NOTES

AIR LAW—WARSAW CONVENTION—MENTAL ANGUISH ALONE IS A COMPENSABLE INJURY UNDER ARTICLE 17—*Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975).

On September 6, 1970, a Swissair flight enroute from Zurich to New York was hijacked to a desert outside Amman, Jordan, by members of an Arab terrorist organization.[1] After being held on the plane for 24 hours, the passengers were later released and flown back to New York[2] whereupon Greta Husserl, a passenger on the flight, brought an action in federal district court against Swissair for damages under the Warsaw Convention.[3] Although no claim was made that the plaintiff "was injured by the impact of any physical object on her body,"[4] it was asserted that the fear of injury or death brought about by the hijacking caused various kinds of mental harm and related physiological symptoms.[5]

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[1] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). Swissair was not the only airline involved in the episode. Pan Am flight 93 and TWA flight 741 were also boarded on September 6, and taken to the Middle East. For an account of the highly publicized hijacking incident see N.Y. Times, Sept. 7, 1970, at 1, col. 4.

[2] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). After spending one day on the hijacked plane, the women and children were taken to a hotel in Amman. On September 11, they were transported to Nicosia, Cyprus, and on the 12th to Zurich. The next day they were flown to New York. These facts were not disputed by the parties. *Id.*

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *adhered to* July 31, 1934, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. For a comprehensive work on the Convention see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld I].

The plaintiff also raised claims in tort and contract law. Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). As the court's decision indicated, these "alternative" claims were essential to the plaintiff's case. *Id.* at 1245, 1252. *See* notes 82 and 86 *infra* and accompanying text.

[4] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975).

[5] *Id.* For purposes of simplicity, the phrase "mental anguish" will be used throughout this Note to signify emotional harm, accompanied by psychosomatic or other manifestations, but not derived from any impact upon or physical injury to the body.

Dean Prosser has discussed in detail the various aspects of mental anguish. Mental anguish alone is described as mental disturbance "without accompanying physical injury or physical consequences." W. PROSSER, THE LAW OF TORTS § 54, at 328 (4th ed. 1971) [hereinafter cited as PROSSER]. This is distinguished from mental anguish which is accompanied by some physical injury. *Id.* at 330. In the latter situation, the cases are divided into those where the mental anguish is derived from a bodily injury (*e.g.*, trauma resulting from a broken leg) as opposed to those where the mental anguish itself produces the physical harm (*e.g.*, fright causing a miscarriage or heart attack). *Id.* & n.62.

Since the plaintiff's injuries arose during an international flight,[6] the Warsaw Convention, which expressly governs air carrier liability in international transportation, was applicable.[7] The Convention itself is the product of an international conference on air law held in Warsaw, Poland in 1929, and it was proclaimed a treaty in the United States by President Roosevelt in 1934.[8] The primary purpose of the

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With regard to mental anguish alone, there is generally no recovery. As Prosser explains,

> [t]he temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.

Id. at 329 (footnotes omitted).

Recovery for mental anguish is more often permitted where some physical harm can be shown. For example, where mental anguish flows *from* or immediately accompanies a negligently inflicted bodily injury, the courts will ordinarily allow recovery for the mental harm because "there is sufficient assurance that the mental injury is not feigned." *Id.* at 330 (footnote omitted). Where the mental anguish initiates the physical harm, however, there is a split of authority. Many states will not permit relief when the physical injury is *caused* by the mental anguish, unless there has also been demonstrated an "impact," however trivial, upon the body. *Id.* at 331. Although the necessity for this requirement is slowly eroding, in many cases the plaintiff must still prove that he has received some form of bodily impact. *See id.* at 332–33.

[6] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1243 (S.D.N.Y. 1975).

[7] *See* Warsaw Convention, *supra* note 3, preamble, 49 Stat. at 3014, 137 L.N.T.S. at 15, which states that it regulates "in a uniform manner the conditions of international transportation by air in respect . . . of the liability of the carrier." *See also id.* art. 1, § 1, 49 Stat. at 3014, 137 L.N.T.S. at 15, which states that "[t]his convention shall apply to all international transportation of persons . . . performed by aircraft for hire."

[8] Lowenfeld I, *supra* note 3, at 498, 502. The Treaty was written in French, and adhered to by the United States in that language, even though an English translation accompanied it. Warsaw Convention, *supra* note 3, 49 Stat. at 3000–13, 3014–26. Although the Senate advised adherence to the Treaty in its official French text, the hearing and vote were based on the English version. Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975). An excellent background source on the presidential view in advising American adherence to the Convention in 1934 is SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 2–5 (1934) [hereinafter cited as MESSAGE FROM THE PRESIDENT].

Originally the Treaty set recovery limits at approximately $8,300 per passenger, and in 1955 that amount was amended to $16,600 under The Hague Protocol. The United States never ratified the Protocol, partly because of its dissatisfaction with the relatively low $16,600 ceiling. On November 15, 1965, the United States Department of State denounced the Warsaw Convention, effective six months thereafter. R. FIXEL, THE LAW OF AVIATION § 616, at 699–706 (4th ed. 1967).

