

3-1976

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Recommended Citation

Boone, Joseph William (1976) "International Air Carriers--Psychic Injury and the Warsaw Conventions," *Mercer Law Review*: Vol. 27 : No. 2 , Article 11.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol27/iss2/11

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INTERNATIONAL AIR CARRIERS—PSYCHIC INJURY AND THE WARSAW CONVENTION

In *Rosman v. Trans World Airlines, Inc.*,¹ the New York Court of Appeals held that article 17 of the Warsaw Convention² limits recovery for personal injuries to objective bodily injury caused by psychic trauma, physical circumstances, or physical impact, and thus, prohibits recovery for psychic trauma alone.

This action consolidated two cases³ involving essentially identical facts. The majority of the plaintiffs were passengers on defendant's flight from Tel Aviv, Israel to New York City, when, on September 6, 1970, the plane was hijacked by members of the Popular Front for the Liberation of Palestine and flown to Amman, Jordan. There the hijackers, armed with rifles and grenades, forced the passengers to remain on or near the aircraft for six days. On September 12, the passengers were transferred from the plane to a bus where they witnessed the plane being destroyed by explosives. The passengers were returned to New York the next day. The plaintiff-passengers, all Jewish, in bringing this action against defendant, Trans World Airlines, alleged they had suffered severe psychic trauma throughout the ordeal, fearing for their lives and personal safety. Plaintiffs also claimed to have suffered from physical injuries caused by forced confinement in their seats, extreme temperatures of the desert, and lack of an adequate food and water supply.

Moving for summary judgment, the plaintiffs asserted that under the provisions of the Warsaw Convention and the subsequent Montreal Agreement,⁴ the defendant was absolutely liable for their psychic and physical injuries resulting from the hijacking. The trial court⁵ directed summary judgment for the plaintiffs in both cases, but the appellate division⁶ reversed, finding triable issues of fact as to the interpretation of the

1. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), July 31, 1934, art. 17, 49 Stat. 3018 (1934), T.S. No. 876 (effective October 12, 1929). The Convention imposes liability on international air carriers for passenger injuries.

3. *Herman v. Trans World Airlines, Inc.*, 40 A.D.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972) and *Rosman v. Trans World Airlines, Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972).

4. Montreal Agreement, May 13, 1966, 31 Fed. Reg. 7302 (1966), 44 C.A.B. REP. 819 (1966). See C.A.B. Order No. 18900 approving the Agreement May 13, 1966. See also Warsaw Convention, art. 20(1), 49 Stat. 3019 (1934), T.S. No. 876 which provides:

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

5. *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct., Kings County 1972); *Rosman v. Trans World Airlines, Inc.*, Doc. No. ____ (Sup. Ct., N.Y. County 1971).

6. *Herman v. Trans World Airlines, Inc.*, 40 A.D.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972) and *Rosman v. Trans World Airlines, Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972).

"French legal meaning" of certain critical phrases in article 17 of the Convention. However, the court of appeals reversed the order of the appellate division and explained that the "precise meaning" of article 17 of the Convention must be treated by the court as a question of law.⁷

Article 17 of the Warsaw Convention, concerning the liability of international air carriers for passenger injuries, provides in part: "The carrier shall be liable for damages sustained in the event of the *death or wounding* of a passenger or *any other bodily injury* suffered by a passenger. . . ."⁸ Unfortunately, the records of the Warsaw meetings of 1929, and preparatory meetings from 1925-1929, fail to show whether the drafters meant for "bodily injury" to encompass psychic trauma standing alone and unconnected to any physical injury.⁹

American courts are divided on the question. In *Burnett v. Trans World Airlines, Inc.*,¹⁰ decided prior to and cited in *Rosman*, the District Court of New Mexico dealt with an action based upon the same factual situation as *Rosman*. The *Burnett* court adopted the view that the "French legal meaning" of the term in article 17 prevails and hence, the issue of whether damages for psychic trauma alone are recoverable is to be found from a review of French legal history.¹¹ The main argument advanced by courts following this interpretation is that under article 36,¹² the original and official draft is written in French and that the phrase "*mort, de blessure ou de toute autre lesion corporelle*" connotes only "an infringement of physical integrity;"¹³ therefore, the "French legal meaning" does not con-

7. 34 N.Y.2d at 392, 314 N.E.2d at 852, 358 N.Y.S.2d at 103. In support of its decision, the court in *Rosman* noted that

[w]hile the treaty is written in French, it is nevertheless a domestic, not a foreign law. It is the supreme law of the land of which New York courts are required to take judicial notice.

Id.

