term ‘mental injury’, it complicates things and it is inconsistent with the US cases. His opinion is that brain injury caused by the accident happened on board can be compensable. Based on that, he dismissed Mr. King’s appeal as well as Mrs. Morris’.

This case is very important for European Law as well, not only UK Law. The detailed presentation of the Judges’ views was necessary in order to highlight the way this particular matter is seen in Europe and how Courts, Judges and scholars deal with it. Judges although indicating that in the past times it could not be obvious if the brain had suffered any alterations and now it can be visible and thus included under the already existing term of ‘bodily injury’, they aligned with the decision from the *Floyd* case.

The Irish Circuit Court in the *Geraldine Howe v. Cityflyer Express Limited, 12th October 1998* case is following the decision from the *Morris*⁴⁰⁸ case. In this case the plaintiff claimed for nervous shock and post-traumatic stress disorder after one of the engines of the aircraft she was a passenger caught fire. Judge Haugh said that according to the wording of the Warsaw Convention and the words the translators

⁴⁰⁵ *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 D.N.M 1973.

⁴⁰⁶ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

⁴⁰⁷ *Floyd v. Eastern Airlines*, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.

⁴⁰⁸ [2001] EWCA Civ 790

used it is clear that they would have used the term personal injury if they wanted to include mental injuries rather than the term bodily injury that explicitly excludes those types of injuries. He recognized the personal injury the passenger suffered but he could not award any compensation as her injury was of psychic nature rather than physical that the WSC demands in order to award a remedy.⁴⁰⁹

b. Conclusion

As it is evident by the two cases that were mostly discussed above, the *King* and the *Morris* cases, UK Courts followed the reasoning developed in the US *Floyd* case, that mental injuries can be compensated only if accompanied by a physical injury.

⁴⁰⁹Siobhan Lane 'Bodily Injury and the Montreal Convention'

<http://www.mondaq.com/ireland/x/73434/Healthcare+Medical/Bodily+Injury+And+The+Montreal+Convention>

CHAPTER 5

Examples of Greek and French case law

a. Overview

This chapter starts with an introduction to the European perspective of the international carriage by air. EU Directives regarding this matter have incorporated both WSC and MC thus all State members have to follow them as well, as the relevant Regulations mentioned below. Furthermore, some cases from France and Greece are analyzed, where the aim is to provide a perspective from civil law jurisdictions. It is noteworthy that the French legal system recognized pure mental injuries under WSC, one of the possible reasons of which was that their domestic tort law allowed such recovery and that WSC was originally drafted in French.

Introduction

International Carriage by Air in the European Union

In Europe before European Union was founded, what used to be the main focus was the protection of the market. States mostly had signed bilateral agreements regarding a series of matters. After the founding of the EU liberalization rules dominated instead.

In the German version of Article 17 of the WSC the words ‘other injury to health’ used to be included.⁴¹⁰ The passengers could claim pure mental injuries only if the jurisdiction in question perceived the meaning of ‘bodily injury’ as containing mental injuries as well. According to German Law mental trauma can be considered bodily injury only if there is an important loss of health.⁴¹¹ The injury must be caused by an

⁴¹⁰ Cunningham Mckay *‘The Montreal Convention: Can passengers finally recover for mental injuries?’* *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008, 1045.

⁴¹¹ Cunningham Mckay *‘The Montreal Convention: Can passengers finally recover for mental injuries?’* *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008, 1045.

accident on board of an international flight and it can occur later rather than be foreseen in advance. Still though there was imbalance between what passengers could get compensated for. They had to have a bodily injury connected to their emotional injury although the accident could have been far from a bodily injury (like molestation by a member of the flight crew⁴¹²). According to Clarke⁴¹³ no change was intended to be made concerning the term ‘bodily injury’ which was included in the original text of the WCS.