On May 14, 1966, the denunciation was withdrawn by reason of an interim agreement reached between a majority of the major international airlines and the United States, as approved by the Civil Aeronautics Board (CAB). Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 n.1 (5th Cir. 1967). The agreement raised the

Convention was to establish a uniform system in the regulation of the liability to which an international air carrier would be subject.[9] Article 17 of the Convention specifically states that an airline is liable for "the death or wounding . . . or any other bodily injury"[10] suffered by an air passenger in an accident on board an aircraft or while embarking or disembarking.[11]

Since plaintiff Husserl alleged mental anguish without bodily impact,[12] the central issue before the trial court was whether such an injury was claimable under the "death or wounding . . . or any other bodily injury" phrase of Article 17.[13] On motion for summary judgment,[14] defendant Swissair argued that mental anguish was a

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limit of recovery to $75,000 per passenger, and provided that the airlines would waive their defenses under Article 20(1) of the Warsaw Convention, Lacey, *Recent Developments in the Warsaw Convention*, 33 J. AIR L. & COM. 385, 388–89 (1967), and assume absolute liability for injuries resulting from an air accident. *See* Lowenfeld I, *supra* note 3, at 599–601. The modifications of the Convention brought about by this arrangement have been called the "Montreal Agreement." Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1241 n.2 (S.D.N.Y. 1975). For details of the Agreement see Liability Limitations of Warsaw Convention and Hague Protocol, 31 Fed. Reg. 7302 (1966). *See generally* Lowenfeld I, *supra* at 586–96.

The *Husserl* court in referring to the Warsaw Convention as well as the modifications effected by the Montreal Agreement used the phrase "Warsaw system." 388 F. Supp. at 1241 n.2. Throughout this Note, "Warsaw Convention," "Convention," or "Treaty" refers to the Montreal Agreement as well as the original Treaty.

[9] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975). *See* Warsaw Convention, *supra* note 3, preamble, 49 Stat. at 3014, 137 L.N.T.S. at 15. The preamble states that the signatories, in adopting the treaty, had

> recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier.

Id. To effect uniformity, the Convention established a system of documentation with regard to ticketing, air-waybills, baggage and freight, as well as a procedure for raising claims by specifying the time limits and places for suits. Lowenfeld I, *supra* note 3, at 498–99.

[10] Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

[11] *Id.* The full text of Article 17 reads:

> 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.

[12] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). *See* note 5 *supra*.

[13] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242, 1246, 1248 (S.D.N.Y. 1975). For a general discussion of this issue see Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. 345 (1973) [hereinafter cited as Lowenfeld II].

[14] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975). This was the defendant's second motion for summary judgment. *See id.* at 1241–42. In its first motion, the defendant argued that under the Convention's liability provisions a hijacking was not an accident within the terms of Article 17. Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 704–05 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir.

claim implicitly precluded by the terms of Article 17, and that to allow such a claim would not be in keeping with the Convention's purpose of uniformity of regulation, its objective of limiting liability, and the supremacy of the Treaty as the exclusive arbiter of an air passenger's claim.[15] Plaintiff Husserl denied the defendant's contentions, urging that Article 17's terms should be interpreted to encompass all areas of personal injury, including mental anguish.[16] Additionally, the plaintiff argued that she had a right to assert claims in tort and contract alternative to any claim calling forth the presumptive liability established under the Convention.[17]

In *Husserl v. Swiss Air Transport Co.*,[18] the court denied summary judgment for the defendant, holding that mental anguish was a compensable injury under Article 17.[19] In addition, the court concluded that the Convention's conditions and limitations applied to any injuries alleged under Article 17, but that the cause of action for those injuries must be derived from the local substantive law.[20] Therefore, since the court believed that the applicable local law would be that of New York, and New York law provided a cause of action for mental anguish alone,[21] it was held that the plaintiff asserted a valid claim before the court.[22]

Prior to *Husserl*, two recent decisions in cases arising from a related hijacking incident had held that mental anguish alone was not a claimable injury under the Warsaw Convention. In *Burnett v. Trans World Airlines, Inc.*,[23] two passengers claimed mental and bodily in-

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1973). The court dismissed the motion, holding that a hijacking may be construed to be an accident within the meaning of the Warsaw Convention. 351 F. Supp. at 707. The text of Article 17 is reproduced in note 11 *supra*. For a discussion of the case see 39 J. AIR L. & COM. 445 (1973).

[15] *See* Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242–43, 1246 (S.D.N.Y. 1975).

[16] Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment at 6, Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238 (S.D.N.Y. 1975). The court did not specifically refer to this side of plaintiff's argument, but rather incorporated it throughout the decision. *See* 388 F. Supp. at 1242, 1249.

[17] Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1243 (S.D.N.Y. 1975). For a discussion of the presumption of carrier liability under the Convention see note 8 *supra*.

[18] 388 F. Supp. 1238 (S.D.N.Y. 1975).

[19] *Id.* at 1253.

[20] *Id.*

[21] *Id.* at 1252. For a discussion of the court's reasoning on these points see notes 85–86 *infra* and accompanying text.

