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Compensation for Passengers of Hijacked Aircraft

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COMPENSATION FOR PASSENGERS OF HIJACKED AIRCRAFT

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I. INTRODUCTION

ON June 11th, 1971, in Albuquerque, New Mexico, Howard L. Franks boarded Transworld Airlines (TWA) flight 358 bound for New York's LaGuardia Airport. Flight 358 finally arrived in New York a day later. On its arrival only six persons disembarked.[1] Howard L. Franks was not one of them, his life having been snuffed out by a hijacker's bullet. He had made history—his was the first passenger death stemming from a hijacking attempt in the United States. What had long been feared had finally occurred. An innocent air traveler had been murdered in the United States.

During a six-week period in the summer of 1971, three daring hijackings involving United States airlines took place. In the incident which culminated in the death of Howard L. Franks, the hijacker demanded to be flown to North Vietnam before he was shot and apprehended by a United States Deputy Marshal.[2] In a second incident, a pair of hijackers demanded and received one hundred thousand dollars as ransom for a woman hostage after having hijacked a Braniff International Aircraft en route from Mexico to San Antonio, Texas. The hijackers were finally apprehended, but not until a terror-ridden flight from Monterey, Mexico, to Lima, Peru, to Rio de Janeiro, Brazil, to Buenos Aires, Argentina, had ended.[3] In a third incident, a hijacked TWA plane en route from New York to Chicago returned to LaGuardia Airport. After permitting the passengers to disembark, the hijacker and his stewardess hostage were driven to Kennedy Airport so that his demand to be flown to Italy could be met. In a desperate effort to avert the second hijacking, an FBI sharpshooter shot and killed the perpetrator.[4] Miraculously the stewardess was not

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1. Four crew members, the hijacker and a United States Deputy Marshal. In an exchange of gunfire between the hijacker, the United States Deputy Marshal and a co-pilot, the co-pilot was nearly killed and the stewardess spent the terror-ridden flight crouched behind a seat. N.Y. Times, June 13, 1971, at 1, col. 5.

2. *Id.*

3. N.Y. Times, July 4, 1971, at 23, col. 1.

4. N.Y. Times, July 24, 1971, at 16, col. 1.

harmed. In these incidents, the hijackers were persuaded to release the passengers, thus averting multiple deaths. It is doubtful whether this fortuitous pattern will continue. If it does not, the lives of hundreds and possibly thousands of passengers every year will be imperiled.

Until several years ago, unlawful seizure of aircraft, and its counterpart, unlawful interference with aircraft, while constituting a threat to American and international civil aviation and posing a nerve-shattering menace to the passengers and crew involved, was not an everyday experience. In recent times, these criminal acts have resulted in injury and death to innocent passengers and crew members, both at home and abroad. Hijackers' unlawful actions have progressed from the temporary seizure of an aircraft and its passengers,[5] to the detention of an entire passenger load and crew for several weeks under intolerable conditions in a hot desert,[6] to the maiming of a co-pilot and the killing of a stewardess in flight.[7] In the unlawful interference sphere, the illegal activity has ranged from the shelling of an aircraft,[8] to the maiming and killing of some passengers,[9] to the complete annihilation of all the passengers and the destruction of an aircraft.[10]

Since 1961, 115 hijackings of United States aircraft have occurred.[11] In an effort to combat this criminal activity, a combined federal government and airline industry program to prevent hijackings has been instituted. There are two major features to this program. The first is the installation of metal-detecting devices at airport boarding gates coupled with the formulation of a "hijacker behavioral profile." The metal-detecting devices, or "magnetometers" as they are commonly called, record the amount of ferrous metal carried by a passenger. The "hijacker behavioral

5. *See, e.g.*, N.Y. Times, Jan. 4, 1969, at 18, col. 3 (one of the numerous hijackings to Cuba).

6. *See* N.Y. Times, Sept. 7, 1970, at 1, col. 4.

7. This incident occurred during a successful hijacking from Russia to Turkey. N.Y. Times, Oct. 16, 1970, at 1, col. 5.

8. On February 18, 1969, four Arab terrorists attacked an El Al plane in Zurich. Six passengers were seriously injured in the incident. N.Y. Times, Feb. 19, 1969, at 1, col. 6.

9. On December 26, 1968, an El Al plane in Athens, Greece was shelled. In this incident, Leon Sherdan, an Israeli engineer, was killed and a number of others were injured. N.Y. Times, Dec. 27, 1968, at 1, col. 2.

10. A Swiss Air aircraft was destroyed in flight, killing all the passengers and crew on February 21, 1970. N.Y. Times, Feb. 22, 1970, at 1, col. 4.

11. N.Y. Times, July 24, 1971, at 16, col. 2.

profile,"—a set of behavioral characteristics deemed to be common to all potential hijackers—was compiled in 1969 by a special task force instituted by the Federal Aviation Administration (FAA).[12] If a potential passenger's behavior displays these characteristics, he is designated as a "selectee" and then comes under the surveillance of the magnetometer located at the boarding gate. If the individual fails to clear the screening tests, he is interviewed and his identity is verified. A federal marshal is to be available if a search of the passenger is deemed necessary.