EU signed the Charter of Passenger Rights⁴¹⁴ in order to ensure a minimum level of protection for passengers traveling using any type of transportation. EU also ratified the WCS with its 2027/97 Council Regulation⁴¹⁵ and MC with its 2001/539/CE Decision.⁴¹⁶ It also has two air transport Regulations regarding passengers’ rights.⁴¹⁷ With its Regulation (EC) 889/2002⁴¹⁸ amended the Regulation ratifying the WCS and what it should be noted is that it does not include the term ‘bodily injury’. Instead it introduced the term ‘harm entitling to compensation’. This differentiation is of high importance as the term used by the EU is broad enough to include any type of injury, including mental injuries. Furthermore, in the EU legislation the term injury is not defined.⁴¹⁹ EU Regulations in 1993 and 1997 are similar to the IATA Agreements, not only regarding the Articles of MC but the general content of those Agreements. There is great dissatisfaction on behalf of the EU regarding passengers’ liability. Reg. 2027/97 states that EU Members are obliged to include WCS provisions in their conditions of carriage. Carriers outside of the EU have the chance not to include them but they have to clearly state it so.

Regulation 2027/97 defines and harmonizes obligations of air carriers within the EU and sets the nature and limits of their liability. Damages like death, wounding or other bodily injuries in course of an accident on board an international flight or during the

⁴¹² Cunningham McKay ‘The Montreal Convention: Can passengers finally recover for mental injuries?’ *Vanderbilt Journal of Transnational Law*, Vol. 41, Issue 4 October 2008, 1045.

⁴¹³ Clarke *Contracts of Carriage by Air* Chapter 2 Second Edition Lloyd’s List 2002, 7.

⁴¹⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement.

⁴¹⁵ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents *Official Journal L 285, 17/10/1997 P. 0001 -Re 0003*.

⁴¹⁶ 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) *Official Journal L 194, 18/07/2001 P. 0038 – 0038*.

⁴¹⁷ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (Text with EEA relevance) / Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement.

⁴¹⁸ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

⁴¹⁹ Dal Pozzo Francesco Rossi ‘EU Legal Framework for Safeguarding Air Passenger Rights’ Springer 2015, 1.

embarking or disembarking process. There is no financial limit defined by law, Convention or contract for a passenger's injury or baggage loss. Based on Article 5 of the Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents⁴²⁰ community air carriers have to pay the victims or those who are eligible for compensation, a proportional amount for their damages sustained, within 15 days after the identification of the victim. Also, Community carriers must inform their passengers about all of the provisions related to carrier's liability in case of an accident as well as to the compensation they can be awarded on the conditions of carriage.⁴²¹

Regulation 889/2002 amending Regulation 2027/97 implements relevant provisions of the MC, adds certain supplementary provisions and it is fully aligned with MC. The aim is to harmonize liability limits and legal defenses for Community air carriers, regardless of the route they follow (internal, intra-community, international). MC rules adopted by the EU apply to any kind of route, not only international flights. Air carriers must provide in written form 1) applicable limit for the flight in question on the carrier's liability in respect of death or injury 2) applicable limit for the flight in question on the carrier's liability when the baggage is destroyed lost or damaged 3) applicable limit for the flight in question in respect of damage occasioned by delay.⁴²² Regarding liability of the air carrier in compensation for the event of death or injury no financial limit is set. But there is a first tier of strict carrier liability for damages up to 15,000 SDR's (set by the Monetary Fund) according to which air carrier cannot contest claims for compensation. In excess, a second tier of liability is based on the possible fault of the carrier, which can be avoided if the carrier can prove it was not his fault.

1. The approach of French and Greek Courts

Some courts try interpreted the terms 'accident' and 'bodily injury' in order to award recovery to everyone claiming an injury and they did so by applying their domestic law although this may be seem as an obstacle before the uniform application of WSC and MC. Another element that might prove inefficient toward uniformity is the acceptance of 6 languages as official.⁴²³ It can be quite complicating for Courts, scholars and professionals of the aviation industry to find some common place if each part is promoting its own language version One thing that should be apparent for any

⁴²⁰ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents.

⁴²¹ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents *Official Journal L 285, 17/10/1997 P. 0001 -Re 0003.*

⁴²² Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents.