[22] *See* 388 F. Supp. at 1252–53. It was stated that for purposes of the motion before it, the court "puts aside its substantial doubt that plaintiff will be able to prove both injury and causation." *Id.* at 1242 (footnote omitted).

[23] 368 F. Supp. 1152 (D.N.M. 1973).

juries after the jet in which they were traveling was hijacked to Amman, Jordan.[24] During the six days the plaintiffs were held captive on the aircraft, they suffered severe mental anguish by reason of the activities of their hijackers, as well as bodily injuries due to the general conditions of confinement and the extreme variation of temperatures in the desert.[25] The issues considered by the *Burnett* court were two: first, whether mental anguish alone was compensable under Article 17, and second, whether mental anguish stemming from a bodily injury was compensable under the Article.[26] It was held that under the Convention the plaintiff could not recover for mental anguish alone, but that compensation would be available for mental anguish "directly resulting from a bodily injury" under the terms of Article 17.[27]

The bulk of the analysis in the *Burnett* decision centered on the issue of mental anguish alone. The court decided that by reason of the French legal meaning of Article 17 a cause of action for mental anguish alone was not allowable,[28] and further, that it could be inferred from the Convention's legislative history that it was the intent of the drafters to restrict claimable injuries.[29]

In the original French version of the Convention, the phrase "or any other bodily injury" had been "ou de toute autre lésion corporelle."[30] By dictionary definition, however, mental injury or "wrong" translates as "lésion mentàle."[31] The *Burnett* court, upon examination of the possible variances of French-English interpretation, determined that "lésion corporelle" (bodily injury) and "lésion

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[24] *Id.* at 1153. The plaintiffs in *Burnett* were victims of the same hijacking events of September 6, 1970 as was the plaintiff in *Husserl*. However, while the Burnetts spent six days on board their TWA jet, Greta Husserl was aboard the Swissair craft for only a day. *Compare id. with* 388 F. Supp. at 1242.

[25] 368 F. Supp. at 1153.

[26] *Id.* at 1155. For a general discussion of the distinctions concerning mental anguish see note 5 *supra*.

[27] 368 F. Supp. at 1158.

[28] *Id.* at 1156. It was earlier determined that the French legal meaning of the Convention's terms was controlling. *Id.* at 1155. Supporting this proposition was Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), which held that because the Warsaw Convention was adhered to by the United States in the official French version, "[t]he binding meaning of the terms is the French legal meaning." *Id.* at 330. *See* note 8 *supra* and accompanying text.

[29] 368 F. Supp. at 1156–58.

[30] *Id.* at 1156.

[31] *Id. See, e.g.*, DICTIONNAIRE MODERNE FRANCAIS-ANGLAIS (6th ed. rev. 1960). There, "corporelle" is translated simply as "bodily," *id.* at 165, and "mentale" as "mental," *id.* at 450. In fact, a "spécialiste de maladies mentales" is described as a "U.S. pyschiatrist." *Id.*

mentàle" (mental injury) "appear to be mutually exclusive and therefore, sound construction compels the court to attribute to 'lésion corporelle' its normal import only, excluding mental injury."[32]

The legislative intent behind the Warsaw Convention also played a key role in the *Burnett* court's interpretation of the Article 17 provision.[33] It was pointed out that the original version of air carrier liability, as written by the First International Conference on Private Air Law in 1925, proposed very broad and liberal liability provisions.[34] That early draft read:

"Le transporteur est responsable des accidents, pertes, avaries et retards."	"The carrier is liable for accidents, losses, damages to goods and delays."[35]

If this extensive liability provision had been adopted, the court noted, then under French law mental anguish would have been comprehended.[36] However, the drafts proposed during the second convention in Warsaw in 1929 and the final form of Article 17 as it stands now, exhibit a more restricted concept of liability than had been provided for in 1925, as is evidenced by the limitation of recoverable injuries.[37]

Accordingly, the *Burnett* court concluded that the restriction of recovery to particular enumerated injuries reflected an effort on the drafters' part to make the Convention more attractive to nations whose laws did not provide for broad liability.[38] From its interpretation of the Convention's history, the court reasoned:

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[32] 368 F. Supp. at 1156.

[33] *Id.*

[34] *Id.* at 1157.

[35] *Id.* (footnote omitted) (quoting from de Vries translation: MINISTÈRE DES AFFAIRES ETRANGÈRES, CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, FRANCE—DOCUMENTS DIPLOMATIQUES, ser. C, pamph. 42, at 79 (1926)).

[36] 368 F. Supp. at 1157. Citing Professor Henri Mazeaud, the *Burnett* court asserted that an analysis of French law prior to 1925 would indicate that carrier liability would extend to

> "cases where the carrier in failing to perform its contractual obligations infringed the emotional condition of the passenger: his sentiments of affection in delaying his arrival at funeral ceremonies, the comfort to which he is entitled by placing him in a baggage car, and even for the simple inconvenience of delay in arrival."

Id. (footnote omitted) (quoting from H. MAZEAUD, L. MAZEAUD & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 416–17 (5th ed. 1957)).