8. Warsaw Convention, art. 17, 49 Stat. 3018 (1934), T.S. No. 876 (emphasis added).

9. See Lowenfield, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. 345, 347 (1973); II Conference Int'l de Droit Prive Aerien, 4-12 (Oct. 1929). See also pp. 52, 111-12, 135-36, 163-65, Comite Int'l Technique d'Experts Juridiques Aeriens, Compte-Rendu, 1st-4th Sess. (1926-29) and pp. 47, 113, 3d Sess. (1928).

10. 368 F.Supp. 1152 (D.N.M. 1973).

11. *Id.* at 1155. See *Tokok v. Union State Bank*, 281 U.S. 449, 454, 50 S.Ct. 363, 365, 74 L.Ed. 956, 960 (1930). (When the text of a treaty is drawn up in only one language, that language is controlling; moreover, treaties should be given a liberal interpretation to give effect to their apparent purpose.) See also *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967).

12. Warsaw Convention, art. 36, 49 Stat. 3022 (1934), T.S. No. 876 provides:

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

13. See A. COLIN AND H. CAPITANT, *TRAITE DE DROIT CIVIL*, 605 (revised by J. de la Morandiere, 1959), cited in *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973). The court in *Burnett* noted that the original draft tended to allow recovery for psychic

note inclusion of mental injury. In contrast to *Burnett*, is *Husserl v. Swiss Air Transport Co.*,¹⁴ decided subsequent to *Rosman*. *Husserl*, a federal court case in the Southern District of New York, arose out of the same hijacking as that in *Rosman*. The court in *Husserl* determined that a treaty is the supreme law of the land and therefore, the Warsaw Convention should be treated as part of the United States law to be interpreted in light of and according to federal law.¹⁵

The American courts are further split as to whether local¹⁶ or federal¹⁷ law should apply in determining if damages for psychic trauma standing alone are recoverable under the Convention.¹⁸ The *Husserl* court adopted

trauma alone but was amended in a later draft to restrict recovery to bodily injuries, thus inferring the intention of the drafters to exclude recovery for mental injuries. 368 F.Supp. at 1156-57.

14. 388 F.Supp. 1238 (S.D.N.Y. 1975). See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967) where the court reaches a compromise between the two opposing views by stating that the "French legal meaning" must prevail, but that the Convention's terms should be interpreted broadly, suggesting that an acceptable American view could be derived from the "French legal meaning."

15. 388 F.Supp. ¶ 1249. See *Lowenfield, Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. at 345-48 (1973) where it is noted that the French have had as much trouble as the United States in deciding whether psychic trauma, standing alone, is grounds for recovery.

See also *Kreindler, An Appraisal From a Plaintiff's Viewpoint of Tort Liability Arising From Aircraft Hijacking*, 1 SYRACUSE J. INT'L L. & COM. 327, 329-30 (1973). After discussing the trial court's finding in *Herman v. Trans World Airlines*, 69 Misc.2d 642, 330 N.Y.S.2d 829 (1971) that the French legal meaning must prevail, *Kreindler* concludes:

If this decision is not reversed by the Court of Appeals, it is interesting to speculate about what a Kings County jury, interpreting the Warsaw Convention and considering proof of what a few French words mean, is going to come up with.

Id. at 330.

16. See *Lowenfield, Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. at 349-50 (1973) and *Calkins, The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323 (1959). But see *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d at 398, 314 N.E.2d at 856, 358 N.Y.S.2d at 108 where the court stated:

The application of local law would impress an artificial sense upon the terms which finds no warrant in the treaty and such a course would surely be a deviation from the principles of treaty construction.

17. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 699 (2d Cir. 1957) where the court stated:

[T]he law to be applied in this case is not state law but a federal treaty. It is applied in the state courts not because it expresses a state policy which a federal court must follow, but because it expresses federal policy which a state court must follow.

See also *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Husserl v. Swiss Air Transp. Co.*, 388 F.Supp. 1238, 1249 (S.D.N.Y. 1975); *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970); *Eck v. United Arab Airlines*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964); *Herman v. Trans World Airlines, Inc.*, 40 A.D.2d 850, 337 N.Y.S.2d 827 (1972)(dissenting opinion); *Herzog, Kreindler, et al., Panel Discussion: Lawyers, Liability, and Recovery*, 1 SYRACUSE J. INT'L L. & COM. 353, 356 (1973).