The second major feature of the program is the assignment of "sky-marshals" to certain planes in an attempt to subdue and apprehend the hijacker if he succeeds in boarding the aircraft. It is estimated that currently approximately 1,200 Treasury Department agents are assigned to the force.[13] While this program may have deterred some would-be hijackers, it cannot be concluded that it has been successful. From January 1 to June 14, 1971, fifteen attempts to hijack United States airliners have occurred. In 1970, during the same period, there had been only eleven attempts.[14] Moreover, eight of the attempts this year have been successful as compared to six in 1970 in the same period.[15]

Passengers aboard a hijacked aircraft face a harrowing experience. Their lives and property are in constant danger until the hijacker has disembarked. At times, they have spent several weeks in confinement in alien and hostile countries.[16] On too many occasions both passengers and crew members have been injured or killed. Theoretically, a passenger could institute an assault or battery action against a hijacker. However, in the vast majority of the incidents, such actions would be impractical if not impos-

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12. HORIZONS, Sept. 29, 1969, at 8.

13. N.Y. Times, July 24, 1971, at 16, col. 1.

14. *Id.*

15. *Id.* An indication of the effectiveness, or lack thereof, of the program may be gleaned from the incident in which an American Airlines 747 jumbo jet with 221 passengers aboard was hijacked by a ballpoint-wielding bandit to Havana. The twist to what would otherwise have been a "routine" hijacking lies in the fact that among the 221 passengers were three United States Marshals and an off-duty FBI agent. Buffalo Evening News, Nov. 10, 1971, at 66, col. 1.

16. On July 23, 1968, an El Al airplane enroute from Rome to Tel Aviv was hijacked to Algiers. The Israeli male passengers and crew were held in Algiers until August 31, 1968. N.Y. Times, July 23, 1971, at 1, col. 7.

sible to commence.[17] Generally, hijackers do not possess sufficient assets to make a tort action worthwhile. Furthermore, such an action cannot be commenced unless the perpetrator in an international hijacking case is extradited. Thus, at the present time, a passenger who has suffered serious physical or emotional injury in the process of an attempted or successful hijacking may be under the impression that no compensation is forthcoming.

This article seeks to determine whether liability for failure to prevent hijackings can be placed on the airlines. An examination will be made as to what actions can possibly be initiated against the airlines by a passenger whose plane has been hijacked. Here a differentiation will be made betweeen the cases where the passenger is either physically injured or killed by the hijacker and the typical hijacking situation (*e.g.*, hijackings to Cuba) where all that can probably be alleged is the incurring of emotional distress or nervous shock, which may or may not be accompanied by physical manifestations. Secondly, an analysis will be undertaken to determine if any additional legal considerations attach if the flight is international rather than domestic. In the context of international flights special attention will be given to the provisions of the Montreal Agreement[18] as well as to the pertinent provisions of the Warsaw Convention[19] and the Guatemala Protocol.[20]

II. Airline Liability for Damages Incurred as a Result of the Hijacking of a Domestic Flight

In order to hold an airline liable for damages incurred as a result of the hijacking of a domestic flight, negligence on the part of the airlines will have to be established. It has often been

17. Since 1961, a total of 150 persons have been accused of 115 hijackings of United States aircraft, and one of foreign registry, engaged in air commerce in this country. . . .

Of this total . . . 92 are listed as fugitives, two have committed suicide, three have been acquitted, charges against ten others have been dismissed, charges against 14 others are pending, and 29 have been convicted in Federal courts and are serving sentences totaling more than 350 years.

N.Y. Times, July 24, 1971, at 16, col. 2.

18. Special Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol, Feb. 1-15, 1966, Montreal, Canada, ICAO Doc. 8584-LC/154-1 & ICAO Doc. 8584-LC/154-2.

19. Warsaw Convention, Oct. 29, 1934, 49 Stat. 3000 (1934), T.S. No. 876 (effective Oct. 12, 1929).

20. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carrier by Air, March 8, 1971, Guatemala City, Guatemala. ICAO Doc. 8932 [hereinafter cited as *Guatemala Protocol*].

held that while an airline owes its passengers a very high degree of care, it is not an insurer of their safety, and therefore before liability can be imposed, the plaintiff must prove that his injuries resulted from the negligence of the airline.[21]

In general, in order to establish a case of negligence, the plaintiff bears the burden of proving that the defendant was under a duty to exercise care towards him, that by acting in a certain manner that duty was breached, that the breach of duty was the proximate cause of his injuries, and that as a result of those injuries he has suffered certain identifiable damages. Some jurisdictions also require that before a case of negligence can be said to exist the plaintiff must show that he was not guilty of contributory negligence.[22]

In light of these requisites, the first issue which must be resolved in determining whether the airline can be said to be liable for injuries to a passenger whose plane has been hijacked is the scope of the airline's duty to its passengers. An airline is a common carrier and like all common carriers bears a very high standard of care.[23] While the courts have used different adjectives in characterizing the scope of this duty, a brief analysis of the language which they employ evinces an agreement that the duty of care to be borne by the carrier is an extraordinarily high one. While it has repeatedly been held that a common carrier is not an insurer of the safety of its passengers,[24] on different occasions it has been stated that a carrier's duty to its passengers requires the exercise of the "highest degree of care,"[25] "a very high degree of diligence,"[26] "highest practical degree of care,"[27] "utmost care and dili-

21. *See* Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962); Ness v. West Coast Airlines, 90 Ida. 111, 410 P.2d 965 (1964); Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964).