[37] 368 F. Supp. at 1157. Compare the earlier draft emphasized by the *Burnett* court, *see* text accompanying note 35 *supra*, with the present text of Article 17, reproduced in note 11 *supra*.

[38] 368 F. Supp. at 1157.

> By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.[39]

With regard to mental anguish arising *from* a bodily injury, the *Burnett* court recognized that the Convention would generally allow recovery for the plaintiffs' "emotional distress" as if it were "a part of the bodily injury itself."[40]

A very similar conclusion was reached in *Rosman v. Trans World Airlines, Inc.*,[41] which dealt with the exact factual context, issues, and claims present in *Burnett*.[42] In *Rosman*, the plaintiffs asked for damages under the Warsaw Convention for bodily injuries, mental anguish alone, and certain behavioral manifestations brought about by the emotional distress.[43] In a six-to-one decision, the Court of Appeals of New York reinstated a verdict against the defendant for the plaintiffs' bodily injuries and for damages arising therefrom, as

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[39] *Id.*

[40] *Id.* at 1158. With regard to this second issue the court explained its position by stating:

> Certainly, mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury. The delegates apparently chose to follow this well recognized principle of law allowing recovery for mental anguish resulting from the occurrence of a bodily injury . . . . Therefore, plaintiffs may recover in this action for any such emotional anxiety that they can demonstrate resulted from a bodily injury suffered as a consequence of the hijacking.

Id.

[41] 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974). *Rosman* was a consolidated action before the Court of Appeals of New York, which issued a decision concerning both Rosman v. Trans World Airlines, Inc., 40 App. Div. 2d 963, 338 N.Y.S.2d 664 (1972), and Herman v. Trans World Airlines, Inc., 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (1972).

[42] The plaintiffs in *Rosman* were on the same TWA jet as the Burnett couple. Consequently, the facts and circumstances in *Rosman* and *Burnett* were the same, except that the *Rosman* plaintiffs were Jewish, which, as the *Rosman* court noted, may have increased their apprehension of bodily harm at the hands of their Arab captors. *Compare* 34 N.Y.2d at 388–89, 314 N.E.2d at 849–50, 358 N.Y.S.2d at 99–101 *with* 368 F. Supp. at 1153. *See also* note 24 *supra*.

[43] 34 N.Y.2d at 388–89, 314 N.E.2d at 849–50, 358 N.Y.S.2d at 99–101. The behavioral manifestations alleged by the plaintiffs to have occurred after their release generally involved complaints of nervousness, tension and depression, as well as irritability, loss of sleep and nightmares. *Id.* These claims were distinguished by the court from the "bodily" injuries claimed, which included backaches, swelling, boils, rashes and skin discoloration. *Id.* The distinctions were important to the ultimate holding in the case.

well as those bodily injuries caused by the mental anguish.[44] However, the court refused to permit recovery for mental anguish alone, or for the nonphysical symptoms of the mental anguish.[45] The *Rosman* decision, therefore, appeared to determine airline liability according to a division between bodily and mental injury, claims arising from the former being permissible, but claims for the latter alone held excluded.[46]

Unlike the approach taken in *Burnett*, the *Rosman* court asserted that an analysis of the legislative intent of the Convention's drafters and the French legal meaning of its terms would not be determinative.[47] Instead, the court stated that an interpretation of Article 17 should seek to achieve uniformity of substance and application under the Convention, and an understanding of its language in "its ordinary and natural meaning."[48]

The plain meaning of the critical words "bodily injury" in Article 17 was found to be "palpable, conspicuous physical injury."[49] To the court, this meaning denoted the opposite of "mental injury."[50] The *Rosman* court believed that the aim of the Convention was to establish uniformity of law throughout its provisions,[51] and concluded that

> a reading of the terms "wounding" or "bodily injury" which might comprehend purely mental suffering without physical manifesta-

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[44] *Id.* at 400, 404, 314 N.E.2d at 857, 859, 358 N.Y.S.2d at 110, 113.

[45] *Id.* at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 110.

[46] *See id.* at 399–400, 314 N.E.2d at 856–57, 358 N.Y.S.2d at 109–10.

[47] *Id.* at 394–95, 314 N.E.2d at 853–54, 358 N.Y.S.2d at 104–05. The court stated that

> [i]t does not follow from the fact that the treaty is written in French that in interpreting it we are forever chained to French law, either as it existed when the treaty was written or in its present state of development. There is no suggestion in the treaty that French law was intended to govern the meaning of Warsaw's terms, nor have we found any indication to this effect in its legislative history or from our study of its application and interpretation by other courts.

Id. at 394, 314 N.E.2d at 853, 358 N.Y.S.2d at 105. Furthermore, regarding the legislative intent behind the Convention, the court stated that it did not perceive

> any useful purpose to be served by such a hearing to search out the intent of the drafters of Warsaw. Our study of the minutes of the Convention indicates that the drafters did not define or discuss what was meant by the phrase "death or wounding . . . or any other bodily injury" in article 17.