⁴²³ Laucamp Luis Castellvi '*Carrier Liability in case of death or injury of passengers*' Sant'Anna Legal Studies STALS Research Paper n. 2/2009, 1.

international Convention is that no remedy can be awarded if there is no such provision allowing so. The same applies for WSC and MC.

In the decisions mentioned below, French and Greek courts decided to follow the approach of awarding damages for pure mental injuries because this type of damages are recognized under their national tort law and are compensated.

Nevertheless, it is curious to see how the courts decided this way despite MC and WSC (subsequently the EU Directions which have adopted WSC and MC and some of the interim Agreements) do not allow national tort laws to overrule them.

France

A judgment by the French Cour de Cassation in 1982,⁴²⁴ without examining the issue or retain the liability of the air carrier referred to the damage sustained by the passenger that had undergone a hijacking as “tant sur le plan physique que sur le plan psychique” (as a both physical and mental damage). In this case, the air carrier was exonerated of all liability for the physical and psychic damage suffered by the passenger not because the physical injuries were not compensable but because the air carrier proved that he had taken all the precautions needed to avoid the incident according to Article 20 WSC.

In the common law where the problem is viewed under the same terms, the idea of a work accident ‘is not legally characterized by a bodily injury’. In a case from the Cour de Cassation, it was adopted that a simple mental disorder is a bodily injury.⁴²⁵ Cour de Cassation has stated this qualification for a nervous breakdown manifested following an evaluation interview. The sense of the bodily injury is therefore widely perceived, since it extends to mental disorders. The same solution can be followed at the interpretation of Article 17 WSC. WSC defers to national law in order to determine the types of reparable damages. In the French Law the damages is reparable, based on Article 1382 of the French Civil Code which applies both to non-pecuniary and material damages, when they are personal, direct and certain. So when those 3 elements are gathered the victim can claim for compensation of any damage to his physical integrity, for the pain he experienced at his flesh, physical or moral.

The jurisprudence,⁴²⁶ while endorsing to the dualism concept of pretium doloris, an idea which covers the physical or moral suffering, dismissed during the lifetime of the victim in the existence of non-material damage which is thus founded on the legal definition of the pretium doloris. Indeed, it is generally accepted that personal injury

⁴²⁴ Tribunal de grande instance de Paris, Chambre 03, 11 Mai 1984 1042217 CL24;CL25;CL26
Référence INPI : M19840619.

⁴²⁵ *Cass. soc. 27 Janvier 1961, Bull. civ. 1961, IV, n° 134.*

⁴²⁶ Weissberg Kenneth *La réparation du préjudice moral dans les accidents de transport aérien*
Cabinet International Weissberg 2007, 1.

covers the *pretium doloris* (the suffering endorsed), the aesthetic injury, and the injury of approval, the sexual injury and the juvenile harm. These positions seem to cover exhaustively the consequences on a moral and subjective level of a damage suffered and endorsed. Since this point, it seems difficult to identify today a radically new concept, which would repair an aspect of the moral damage distinctly different from that of the abovementioned posts.

The Cour de cassation recently overturned a decision from the Cour d'Appel d'Aix-en-Provence,⁴²⁷ which accepted the claim of a victim regarding a mental injury distinct from *pretium doloris* for the victims awareness of the seriousness of irreversible attacks and recalled that compensation for the price of pain repartees both physical and mental suffering and that by compensating separate moral injuries the substantive judges had awarded compensation in excess of the amount of the damage. However, even if the Courts are reluctant to admit, the existence of pure mental damages (non pecuniary damages) it goes only to the extent that they consider that type of damage is reparable to the price of pain caused. Since then, the psychic damage suffered as a result of an accident during a flight operation governed by WSC is without contest reparable and repaired.⁴²⁸

The *Floyd*,⁴²⁹ *Jack*⁴³⁰ and *Chendrimada v. Air-India*⁴³¹ cases were examined by the Cour de cassation in order to make its decision.

It seems to be necessary to distinguish between the psychological and the physical damage suffered at the time of the accident of the psychological damage directly caused by the occurrence of the accident, only the first is compensable. A question was also raised whether the physical manifestations following the psychic disorders suffered, are reparable on the basis of WSC. Numerous jurisdictions refused to grant compensation in respect of such damages. Indeed, the *Floyd*⁴³² case makes a clear distinction between psychological harm and the physical harm. If the award for the physical manifestation of the non-pecuniary damage sustained is allowed, this distinction can no longer be made.