22. *See, e.g.*, Walheim v. City of Batavia, 12 App. Div. 2d 228, 12 N.Y.S.2d 228 (4th Dep't 1939). *See generally* W. PROSSER, LAW OF TORTS § 64 (3d ed. 1964) [hereinafter cited as PROSSER].

23. PROSSER § 34, at 183-84.

24. *See* Smith v. Baltimore Transit Co., 211 Md. 529, 128 A.2d 413 (1957); Quigley v. Wilson Line of Mass., Inc., 338 Mass. 125, 154 N.E.2d 77 (1958); Connelly v. Philadelphia Transp. Co., 420 Pa. 280, 216 A.2d 60 (1966); Seburn v. Luzerne & Carbon County Motor Transit Co., 394 Pa. 577, 148 A.2d 534 (1959); Shamblee v. Virginia Transit Co., 204 Va. 591, 132 S.E.2d 712 (1963).

25. Mobile Cab & Baggage Co. v. Busby, 277 Ala. 292, 169 So. 2d 314 (1964); Collier v. Citizens Coach Co., 231 Ark. 49, 330 S.W.2d 74 (1959); Jacob v. Key System Transit Lines, 140 Cal. App. 2d 357, 295 P.2d 569 (Dist. Ct. 1956).

26. North v. Williams, 366 P.2d 406 (Okl. 1961); Peoples Checker Cab Co. v. Dunlap, 307 P.2d 833 (Okl. 1957).

27. Angelo v. Pittsburg Ry., Bus Div., 189 Pa. Super. 574, 151 A.2d 867 (1959).

gence,"[28] and the use of "extraordinary care,"[29] in transporting them to their destination.

More specifically, it has been held that the special relationship which exists between the common carrier and its passengers imposes a duty upon the carrier to protect its passengers from the wrongful acts of third persons whether they be its employees, fellow passengers or strangers.[30] On numerous occasions courts have held that this duty extends to the protection from fellow passengers who have become inebriated and unruly,[31] from fellow passengers who have threatened violence,[32] and from external criminal attacks by third persons.[33] For example, in *Neering v. Illinois Railroad Co.*,[34] the Supreme Court of Illinois held:

> [k]nowledge of conditions which are likely to result in an assault upon a passenger, or which constitute a source of potential danger, *imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in light of the existing hazards.*[35]

A similar rationale was espoused by the court in the case of *Yellow Cab Company of Atlanta v. Carmichael*[36] when it held:

> A common carrier of passengers for hire is bound to use extraordinary care and diligence to protect its passengers in transit from violence or injury by third persons; and whenever a carrier, through its agents and servants, knows, or has opportunity to know, of a threatened injury to a passenger from third persons, whether such persons are passengers or not, *or when the circumstances are such that injury to a passenger from such a source might reasonably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.*[37]

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28. Roberts v. Trans World Airlines, 225 Cal. App. 2d 344, 37 Cal. Rptr. 291 (Dist. Ct. 1964); Andrea v. New York, N.H. & H.R.R., 144 Conn. 340, 131 A.2d 642 (1957); Yu v. New York, N.H. & H.R.R., 145 Conn. 451, 144 A.2d 56 (1958).

29. Metropolitan Transit Sys., Inc. v. Burton, 103 Ga. App. 688, 120 S.E.2d 663 (1961); Atlanta Transit Sys., Inc. v. Allen, 96 Ga. App. 622, 101 S.E.2d 134 (1957).

30. *See* Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959); Quigley v. Wilson Line of Mass., Inc., 388 Mass. 125, 154 N.E.2d 77 (1958).

31. Thompson v. St. Louis Pub. Serv. Co., 242 S.W.2d 299 (Mo. 1951); Liljegren v. United Ry., 227 S.W. 925 (Mo. 1921).

32. *See* discussion, *infra* note 37.

33. Letsos v. Chicago Transit Authority, 118 Ill. App. 2d. 26, 254 N.E.2d 645 (1969); Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).

34. 383 Ill. 366, 50 N.E.2d 497 (1943).

35. *Id.* at 379, 50 N.E.2d at 503 (emphasis added).

36. 33 Ga. App. 364, 126 S.E. 269 (1925).

37. *Id.* at 368, 126 S.E. at 271 (emphasis added).

These two cases, and others which have held likewise,[38] establish a general rule whereby a carrier may be said to have a definite duty to protect its passengers from third persons. First, it is clear that regardless of the source from which the danger arises if it was known to the carrier or *should* have been known to him, proper precautions must be exercised to protect the passenger from that danger. Secondly, of great importance are the underlying circumstances at the time of injury.