Id. at 395, 314 N.E.2d at 854, 358 N.Y.S.2d at 105 (footnote omitted).

[48] *Id.* at 396, 314 N.E.2d at 854–55, 358 N.Y.S.2d at 106.

[49] *Id.* at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107 (footnote omitted).

[50] *Id.* at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 107.

[51] *See id.* at 396, 314 N.E.2d at 854, 358 N.Y.S.2d at 106, wherein the court maintained:

> The apparent purpose of the entire Convention is uniformity among its diverse adherent Nations—the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered.

> tions . . . would little serve the interests of promoting uniformity in the treaty's interpretation and application . . . . [52]

Under the *Rosman* holding, then, any damage claim brought under Article 17 had to be based upon some physical injury caused by an air accident.[53] The court stated that a physical injury which resulted from the mental anguish engendered by the accident was compensable and, further, that once this bodily harm existed, all damages flowing therefrom, including "mental suffering," would also be compensable.[54] However, the *Rosman* court asserted that under the Warsaw Convention neither mental anguish alone nor mental anguish which *produced* a physical injury would be compensable, so that an airline would not be liable "for the trauma as such or for the nonbodily or behavioral manifestations of that trauma."[55]

The *Husserl* decision substantially departed from *Rosman*, primarily by expanding the interpretation of Article 17 to include mental anguish, as well as every type of injury for which local law provided a remedy.[56] Whether the ordinary meaning of bodily injury could be said to include mental injury was the critical question resolved by the *Rosman* court. That court emphasized the dissimilarity between the terms "bodily injury" and "mental anguish."[57] The *Husserl* court, by contrast, did not perceive that there were any distinctions to be drawn between these terms, and described argumentation on the point as "unconvincing and inconclusive."[58] Rather than concentrating on definitional problems, the *Husserl* court considered what effect allowing an action for an injury not enumerated within Article 17 would have on the purposes and legislative intent behind the Convention. In the court's view, the Convention was to be construed in light of the principle that it does not create its own cause of action.[59] Thus, injured passengers may not "plead" the Convention as such, but must instead seek their cause of action from the applicable local law.[60] To the *Husserl* court, the Convention served only to af-

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[52] *Id.* at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107.

[53] *Id.* at 399, 314 N.E.2d at 856, 358 N.Y.S.2d at 109.

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

[55] *Id.* at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 109–10.

[56] 388 F. Supp. at 1247, 1250, 1253.

[57] 34 N.Y.2d at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107. *See* text accompanying notes 47–50 *supra*.

[58] 388 F. Supp. at 1250.

[59] *Id.* at 1243.

[60] *Id.* at 1243, 1252. *See also* note 82 *infra*. For discussion of the conflicts of law problems inherent in determining the applicable law see note 85 and sources cited note 93 *infra*.

ford injured passengers a presumption of liability on the part of the carrier, while at the same time limiting the amount of any recovery to $75,000.[61] The court further reasoned that the Convention's aim of establishing uniformity in the regulation of international air carrier liability was related to the intent of the drafters that such liability be presumptive but limited.[62]

By creating Article 17, the court explained, the drafters must have intended that the Convention's recovery limitations be exclusively applied to actions for injuries incurred during an air accident, if those injuries were comprehended by the Article's terms.[63] A problem, however, would arise with regard to injuries "neither explicitly nor implicitly comprehended by Article 17."[64] The court was initially faced with a hypothetical question: If an injury—for example, mental anguish alone—were held to be outside the compass of Article 17, how should a court deal with an action based on such an injury? There were obviously two possible answers.

First, such an action could be disallowed as an intrusion upon the uniformity of the Convention and an interference with its status as the supreme and exclusive arbiter of claims for injuries arising in international air travel.[65] A second alternative was that an action for an injury not comprehended by Article 17 could be brought completely outside the Convention, as if that document did not exist, assuming that the action would be one cognizable under the substantive law of the forum.[66] In spite of certain "reservations," the *Husserl* court found the second alternative to be the legally correct one and concluded "that such injuries [not provided for in Article 17] may give rise to causes of action not subject to any of the conditions or limits of the Warsaw system."[67]

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[61] 388 F. Supp. at 1243. Regarding the maximum recovery amounts under the Convention, as well as the waiver of airline defenses, see note 8 *supra*.

[62] 388 F. Supp. at 1244.

[63] *Id.* at 1244–45. After discussing the general purposes and objectives of the Convention the court stated:

> It seems implicit in these indisputable propositions that the purpose of the Warsaw system and the intent of its drafters . . . must also have been to establish the exclusive relief available for damages resulting from an injury sustained in international transportation.

Id. at 1244.

[64] *Id.* at 1246.

[65] This was essentially the position argued for by the defendants in *Husserl*. *See id.* at 1242, 1243.

[66] If this were the case, then apparently the plaintiff would have to prove all the elements of actions in tort or contract, without benefit of the carrier's absolute liability. *See id.* at 1247.