Thus, the Court of Appeal has judged that WSC allows the compensation of mental injury to the extent that it is caused by the physical injury caused by the accident. But it has equally considered that the physical manifestation of psychic injuries like weight loss or even insomnia, are not entitled to compensation on the basis of WSC.

⁴²⁷ Civ. 2, 9 décembre 2004, n° de pourvoi : 03-15962.

⁴²⁸ Weissberg Kenneth *La réparation du préjudice moral dans les accidents de transport aérien* Le Cabinet International Weissberg 2007, 1.

⁴²⁹ *Floyd v. Eastern Airlines*, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.

⁴³⁰ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 N.D. Cal. 1994.

⁴³¹ *Chendrimada v. Air-India*, U.S. District Court for the Southern District of New York - 802 F. Supp. 1089 (S.D.N.Y. 1992) October 5, 1992.

⁴³² *Floyd v. Eastern Airlines*, U. S. Supreme Court 872 F.2d 1462 11th Cir. 1989.

Greece

In a decision given by the Court of Appeal of Athens, Greece the issues were Article 17 of MC, definition of accident and bodily injuries. It should be noted that Greece is member of the EU where all the above mentioned Directives and Regulations are applicable as a force of law.

The plaintiff did not hold that he suffered a physical injury, only that his health was exposed to danger. In order for the Court to apply Article 29 MC⁴³³ for air carrier's liability and award compensation for "any action of damage, however founded" the injury had to derive from an accident. The plaintiff bought tickets to fly from Athens to London and vice versa. After arriving to Athens, he found out through media and the carrier's own website that in Boeing 767 aircrafts like the one he travelled with, traces of the radioactive substance Polonium 210 were found, a substance extremely dangerous for humans. Since then he did not have any authoritative updating from the air carrier, although he tried to contact the airline. During the period following the incident, in the absence of any information, he experiences a prolonged period of anguish, concern and mental suffering regarding the state of his health, the extent of the danger he has been exposed to and the potential harmful symptoms he might have. He claimed that because of the carrier's illegal and negligent behavior as the airline failed to take all the necessary safety measures, thus allowing the introduction in some of its aircrafts of the radioactive substance and because of the incompetent information on behalf of the carrier regarding the progress of the case and any steps passengers should take in order to avoid getting infected and any future health issue, his personality was affected and he suffered major moral damages (non pecuniary damages for mental injuries). He asked for financial satisfaction in order for his moral damage to be restored.

The first degree Court held that the lawsuit was not legal and it was dismissed. The plaintiff appealed against this decision. The Court of Appeal (Efetio Athinon⁴³⁴) examined MC and stated that Greece had ratified the MC with the state law 3006/2002 based on the EU Regulation 2027/1997. The Court stated that according to Article 17 the carrier is liable for any case of death or bodily injury of a passenger during an accident on board an international flight. Furthermore Article 29 sets the limits of liability and no external limits could be set. The Court also analyzed Article 17 MC and held that according to it, since the issue regarding compensating only physical injuries or mental injuries too is not clear, State members can decide for this matter. According to Greek law, compensation for moral damages can be awarded as

⁴³³Article 29 of the Montreal Convention '*In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.*'

⁴³⁴ Monomeles Efetio Athinon 4326/2015

well (Greek Civil Law), if the requirements of the relevant article are met. Based on the claims of the plaintiff, in this case there cannot be civil responsibility on behalf of the carrier. Since the plaintiff only mentioned danger of his health and no physical injury at all, the court decided that his claims should be dismissed. Holding that, one's health is not an injury and so it cannot be compensated the Court here followed the prevailing view in *Floyd*,⁴³⁵ *Rosman*⁴³⁶ and *Jack*.⁴³⁷