It is submitted that a breach of duty on the part of the airlines, which is an essential element in establishing their negligence, may be proved by a passenger whose plane has been hijacked. A passenger purchasing a ticket expects safe transportation to his destination and the airline should be required to do all that is possible, within human care and foresight, to transport him safely. As has been stated above, the high duty imposed on carriers for the protection of its passengers includes the responsibility for the prevention of assaults by third persons. In light of this standard the airlines may be said to have breached their duty where they have failed to use sophisticated detection mechanisms and other screening devices at all, or where their use was conducted in a negligent or haphazard manner by employees or independent contractors.[39] On several occasions in the past it has been held that

38. *See* Sue v. Chicago Transit Authority, 279 F.2d 416 (7th Cir. 1960); Florida East Coast Ry. v. Booth, 348 So. 2d 536 (Fla. 1963); Fuller v. Southwestern Greyhound Lines, 331 S.W.2d 455 (Tex. 1960).

39. Even though the airline had knowledge of the probability of a hijacking, the careless use of detecting mechanisms failed to avert a hijacking as illustrated in the following example:

> The man who hijacked a Trans World Airlines jetliner at LaGuardia Airport [on June 23, 1971] had aroused the suspicions of airline employees enough to make them search a small bag he was carrying aboard the plane. But no weapon was found, so the line's agents let him board the aircraft.
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> A small blue signal light on a metal-sensing antihijacking device was tripped when the passenger, who was identified last night as Richard A. Obergfell, walked in a corridor toward the aircraft.
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> Airline agents said the passenger showed several unspecified behavior traits that in the past had been common to many hijackers.
>
> Since he fell within what airline security officers call the 'hijacker behavioral profile,' and the metal-sensing alarm was tripped, the man was stopped and questioned by an airline agent.
>
> The passenger was not searched physically before boarding, but the agent asked him to open his coat so he could see whether any weapons were concealed. None was observed. His carry-on luggage was inspected, however.
>
> 'We found several [metal] items in the bag that could have tripped the detection device, so he was let through,' a T.W.A. spokesman said.

N.Y. Times, July 24, 1971, at 16, col. 1.

a common carrier is "liable for injuries caused by the negligence of its hired officers where their negligence [constituted] a breach of the carrier's duty of vigilance in behalf of its passengers."[40] In *Quigley v. Wilson Line of Massachusetts*[41] the court stated: "[e]ven if the hired police officers . . . were acting as independent contractors . . . the defendant common carrier was not thereby relieved from its liability for the negligence of those officers in not adequately protecting the plaintiff against a foreseeable risk."[42]

In addition, it has long been held that an airline's failure to equip its aircraft with adequate safety devices constitutes actionable negligence.[43] Although traditionally such cases concern safety devices on board the aircraft, the underlying rationale can logically be extended to safety devices located at the boarding gate. In both instances, the interest sought to be protected is the safety of the passengers and crew, and, as a result, neglect in both cases should be actionable.

In addition to proving that the airlines have breached their duty of care, the issue which must be resolved before their liability can be established is whether the hijacker's acts break the chain of causation so completely as to supersede the airlines' negligence as the proximate cause of the injury to the passenger.[44] If the hijacker's actions were reasonably foreseeable, while they may intervene in the chain of causation, they will not break it.[45] The reason for this result is that the airline is charged with the responsibility of foreseeing third party actions that could reasonably be expected to intervene between its negligent action and the ultimate injury. Thus, in spite of the hijacker's intervening negligent action, the airlines' original negligence remains the proximate cause of the injury.[46] This point was clearly delineated by Professor Prosser when he stated, "[i]f the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the par-

40. Quigley v. Wilson Line of Mass., 338 Mass. 125, 130, 154 N.E.2d 77, 80 (1958).
41. 338 Mass. 125, 154 N.E.2d 77 (1958).
42. *Id.* at 130, 154 N.E.2d at 80.
43. Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).
44. *See generally* PROSSER § 51.
45. *Id.*
46. Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943); Garibaldi & Cuneo v. O'Connor, 210 Ill. 284, 71 N.E. 379 (1904).

ticular circumstances, he may be negligent among other reasons, because he failed to guard against it."[47] The risk created by the defendant is not restricted to the intervention of foreseeable negligent acts by others, but includes those "intentional or criminal acts which the defendant might reasonably anticipate, and against which he would be required to take precautions. . . . [O]nce it is determined that the defendant's duty requires him to anticipate the intervening misconduct, and guard against it, it follows that it can not supersede his liability."[48] Thus the airline may be held liable since it may be said that it had made a substantial contribution to the injury by its failure to carefully search potential hijackers or to employ other sophisticated detection methods, even though the injuries would not have occurred without the hijacker's acts.[49]

It is submitted that recurrent hijacking attacks strongly suggest the imminence of others and therefore the attention of the airline should be directed towards their prevention. To suggest that the airlines were not aware of the threat of future hijackings or could not foresee them is to ignore the harsh reality of the state of air commerce. It is not suggested that the airlines should be the insurers of their passengers' safety, but it is contended that in a situation where a series of hijackings have occurred, the burden of proof, where serious injury is suffered by a passenger, should be placed on the airline to show that it has done everything possible to avert the attacks, regardless of whether or not one of its own planes was hijacked in the recent past. The airline is in a position to prevent the hijacker from accomplishing his criminal act, while the passenger is in no way capable of doing so. Though it may be argued that a carrier should not be liable to a passenger for injuries which arose out of sudden, unanticipated assaults committed by persons not in its employ, injuries to a passenger after due notice that criminal activity involving the use of weapons has occurred, and is likely to occur, present a totally different situation.