[67] *Id.* at 1246. This was consistent with the position taken in the earlier *Husserl*

In light of this conclusion, the court undertook a reexamination of the scope of Article 17, with emphasis upon the intent behind the Convention's provisions. The *Husserl* court speculated that the Convention's drafters might have believed that by the language of Article 17 they had provided for all varieties of recoverable injuries.[68] Otherwise, it was reasoned, the drafters could have specifically listed those injuries intended to be precluded, especially if a primary purpose of the Convention was the limitation of liability.[69] The court appeared to lean toward the theory that the drafters intended to cover all injuries but failed to do so clearly, concluding that "the drafters neglected to deal with a problem which they would have wished to resolve if they had been aware of it."[70] In the end, how-

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decision, *see* note 14 *supra*, wherein the court stated that

> the Convention does not "exclusively regulate" the relationship between passenger and carrier on an international flight, but rather sets limits on and renders uniform certain of the aspects of that relationship.

Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F. 2d 1240 (2d Cir. 1973). Instead, the court asserted, "if the Convention 'applies', it applies to limit—not eliminate—liability; if it does not apply, it leaves liability to be established according to traditional common law rules." 351 F. Supp. at 706.

But see Scarf v. Trans World Airlines, Inc., 4 Av. Cas. 17,795, 17,795 (S.D.N.Y. 1955) which held that "[t]he Convention relieved the carrier from liability under pre-existing law and substituted a new liability with express limitations as to amount and method of recovery."

[68] 388 F. Supp. at 1246. The court stated:

> [I]t is quite possible that the drafters did not choose the appropriate words to effect their intent. They may well have believed they had enumerated all types of injuries for which any law provided a remedy. Such an inference from their silence on some types of injury is at least as plausible as the inference defendant would draw. Indeed, the former inference may be reinforced by the Convention's failure to explicitly preclude recovery for types of injury not comprehended by Article 17 . . . .

Id.

The *Husserl* court's view that the Convention's drafters somehow did not put into words the true expression of their intent regarding injuries appears to conflict with the view taken in Rocca v. Thompson, 223 U.S. 317 (1912), wherein the United States Supreme Court stated:

> It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.

Id. at 332.

[69] 388 F. Supp. at 1246. The court found it

> extremely unlikely that the drafters considered other types of injuries but deliberately decided to leave the law unchanged as to them, allowing whatever recoveries the law permitted. Furthermore, they must have been aware that to extinguish pre-existing rights their intent and expression must be clear; ambiguity or silence is rarely, if ever, sufficient.

Id.

[70] *Id.* (footnote omitted).

ever, the court conceded that a "vacuum" existed with respect to the legislative disposition toward those injuries outside the express terms of the Convention's liability provisions.[71]

It was observed that the argument could be made that the Treaty's purpose of limiting liability would best be effectuated by completely precluding relief for injuries not contemplated by Article 17.[72] The *Husserl* court rejected the argument however, finding that this purpose could be better achieved by interpreting "the types of injuries enumerated [under Article 17] expansively to comprehend as many types of injury as possible for which there is normally legal redress."[73] It was also noted that a further purpose of the Convention was to make it easier for an injured passenger to recover.[74] The court conceded that it might be difficult in certain cases to ascertain the appropriate substantive law of a particular locality, but no alternative was apparent.[75]

Having reached the foregoing conclusion, the court addressed the arguments presented by the parties with respect to the language of Article 17. The court observed that the various methods of ascribing meaning to the words, and the various canons of construction invoked, could as easily support one position as the other.[76] For example, the defendant maintained that the words "death," "wounding," and "bodily injury" connote some visible physical impairment, as opposed to mental anguish alone.[77] But the court indicated that modern advances in the medical and behavioral sciences would sup-

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[71] *Id.*

[72] *Id.* at 1246–47.

[73] *Id.* at 1247 (footnote omitted).

[74] *Id.* To support its conclusion, the *Husserl* court cited Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499–500 (1967). That article quoted then Secretary of State Cordell Hull, who, when presenting the Warsaw Convention to the Senate, described the potential benefits to air passengers as follows:

> It is believed that the principle limitation of liability will . . . be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation . . . .

Id. at 499 (quoting from MESSAGE FROM THE PRESIDENT, *supra* note 8, at 3).

Although the *Husserl* court inferred from the foregoing that the facilitation of passenger recovery was a *purpose* of the Convention, it would appear from Secretary Hull's letter that he was merely outlining the advantages the proposed Convention would offer to passenger and freight transportation. For a critique of other passages of Secretary Hull's letter see Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 328–29 (1959).

[75] 388 F. Supp. at 1247.

[76] *Id.* at 1248–49.