18. The American courts are also divided as to whether the interpretation of any international treaty entered into by the United States is a matter of law rather than one of fact.

the more accepted view, stating that since the Warsaw Convention is part of federal law, it should be interpreted accordingly.¹⁹ Furthermore, the court reasoned that two purposes of the Convention—to limit an international air carrier's liability and to facilitate recovery by injured passengers—could best be served by expansively construing the types of injury for which a plaintiff may recover.²⁰ Specifically rejecting the holding in *Rosman*, the *Husserl* court noted the recent developments in physiology and psychology relating the mind as part of the body.²¹ Using a "purpose and intent" analysis, the *Husserl* court thus deduced that the drafters meant the Convention to include recovery for psychic trauma unaccompanied by physical injuries.²²

In *Rosman v. Trans World Airlines, Inc.*,²³ the court, after noting that the Warsaw Convention does not itself create a cause of action, but merely sets limits or conditions on recovery,²⁴ rejected the plaintiff's argument that the meaning of "wounding" and "bodily injury" is to be determined by local law.²⁵ The court skirted the issue of whether the French or English interpretation of "bodily injury" (*lesion corporelle*) prevailed by ruling that the meaning would be the same under either language.²⁶

The *Rosman* court based its decision on what it found to be the "ordi-

Professor Herzog's view supports the *Rosman* court's decision that the interpretation of any international treaty validly entered into by the United States is a matter of law, not a matter of fact, regardless of the language in which it was written. Herzog, *Conflict of Laws*, 26 SYRACUSE L. REV. 16, 17 (1975). See also *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d at 392, 314 N.E.2d at 852, 358 N.Y.S.2d at 103 (1974).

19. 388 F.Supp. at 1249.

20. *Id.* at 1247.

21. *Id.* at 1250.

22. The *Husserl* court made the following findings regarding the Warsaw Convention:

- (1) Drafters did not consider the mental injury issue;
- (2) Drafters did not exclude any particular types of injuries;
- (3) Drafters attempted to make the Warsaw Convention comprehensive to cover all the types of injuries recoverable;
- (4) Shouldn't restrict coverage of Convention because drafters neglected to address the psychic trauma issue; and,
- (5) To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by article 17.

Id. at 1250.

23. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

24. *Id.* at 398-99, 314 N.E.2d at 856, 358 N.Y.S.2d at 108-09. See also *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436, 438 (2d Cir. 1953) (claim for damages under article 17 arises in the event of bodily injury).

25. 34 N.Y.2d at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107. The plaintiffs contended that the *Rosman* court should be guided by the New York state court decision, *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), which recognized a right in negligence cases to recover for mere psychic injury standing alone. However, the issue in *Rosman* was whether the Convention's drafters contemplated recovery for this particular type of injury.

26. 34 N.Y.2d at 393-94, 314 N.E.2d at 852-53, 358 N.Y.S.2d at 103-05.

nary and natural" meaning of the terms of article 17.²⁷ The court stated:

[I]n its ordinary usage, the term "bodily" suggests opposition to "mental". . . . [T]herefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily" as distinguished from "behavioral" manifestations.²⁸

The court further noted that in addition to proving injury of an objective and identifiable nature, a plaintiff must also rest his recovery upon showing a causal connection between the bodily injury and the hijacking.²⁹ This causal connection is completed if an intermediate mental link is between the cause (the hijacking) and the effect (the "bodily injury").³⁰ Therefore, the *Rosman* court concluded that where "objective bodily injury" has resulted from psychic trauma, which in turn was induced by an event such as hijacking, then the damages, both mental and physical, sustained as a result of the "bodily injury" are compensable.³¹

Judge Stevens, dissenting in *Rosman*, concluded that the Warsaw Convention held international air carriers liable for injuries resulting from objective physical impact or contact but not for mental injuries.³² After reviewing the background of the Warsaw Convention, the dissent viewed the liability issue in light of the time in which the Convention was drafted, much as the majority did.³³ However, Judge Stevens felt the search for liability should be restricted to types of injury that were generally cognizable at the time of the writing. He thus determined that "psychic trauma" was not embraced within the term "bodily injury" at the time of the drafting and hence cannot be deemed to be a recoverable element under the Warsaw Convention.³⁴ To prevent this conclusion, he suggested that

27. *Id.* at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 106.

28. *Id.* at 396-97, 314 N.E.2d at 855, 358 N.Y.S.2d at 107. In *Rosman*, the court also pointed out that

[w]e deal with a term as used . . . almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental."

Id.

29. *Id.* at 399, 314 N.E.2d at 857, 358 N.Y.S.2d at 109.

30. *Id.* at 399, 314 N.E.2d at 857, 358 N.Y.S.2d at 109. On this point, the court cited with approval, *Burnett v. Trans World Airlines*, 368 F.Supp. 1152 (D.N.M. 1973) in which mental anguish and emotional distress directly resulting from physical injuries suffered in hijacking were found to be compensable in an action under article 17. 34 N.Y.2d at 400, 314 N.E.2d at 1857, 358 N.Y.S.2d at 109, n. 12.