The issue which remains to be resolved is whether damages should be restricted to the case of actual bodily injury or death or whether a passenger who, although not physically injured by the hijacker, may have a cause of action for negligently inflicted mental

47. PROSSER § 51, at 311 (footnotes omitted).
48. *Id.* at 313-14.
49. *Id.*

distress against the airline. This issue is of extreme importance since most hijackings to date have not involved the actual infliction of physical injury upon passengers by the hijacker.

Traditionally, the common law did not recognize a separate cause of action for negligently inflicted mental distress. The attitude of the common law was succinctly stated by Lord Wensleydale when he stated: "[m]ental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act . . . causes that alone . . . ."[50] Several arguments have been offered to support this rationale. They have ranged from the allegation that it is difficult to prove, to the allegation that even if proved it would be difficult to assess the monetary damages, and perhaps most importantly, to the contention that if suits for negligent mental distress were permitted, many spurious actions would be commenced.[51]

The first breakthrough in permitting recovery for negligently inflicted mental distress occurred when the courts permitted recovery where the defendant's negligent acts caused physical injuries to the plaintiff which were accompanied by mental distress.[52] Where physical injury was caused by the defendant's negligence, the courts have allowed "compensation for purely mental elements of damage accompanying it, such as fright at the time of the injury, apprehension as to its effects, and nervousness . . . ."[53]

For many years the courts restricted recovery for mental distress to cases where "impact" occurred. For example, in *Mitchell v. Rochester Railway Co.*,[54] the courts denied recovery to a pregnant woman who, although not physically touched, was caused to abort her child by the defendant's negligent driving. In *Mitchell,* the defendant drove his horses in such a reckless manner that when he was finally able to stop them, the plaintiff was trapped between their heads. In denying recovery in the plaintiff's action for nervous shock, the court held that there could be no recovery for injuries either physical or mental incurred by the fright negligently induced when not accompanied by impact.[55]

50. Lynch v. Knight, 11 Eng. Rep. 854, 863 (Ex. 1861).

51. PROSSER § 11, at 43.

52. *Id.* at 44.

53. PROSSER § 55, at 349 (footnotes omitted). These damages have been labeled "parasitic" since they only attach if a cause of action for physical injury is established. *See* PROSSER § 11, at 44.

54. 151 N.Y. 107, 45 N.E. 354 (1896).

55. *Id.* at 109, 45 N.E. at 354.

In recent times, the impact doctrine has been abandoned by most jurisdictions. Following this trend, the New York Court of Appeals in 1961, in the case of *Battalla v. State*,[56] explicitly overruled the *Mitchell* case. In *Battalla*, an employee of the State of New York, after having placed the plaintiff infant on a ski lift, failed to properly secure the belt which was intended to protect the child. As a result, the infant became frightened and hysterical upon descent and suffered severe emotional and neurological disturbances with physical manifestations. The State of New York sought to dismiss the complaint as not stating a cause of action since no impact had occurred. This argument was rejected by the Court of Appeals which held that the absence of impact did not foreclose recovery for physical or mental injuries incurred by fright negligently induced.[57] In ruling in favor of the plaintiff, the court stated:

> [i]t is fundamental to our common-law system that one may seek redress for every substantial wrong. . . .[58]
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> . . . .
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> . . . In many instances, just as in impact cases, there will be no doubt as to the presence and extent of the damage and the fact that it was proximately caused by defendant's negligence. In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims. Claimant should, therefore, be given an opportunity to prove that her injuries were proximately caused by defendant's negligence.[59]

It is understood that there must be limitations in this type of action. It is not advocated that all a plaintiff should have to do in order to recover is enter a court of law and announce that he was upset by the hijacker. But if the passenger can show that the hijacking incident resulted in mental distress manifested, for example, by continuing nervousness, nausea, severe headaches, or a permanent psychiatric condition, he should be able to recover for his loss of earnings, pain and suffering and medical expenses which he incurred through no fault of his own. The possibility that a number of spurious actions will be initiated is certainly pres-

56. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).
57. *Id.* at 239, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.
58. *Id.* at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.
59. *Id.* at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

ent, but as the court in *Battalla* suggested the courts and juries possess sufficient sophistication to weed out those claims. Furthermore, it is submitted that the possibility of successful spurious actions does not outweigh the injustice which would occur if a passenger who, through no fault of his own incurred serious psychiatric damage, yet was not permitted to recover.

III. Airline Liability for Damages Incurred as a Result of a Hijacking of an International Flight

In 1929, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention,[60] came into being. The United States ratified the Convention on October 29, 1934 and from that date until the advent of the Montreal Agreement in 1966, its provisions controlled most of the major issues encountered by litigants in international aviation cases involving injury or death. The primary purpose of the Convention was to establish a unified standard which would govern the rights and duties of both airlines and passengers in international air travel. In light of this goal the members of the Convention enacted a number of provisions which governed regardless of where the injury occurred.