[77] *See id.* at 1242, 1250.

port an interpretation of "bodily injuries" as "all personal injuries" which pertain to general human dysfunctions.[78]

In addition, the court stressed that since the drafters desired that carrier liability be regulated uniformly, the Convention's provisions must also have been meant to be comprehensive.[79] To carry out this purpose, the court held that the types of injuries under Article 17 "should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types."[80] Mental anguish was found to be within that ambit, and therefore included under Article 17.[81]

As a corollary to its holding on mental anguish, the *Husserl* court emphasized again that a cause of action could not be derived from the Convention, a principle which the court viewed as "well-established," at least in the Second Circuit.[82] Instead, it was stated, a plaintiff must

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[78] *Id.* at 1250. The court elaborated on its view of bodily and mental injury, stating:

> "Bodily injury" is perhaps particularly significant in this regard because of the vast strides which have been taken relatively recently in the fields of physiology and psychology. *It becomes increasingly evident that the mind is part of the body.*

Id. (emphasis added). However, after a discussion of the meaning of these terms, the *Husserl* court determined that "[i]n the end all of these arguments and approaches are unconvincing and inconclusive." *Id. Cf.* notes 49–52 *supra* and accompanying text.

[79] 388 F. Supp. at 1250.

[80] *Id.*

[81] *Id.* To the extent that the court referred to mental anguish as an enumerated injury "colorably within the ambit" of Article 17, *id.*, it appeared to qualify its previous statement that Article 17 should be interpreted "to comprehend as many types of injury as possible for which there is normally legal redress." *Id.* at 1247 (footnote omitted). *Compare* text accompanying note 80 *supra with* text accompanying note 73 *supra.*

[82] 388 F. Supp. at 1252. The principle that in airline accident cases one's cause of action arises from local law rather than from the Convention itself was consistent with the court's perception that the Convention served only to prescribe a limit to passenger recovery and to presume airline liability. *Id.* at 1243.

The "no cause of action" theory was initially propounded in Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), which held that the Warsaw Convention does not itself create a cause of action. 111 F. Supp. at 401. Instead, it was indicated that the law of the place where the accident occurred provided the cause of action under which a plaintiff must claim. *Id.* at 403. The *Komlos* court did point out in dictum, however, that

> if the law of the place of the accident does not provide for a right of action for wrongful death, the forum would apply Article 17 of the Convention; and under those circumstances it might be said that *Article 17 created the right of action* for wrongful death. Under those circumstances, it may also be said that the *right of action*, even though its gravaman is ex delicto, *arises out of the contract of carriage which made the Rules and Regulations of the Warsaw Convention applicable to the international transportation.*

Id. at 402 (emphasis added). For a thorough discussion of the cause of action arising from the contract of carriage under the Warsaw Convention see Calkins, *The Cause of Action Under the Warsaw Convention* (pts. 1–2), 26 J. AIR L. & COM. 217, 323 (1959).

derive his cause of action from the applicable local substantive law.[83] The court noted, without elaboration, that the forum court would have to determine the proper substantive law to be applied by following basic conflicts of law principles.[84] Thus, on the available facts, it was determined that a New York court would probably apply New York law,[85] and since New York recognized a cause of action for men-

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See also Lowenfeld I, *supra* note 3, at 517; Lowenfeld II, *supra* note 13, at 350–52.

Five years later the "no cause of action" principle became more firmly established in Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). There the court of appeals for the Second Circuit, in reaffirming the *Komlos* view, stated "that the Convention did not create an independent right of action," and that Article 17 only operated to presume liability. 247 F.2d at 679. However, contrary to the *Komlos* position, the *Noel* opinion determined that no cause of action arises from the Treaty, even where none exists in the law of the place of the accident. *Id.* at 679–80. The *Noel* court found that neither the terms of Article 17 nor the legislative history of the Convention indicated that the Article would provide a remedy for an air passenger injured in a place where the law provided no cause of action or where no law existed—*e.g.*, on the high seas. *Id.* at 680. *See also* Comment, *Air Passenger Deaths Resulting from Injuries Sustained on or Over the High Seas and at Unknown Places*, 41 CORNELL L.Q. 243, 255–61 (1956).

Prior to the *Komlos* and *Noel* decisions, case law had considered the Convention inherently to provide its own cause of action. Lowenfeld I, *supra* note 3, at 517–18. For example, Salamon v. Koninklijke Luchtvaart Maatschappij, N.V., 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd mem.*, 281 App. Div. 965, 120 N.Y.S.2d 917 (1953), decided just prior to *Komlos*, specifically dealt with the subject. In *Salamon*, the court permitted the plaintiff to assert only those causes of action which conformed to the Convention's provisions, dismissing the alternative actions based upon New York law. 107 N.Y.S.2d at 773–75. The court stated that the objective of the Convention to regulate uniformly air carrier liability would be overturned

> [i]f the carrier, in addition to the liability provided for in the Convention could also be subjected to such other liabilities as might exist under the laws of such state as might be selected for instituting suit . . . .

Id. at 773–74. Thus, the clear holding of *Salamon* was that Article 17 not only purported to create its own cause of action, but also was paramount to state law and would be controlling in the event of any inconsistency. *Id.* at 772–73. *See also* Seth v. British Overseas Airways Corp., 329 F.2d 302, 305 (1st Cir. 1964) (Article 18, concerning lost or damaged baggage, creates its own right of action).

The *Husserl* court elected to follow the *Komlos* and *Noel* opinions, indicating that causes of action under New York law should be adopted by the claimant for injuries comprehended by Article 17. 388 F. Supp. at 1252–53.

[83] 388 F. Supp. at 1252.