Greek Courts do not pay much attention to the uniformity criterion that WSC has set and uses domestic law extensively to fill the above mentioned gaps. Also the Greek Courts are particularly tempted to fill the "gap" that exists regarding compensation for psychic injuries. According to them, moral damages for psychological distress are not regulated under WSC so domestic laws should be applied.⁴³⁸ CJEU⁴³⁹ has different opinion and has reasoned its decisions on contrasting grounds, still the prevailing view among the Greek Courts is that awards for psychological injuries are supplementary to any other type of compensation under MC and they are not covered under the limits of compensation set in the Convention. Greek Courts apply articles of the Greek Civil Law in order to compensate pure mental injuries.⁴⁴⁰ Internationally, the prevailing view is that pure mental injuries are not recoverable.

Mental injuries that cause bodily injuries might not be, but mental injuries caused by a bodily injury has no more chances to be recovered in certain jurisdictions. PTSD is difficult to be compensated. In Greece it is standard practice to award psychological damages although Courts have not dealt with any issues regarding PTSD incidents and in several cases attorneys do not seem familiar with those issues in order to raise them in front of the Court.⁴⁴¹ In cases of death or injury of a passenger psychological injuries are awarded, regardless of the type of the accident based on the Greek Civil Code and the long series of Greek case law. As Greece is a member of the EU, which is also a party to the MC, it has stated that 'in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters governed by the Convention'. All EU member states have done so. Thus EU is responsible to adopt any relevant rules that members should enforce and regarding any external undertakings with third countries and international organizations.

In another Greek case,⁴⁴² where compensation for pure mental injuries was one of the claims, the Court started by stating that Greece had ratified WSC with the state law 596/1937 and the amendments made, starting with the Hague Protocol with the state

⁴³⁵ *Floyd v. Eastern Airlines, U.S. Supreme Court 872 F.2d 1462 11th Cir., 1989.*

⁴³⁶ *Court of Appeals of the State of New York Rosman V Trans World Airlines 34 N.Y. 2d 385 1985.*

⁴³⁷ *Jack v. Trans World Airlines, Inc., 854 F. Supp. 654 N.D. Cal. 1994.*

⁴³⁸ *Greek Cassation (Supreme) Court, Areios Pagos, 1369/2007, 39/2006 / Appeal Court of Athens, 1531/2006, Business & Company Law Review [a Greek law journal] 2011, 936.*

⁴³⁹ *Court of Justice of the European Union.*

⁴⁴⁰ *Multimember First Instance Court of Athens 7658/2009, 2229/2010; and County Court of Thessalia 7757/2001.*

⁴⁴¹ *Gates Sean 'The Aviation Law' Review Third Edition Editor Law Business Research Ltd 2015, 240.*

⁴⁴² *Monomeles Protodikio Athinon 452/1998 (MIIP A@ 452/1998 (2937230)). Only Member Court of First Instance of Athens.*

law 4395/1961, the Guadalajara Convention with the state law 766/1971 and the Guatemala and Montreal Protocols with the state law 1778/1988. This case was heard in 1998 thus the MC was not drafted or ratified by Greece. The plaintiff in this case claimed for bodily injuries due to strong turbulence (air waves) and emotional distress caused by the whole experience as analyzed below. Plaintiff got up his seat and tried to reach the airplane's corridor when strong turbulence caused by air waves made him fall and hurt his leg. It should be mentioned that the neon sign to fasten the seatbelt was not on. The air carrier testified that his injury was caused by a false step, thus the carrier did not have any liability whatsoever. The Court based on the testimonies of eyewitnesses and medical reports from the doctors of the airport where the plane landed as part of the trip, found that it was the captain's mistake that he did not warn the passengers about the upcoming turbulence and by no means was this the plaintiff's fault. The plaintiff claimed also for emotional distress for experiencing all these difficulties in his trip. The Court held that the prevailing and most correct view regarding this matter is that there cannot be recovery for pure mental injuries under Article 17 of WSC. This type of claims could be recovered after the Guatemala Protocol started being in force as there the term 'personal injuries' is used, covering both for bodily and mental injuries. Until then, the Court ruled that since it is not covered by WSC or its enforced successors and neither the Greek law awards compensation for pure mental injuries in cases of contractual liability like this one, the claim is dismissed.