Article 17 of the Convention created a *presumption* of liability on the part of the airlines if injury or death occurred. It states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[62]

It should be noted, however, that while a presumption of liability exists, the airline is not absolutely liable. Article 20 of the Convention provides that 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. If the airline does not meet the article 20 standard, it incurs liability.

60. *See supra* note 19.
61. *See supra* note 18.
62. 49 Stat. 3018 (1934), 137 L.N.T.S. 23 (1929).

Article 22 of the Convention limits the recovery to the sum of 125,000 francs or $8,300. This limitation is applicable both in a personal injury and a wrongful death case. There is only one exception to the limitation of damages, that of article 25 (1) of the Convention which provides:

> The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his *wilful misconduct* or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.[63]

In September 1955, the Warsaw Convention was amended by the Hague Protocol.[64] This Protocol increased the maximum liability of the airlines from $8,300 to $16,600.[65] While the United States was one of the signatories of the Protocol, it never ratified it. In 1965, the United States, not satisfied with the low recovery permitted by the Warsaw Convention and the Hague Protocol, gave notice of denunciation of the Warsaw Convention.[66] On May 14, 1966, with the advent of the Montreal Agreement, it withdrew its notice of denunciation. This agreement substantially enhanced the recovery by a passenger (or his estate) for injuries or wrongful death during an international flight when the United States was a point of origin, a point of destination, or a scheduled stopping point of that flight. The Montreal Agreement modified the provisions of the Warsaw Convention in two important respects. First, the Agreement replaced the presumption of liability standard with absolute liability. Second, it increased the maximum recovery permitted from $8,300 to $75,000.[67]

The Montreal Agreement is of crucial significance for persons who initiate actions against airlines to recover damages for death or injuries suffered as the result of a hijacking. Upon enter-

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63. 49 Stat. 3021 (1934), 137 L.N.T.S. 27 (1929) (emphasis added).

64. ICAO Doc. 7686-LC/140-1 & ICAO Doc. 7686-LC/140-2.

65. U.S. CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIALS 383 (rev. ed. 1971).

66. 53 Dep't State Bull. 924 (1965).

67. CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966). The Montreal Agreement is not an international treaty but is merely an agreement between air carriers approved by the United States Government. Such an agreement is sanctioned by article 22 (1) of the Warsaw Convention. For a thorough discussion of the Montreal Agreement, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967).

ing the Agreement the airlines involved waived their defense under article 20 (1) of the Convention as well as the limitation of liability under article 22 of the Convention. The dual waiver of article 22 and article 20 (1) of the Warsaw Convention places a very light burden of proof upon the plaintiff before he can recover for his injuries. In regard to the waiver of article 20 (1), the Civil Aeronautics Board in adopting the Montreal Agreement stated:

> [t]he parties [referring to the airlines who are members of the Agreement] . . . agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the *death, wounding,* or other *bodily injury* of a passenger, avail itself of any defense under Article 20 (1) of the Convention . . . as amended by the Protocol.[68]

In light of this part of the agreement, there is little doubt that any passenger who has been actually wounded by a hijacker could obtain damages from the airline, since the airline's obligation to him, according to the Agreement, clearly comes into being as soon as he boards the craft and does not end until he has alighted from it at his point of destination.

A more difficult issue to resolve is whether a passenger may, within the provisions of the Agreement, collect for medical expenses, pain and suffering, loss of earnings or other damages which resulted from the emotional distress he suffered during the hijacking episode. The overwhelming majority of passengers involved to date in hijackings have not actually been wounded by the hijacker and as a result could not point to obvious physical injuries after their ordeal had ended. There is little doubt, however, that serious physical and neurological disturbances may result after an individual has been held captive on board an aircraft under a constant threat of death for extended periods of time in flight or after the plane has landed at a hostile airport.

It should be noted that the language of the Agreement speaks in terms of "wounding or other bodily injury" of a passenger.[69] As such, a two-pronged problem arises. First, it must be determined if such physical disturbances as nausea, ulcers, nervousness and severe headaches which result from emotional distress may be said to constitute "bodily injury" within the meaning of the Mon-

68. CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966) (emphasis added).
69. *Id.*

treal Agreement. Secondly, it must be ascertained whether a psychiatric condition such as neurosis, insomnia or the constant recurrence of nightmares is per se excluded by the language of the Agreement or whether it may be said to be included within it. The resolution of these issues is vital if successful actions are to be brought against airlines to compel them to equitably compensate a passenger who was severely and perhaps permanently injured through no fault of his own. (A collateral benefit of the initiation of successful law suits would be the resultant diligent use by airlines of the most sophisticated detection methods possible to avert future hijackings.) If these actions may be said to fall within the wording of the Montreal Agreement, a passenger would not be required to prove negligence on the part of the airline before he could collect since the Agreement promulgates an absolute liability standard. All he would have to do is show that he was on the plane when the hijacking occurred, and prove the extent of his damages up to $75,000.