31. 34 N.Y.2d at 399, 314 N.E.2d at 857, 358 N.Y.S.2d at 109.

32. *Id.* at 401, 314 N.E.2d at 858, 358 N.Y.S.2d at 110.

33. *Id.* at 403, 314 N.E.2d at 859, 358 N.Y.S.2d at 112. See *Valentine v. United States*, 299 U.S. 5, 10, 57 S.Ct. 100, 103, 81 L.Ed. 5, 9 (1936) where the court observed: "It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties."

34. 34 N.Y.2d at 403, 314 N.E.2d at 859, 358 N.Y.S.2d at 112.

either the agreement could be amended to include compensation for psychic trauma, or the member nations could create a mutual fund out of which hijacking victims could be compensated.³⁵

The *Rosman* court, presented with an opportunity to determine whether psychic trauma is recoverable under the Warsaw Convention without accompanying injury, viewed the treaty solely as of the time it was drafted. In marked contrast to *Husserl*, the *Rosman* court limited its consideration to the following criteria: (1) the drafter's intentions;³⁶ (2) the "ordinary and natural meaning" of the terms;³⁷ and (3) the purpose of the Convention, as promoting uniformity among its members.³⁸ The *Husserl* court, using a more practical "purpose and intent" analysis, looked beyond the date of drafting in 1929 to the recent developments in psychology which no longer make the traditional distinction between "mind" and "body."³⁹ Although the Convention had two major purposes, the *Rosman* court emphasized only one—"uniformity among its diverse members."⁴⁰ However, the *Husserl* court looked also to the second purpose—facilitating recovery by injured passengers⁴¹—and thus determined that the purpose of the Convention could best be served by expansively construing the types of injury for which a plaintiff may recover.⁴² The aviation industry of 1975 is a far cry from what existed in 1929, and the *Rosman* court, in contrast to the *Husserl* court, failed to take cognizance that an interpretation, valid 50 years ago, may bring an injustice today.⁴³

It should be noted that the proposed Guatemala Protocol of 1971, signed by 21 countries but not yet in effect, would amend the Warsaw Convention to change the critical terms of article 17 dealing with personal injuries of

35. *Id.* at 403, 314 N.E.2d at 859, 358 N.Y.S.2d at 859, 358 N.Y.S.2d at 112.

36. *Id.* at 396, 314 N.E.2d at 854, 358 N.Y.S.2d at 106, quoting from RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (SECOND) 146 (1965) which states:

[T]he object, in interpreting an international treaty is "to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made."

37. 34 N.Y.2d at 396, 314 N.E.2d at 854, 358 N.Y.S.2d at 106.

38. *Id.* In Herzog, Kreindler, et al., *Panel Discussion: Lawyers, Liability, and Recovery*, 1 SYRACUSE J. INT'L L. & COM. 353 (1973) it is noted that

[t]he purpose of the Warsaw Convention was to promote uniformity of law. The United States should adhere to this policy rather than having potential [sic] fifty different results from the fifty states. This result would undercut the reason of having a multilateral convention.

Id. at 357.

39. 388 F.Supp. at 1238, 1250.

40. 34 N.Y.2d at 396, 314 N.E.2d at 854, 358 N.Y.S.2d at 106.

41. 388 F. Supp. at 1247-50.

42. *Id.*

43. The *Husserl* court observed that the Convention was prompted by a desire to protect an "infant" industry from "potentially destructive liability." 388 F.Supp. at 1244.

passengers from "death or bodily injury" to "death or personal injury."⁴⁴ Changing the key terms "death or bodily injury" to "death or personal injury" will surely result in another series of interpretations by the courts concerning an international air carrier's liability for passenger injuries. The Protocol, by limiting liability against the air carriers for injuries to only innocent (non-negligent) passengers, may prompt the courts to allow recovery for psychic trauma alone, since the air carriers would no longer be absolutely liable as under the present Montreal Agreement.

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44. The proposed article IV of the Guatemala Protocol would change the wording of the present article 17 of the Warsaw Convention to read as follows:

Article 17: 1. The carrier is liable for damage sustained in case of *death or personal injury* of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Guatemala Protocol, done March 8, 1971, DEP'T OF STATE BULL., vol. LXIV, No. 1661 (April 26, 1971) reproduced in 10 INT'L LEG. MAT'L. 613-16 (1971) (emphasis added).

See Seagrave, *An Airline's Appraisal of Tort Liability Arising from Aircraft Hijacking*, 1 SYRACUSE J. INT'L L. & COM. 339, 341 (1973).