According to the Court, the provisions of WSC and its amendments were an integral part of the internal Greek Law and prevailed over any provision to the contrary, regulating international transport by air of passengers, luggage and goods.

b. Conclusion

In this chapter some examples from French and Greek case law were given on pure mental injuries. The decisions mentioned above referred to their internal rules assessing whether or not to award or not pure mental injuries. The French case rejected pure mental injuries because the carrier could not be found liable and in the Greek case the motion was dismissed in first instance as according to the Court the lawsuit was not legal. In the second instance, the Court held that Greek tort law allows recovery for pure mental injuries and since this matter stays unanswered by Article 17, that it is up to each country to enforce its tort law rules. Greek and French courts decide to use their internal tort law in order to award mental damages when the judges believe there is a gap in the Conventions.

Conclusion

Aviation industry has gone through major changes since its founding; nonetheless international aviation law has remained the same. Although efforts were made in order to be modernized, they were not successful in every occasion. Most importantly, Article 17 that was first drafted in 1925 has not undergone a change in the official international Conventions that rule carriage by air. Especially when it comes to the critical issue of awarding compensation for pure mental injuries, no steps have been taken towards this direction. Courts continue to interpret this part of Article 17 based on outdated opinions and decisions formed in the 1970's where claims for these types of injuries started arising.

The above statement can be seen throughout this thesis, as in most the mentioned cases exclude compensation for pure mental injuries. Although there were discussions made, especially when MC was drafted, about how pure mental injuries should be included in Article 17 and how this is a necessity in our times, still Article 17 does not cover them. The approach of US and UK Courts' remain more or less the same, not giving any consideration to the medical progress made regarding this issue. Especially when it comes to PTSD there is a plethora of evidence from the medical field as it is now officially recognized, as well as for other types of mental injuries. The majority of the judges are still hesitant to award compensation for an injury they cannot really see. Nonetheless there are opposite voices that allow them.

The exhaustive analysis of PTSD and the presentation of its medical scope aim to give the opportunity to the readers to understand how this syndrome affects a person even without a physical manifestations and how it actually constitutes an actual injury to the brain. It is time for the people that are affected by it to be compensated as there are cases where plaintiffs with minor injuries are awarded big amounts of money.

As it was stated above, the lack of evidence according to the judges is one of the biggest issues. Judges are not educated regarding this matter, nor should they be as it is not their field, but they should start taking into consideration the medical evidence as they do in cases of physical injuries. The problem of quantification is another major issue as it is a new brand field which needs to be explored carefully. This is the reason why a new Convention is necessary, so that discussions and researches will be made, in order to have a more clear view on this matter.

A solution might be to use each state's tort law in order to cover for pure mental injuries; given the fact that it is accepted that Article 17 covers for them as well. However, this could come across the main goal of MC and the previous documents which is a uniform law for international carriage by air. How can that happen if each country awards different amount of compensation or none at all, as there are certain states that do not recognize pure mental injuries under their tort law.

Today's needs demand a different approach. The old times' dichotomy of body and mind has fallen down by modern medicine and Courts, scholars and States should

follow along. Small steps have been made towards this direction with some US Courts' decisions but there is still much space to be filled. Furthermore, it will be beneficial for the air carriers as well, to know beforehand that there is uniform way of dealing with mental injuries by the Courts. Since this matter remains void it can be a problem for the carriers to be protected by unreasonable claims. The need of revising Article 17 regarding this part is urgent as mental injuries have been recognized as a trauma that can possibly happen on board a flight. As it is not easy to establish this type of trauma and it is a big concern of certain groups that by allowing them a considerable number of forged claims can flood the Courts, strict limits should be drawn in any future amendments of Article 17. These can include medical opinions by recognized psychologists and psychiatrists appointed by the Courts and maybe certain training of the judges that deal with those cases in order to understand better the different hues that may occur in these incidents. All in all, for the protection both of the passengers and the air carriers as well as the industry as a whole, revision of Article 17 is mandatory.

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