It is submitted that those cases which result in physical manifestations are more likely to be interpreted by the courts as falling within the wording of the Agreement, but the possibility certainly exists that psychiatric injuries may also be included. The wording "death, wounding or other bodily injury" contained in the Montreal Agreement is almost identical to the wording of article 17 of the Warsaw Convention.[70] In the case of *American Airlines, Inc. v. Ulen*,[71] decided by the Court of Appeals of the District of Columbia pursuant to the Warsaw Convention, the court permitted recovery for emotional distress. The Court of Appeals in *Ulen* stated:

> [The plaintiff] is entitled to recover such sum of money as . . . will fairly and reasonably and adequately compensate her for the physical injuries and the disabilities which she sustained by reason of this accident, together with pain and suffering and anguish which she has endured, *as well as the mental and nervous shock and any and all permanent injuries which you might find either physically or to her mental and nervous system.*[72]

70. "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury . . . ." 49 Stat. 3018 (1934), 137 L.N.T.S. 23 (1929).

71. 186 F.2d 529 (D.C. Cir. 1949).

72. This extract does not appear in the reported opinion of the court, but in the version reproduced in ICAO, CASES ON THE WARSAW CONVENTION [1929-1955], ICAO Doc. 36, § 2, at 87 (1955) (emphasis added).

A finding that these injuries are covered by the Montreal Agreement does not necessarily mean that $75,000 is all a plaintiff could hope to collect. He may still be in a position to institute a cause of action under the wilful misconduct exception of the Warsaw Convention.

Before analyzing whether a passenger whose plane was hijacked may be able to obtain compensation beyond the $75,000 limitation of the Montreal Agreement by initiating an action under the wilful misconduct exception of the Warsaw Convention for both his physical injuries incurred on board the aircraft and those which resulted from the severe emotional distress he suffered during the hijacking episode, it should be pointed out that the Montreal Agreement by no means excludes this possibility. This fact is made perfectly clear by a Department of State memorandum concerning the Warsaw Convention and the Montreal Agreement dated May 5, 1966 which states:

> In essence, absolute liability [referring to the Montreal Agreement] in this context means that a claimant would not be required to prove fault on the part of the carrier, but only the amount of damages. Claimant would be able to recover the amount of his provable damages, though subject to a maximum limitation of $75,000. Should the claimant, under Article 25 of the Convention, [referring to the Warsaw Convention] attempt to prove wilful misconduct on the part of the carrier, the question of fault would of course be in issue. *In such a case, should claimant succeed in proving wilful misconduct, he would be subject to no limitation on his recovery.*[73]

Article 25 (1) of the Warsaw Convention which contains the wilful misconduct exception provides that what constitutes wilful misconduct is to be ascertained "in accordance with the law of the Court to which the case is submitted." Thus, in order to determine what the term wilful misconduct means, a brief analysis has to be undertaken to determine how the American courts have defined it.

In *Grey v. American Airlines*[74] the court stated:

> There is no dispute as to what constitutes wilful misconduct. The instructions required proof of 'a conscious intent to do or

73. Dep't of State Memo, United States Government Action Concerning the Warsaw Convention 4 (1966), *reprinted in* L. KREINDLER, AVIATION ACCIDENT LAW 380 (Supp. 1970) (emphasis added).

74. 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

> omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.'[75]

In light of this holding, aside from establishing a breach of duty on the part of the airline which was discussed in the domestic flight section, the passenger would have to prove that such a breach constituted an intentional omission on the part of the airline. In the case of *American Airlines, Inc. v. Ulen*,[76] while the court did not require the showing of an intentional omission to establish wilful misconduct, it did require proof that the airline acted with reckless and wanton disregard of probable consequences.

Perhaps the most favorable interpretation of wilful misconduct from the point of view of the hijacked plaintiff occurred in the case of *Berner v. British Commonwealth Pacific Airlines, Ltd.*,[77] where the following charge concerning the definition of wilful misconduct was given to the jury:

> '[W]ilful misconduct' . . . would be [the] reckless disregard of the probable consequences, that is, of the safety of the aircraft and of its passengers, if the pilot intentionally did act, or failed to do an act, which it was his duty to the passengers to do, knowing *or having reason to know of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of bodily harm to the passengers, but also involved a high degree of probability that substantial harm would result to the aircraft and the passengers by doing or failing to do the act in question.*[78]

The latter part of the charge, in which the words "a reasonable man" were used, brings the concept of wilful misconduct closer to an ordinary negligence case than the other cases mentioned above. While the latter part of the *Berner* charge may not suffice to tip the balance in favor of the plaintiff in all cases involving hijacking, a strong argument may be put forth that in a situation

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75. *Id.* at 285.

76. 186 F.2d 529 (D.C. Cir. 1949).

77. 219 F. Supp. 289 (S.D.N.Y. 1963). For an excellent discussion of the *Berner* case and the wilful misconduct issue as a whole, see L. KREINDLER, AVIATION ACCIDENT LAW 350-60 (1963).

78. Berner v. British Commonwealth Pacific Airlines, Ltd., 219 F. Supp. 289, 360 (S.D.N.Y. 1963) (emphasis added).

where a series of hijackings or threats of hijackings have occurred in a relatively short period of time (such as the Arab guerilla hijackings in the fall of 1970), the rule enunciated in the *Berner* case would subject the airline to liability if it did not do all that modern technology afforded in thwarting hijackings. In addition, another part of the charge enunciated by the court in the *Berner* case may be of extreme significance in times to come. In *Berner* the trial judge stated:

> [T]here must be an actual and continuous sequence connecting the act of wilful misconduct . . . with the death . . . . I say that the wilful misconduct must be *a* substantial factor in bringing about the death. *You will note I did not say it must be the sole substantial factor contributing to the death.* In other words, if you find that wilful misconduct by the defendant or any of its employees was a substantial contributing factor to the death . . . [then it] is sufficient to sustain the plaintiff's claim even though you may find that there were also other substantial contributing factors.[79]

The application of this latter standard to the hijacking situation is of great importance, since if the courts find the airlines guilty of wilful misconduct, the fact that the hijacker committed the actual injury would not absolve them from liability. While it is submitted that the possibility exists that a wilful misconduct case may be established, it is uncertain whether the courts will be willing to extend the airline's liability to such a degree.

IV. The Guatemala Protocol—Amendments to the Warsaw Convention

In the winter of 1971, a diplomatic conference was convened in Guatemala City under the auspices of the International Civil Aviation Organization for the purpose of amending the Warsaw Convention. This conference was attended by fifty-five states and adopted a Protocol to the Warsaw Convention which called for absolute liability and a substantial increase in the compensation for air passengers in the case of injury or death.[80] The Guatemala Protocol, article 4, would amend article 17 (1) of the Warsaw Convention to provide:

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79. *Id.* at 363 (emphasis added).
80. *See* 64 Dep't of State Bull. 555 (1971); 65 Am. J. Int. L. 670 (1971).

> 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.[81]

There are only two occasions in which the air carrier is absolved from liability. Article 17 (1) as amended provides: "the carrier is not liable if the death or injury resulted solely from the state of health of the passenger."[82] Article 21 of the Warsaw Convention was deleted by article VII of the Protocol and replaced by:

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful acts or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage.[83]

According to the terms of the Protocol, the airlines would be absolutely liable up to a $100,000 limit per passenger. Article 22(1)(a) of the Warsaw Convention as amended by the Protocol provides:

> In the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs.[84]

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81. *Guatemala Protocol, supra* note 20, at 7.

82. *Id.*

83. *Id.* at 8.

84. *Id.* In addition, article 22 (3) (a) of the *Warsaw Convention* as amended by article VIII of the *Guatemala Protocol* provides:

> The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including lawyers' fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable.

Guatemala Protocol, supra note 20, at 8.

Article 22 (3) (b) as amended provides:

> The costs of the action including lawyers' fees shall be awarded in accordance with subparagraph (a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after

The Protocol further provides that the parties to it will meet every five years after the Protocol enters into force for the purpose of reviewing this limit, and unless the parties to the Protocol decide to the contrary, the limit will be extended by the sum of $12,500.[85] These provisions are of particular significance in future actions commenced by passengers hijacked during an international flight, since once the Guatemala Protocol enters into force, they may be able to recover under an absolute liability standard $100,000 and after a period of ten years, $125,000 instead of the current $75,000 permitted by the Montreal Agreement.

It should be noted, however, that while the proposed amendments just discussed favor the passenger in that a higher maximum liability on the part of the airlines is called for, their effects are somewhat balanced by the more restrictive language of the wilful misconduct exception. Article 25 of the Warsaw Convention as amended by the Protocol provides:

> The limit of liability specified in Paragraph 2 of Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.[86]

Prior to the proposed amendment of article 25, the task of defining what constitutes wilful misconduct was to be ascertained "in accordance with the law of the Court to which the case is submitted."[87] Under the proposed amendment, which is still subject to judicial interpretation, an international standard defining wilful misconduct has been formulated. At present it appears that a passenger, in order to recover damages above and beyond the maximum permitted under the absolute liability standard of the Guatemala Protocol, must prove intent, or recklessness cou-

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his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

Id. at 8-9. Article 22 (3) (c) as amended provides: "The costs of the action including lawyers' fees shall not be taken into account in applying the limits under this Article." *Id.* at 9.

85. *Guatemala Protocol, supra* note 20, at 10.

86. *Id.* at 9.

87. 49 Stat. 3020 (1934), 137 L.N.T.S. 26 (1929).

pled with knowledge that damages would probably result on the part of the airlines.

V. Conclusion

In conclusion, it is submitted that the possibility of being involved in litigation whose outcome could result in a large award of damages may persuade the airlines to use the utmost security methods possible to avert hijackings. Awards of substantial damages, and the unfavorable publicity which would ensue, may provide the necessary incentive to protect innocent lives in the future. There seems to be a direct correlation between financial loss and protective action taken by the airlines. It was after the destruction of the first jet hijacked to Syria that sophisticated detection mechanisms came on the scene. Perhaps the knowledge that substantial judgments would be awarded to hijacked passengers who have suffered serious physical and emotional injuries would assure that such incidents would rarely occur in future times. Furthermore, and just as importantly, an innocent passenger who had suffered through no fault of his own could and would be adequately compensated.