[84] *Id.*

[85] *Id.* The court cited Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Babcock* had held that the " 'center of gravity' " or " 'grouping of contacts' " principles, previously employed in conflicts of law situations involving contracts, should be similarly applied in tort cases. *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. The court stated that the most equitable and practical result could

> best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

Id. The *Husserl* court apparently believed that under the foregoing principles, a New

tal anguish alone,[86] the *Husserl* court allowed the plaintiff her day in court on the mental anguish issue, "subject to the conditions and limits" of the Convention.[87]

In light of *Rosman* and *Burnett*, the *Husserl* decision is unique in that it interpreted Article 17 so expansively, including under the Convention claims for mental anguish, as well as claims for any other injuries cognizable under local law. Should the decision be upheld on appeal,[88] there will remain a number of questions and problems to be resolved.

First, it is unlikely that any local law, at least in the United States, would fail to provide a cause of action for death, wounding, or bodily injury. However, actions for mental anguish raise a problem because they are not uniformly recognized in all jurisdictions.[89] While the substantive law of New York, for example, allows recovery for mental anguish alone,[90] the majority of states require a corroborative physical injury in order to prove emotional harm, and would thus not supply a cause of action to a passenger claiming only mental anguish.[91] An application of the *Husserl* decision, therefore, would

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York court would find that New York had the greatest interest in having its law applied to the issue before it. *See* 388 F. Supp. at 1252. For an extensive discussion of the *Babcock* decision and its effect on conflicts of law see Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

[86] 388 F. Supp. at 1252. The court cited Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), where the plaintiff, an infant, became extremely frightened and hysterical upon descending a ski lift, because a state employee had negligently failed to fasten the retaining belt properly. *Id.* at 238–39, 176 N.E.2d at 729, 219 N.Y.S.2d at 35. It was held that a claim for mental anguish without physical impact presented a valid cause of action upon which recovery could be sought. *Id.* at 239, 242, 176 N.E.2d at 730, 732, 219 N.Y.S.2d at 35, 38. This overruled the prevailing New York authority governing mental anguish, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

Dean Prosser, although supporting the *Battalla* holding, found that a considerable number of states still adhere to the stricter rule that in order to preclude the possibility of fictitious claims, a cause of action for mental anguish must exhibit a "guarantee of genuineness" by evidence of a physical impact. PROSSER, *supra* note 5, § 54, at 328, 331–32. He nevertheless observed that

> cases will . . . be rare in which "mental anguish," not so severe as to cause physical harm, will be so clearly a serious wrong worthy of redress, or sufficiently attested by the circumstances of the case.

Id. at 330 (footnote omitted). *See also* note 5 *supra*.

[87] 388 F. Supp. at 1252.

[88] An appeal from the decision has already been filed. Husserl v. Swiss Air Transp. Co., Civ. No. 75–7298 (2d Cir., filed May 14, 1975).

[89] *See generally* PROSSER, *supra* note 5, § 54, at 330–33.

[90] *See* note 86 *supra*.

[91] PROSSER, *supra* note 5, § 54, at 328–29.

provide relief for a plaintiff only in those situations where the applicable local law itself so provides. This result would seem incongruous, however, inasmuch as the Warsaw Convention was clearly intended not only to regulate carrier liability, but also to regulate in a *uniform* manner.[92]

A further problem associated with air accident cases involving mental anguish concerns the conflicts of law principles to be followed.[93] State courts, and federal courts sitting within the states and applying state law, utilize varying conflicts theories in order to determine which substantive law to apply, where more than one jurisdiction is involved in the action.[94] Since a passenger's mental anguish claim would be determined according to local law, and not every local law recognizes a cause of action for mental anguish alone, resolution of the conflicts problem could effectively determine the outcome of a particular case.[95]

For example, if a plaintiff brought a *Husserl*-type action in a forum which recognized a cause of action for mental anguish alone, but the court determined that the applicable substantive law was that of a jurisdiction which failed to supply such a cause of action, the plaintiff would apparently be precluded from any recovery. Conversely, if a plaintiff sued in a forum which did not provide for mental anguish claims, but the court decided to apply the law of a jurisdiction that did, such plaintiff would be permitted to pursue his action, the law of the forum notwithstanding. While such results are actually a consequence of the local cause of action principle[96] rather than the *Husserl* court's interpretation of the Warsaw Treaty and its purposes, the possibility of almost random recoveries based on wholly fortuitous factors is apparent.[97]

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[92] *See* note 9 *supra* and accompanying text.

[93] *See* Lowenfeld I, *supra* note 3, at 526–32, 578–86. *See also* Gair, *Aviation Law Today*, 30 ALBANY L. REV. 189, 194–204 (1966); Note, *A Proposal to Make Lex Domicilii the Required Choice of Law Under Article 28 of the Warsaw Convention*, 9 WM. & MARY L. REV. 1118, 1129–38 (1968).

[94] *See generally* Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

[95] *Cf.* Lowenfeld II, *supra* note 13, at 349.

[96] *See* notes 82–83 *supra* and accompanying text.

[97] The possibilities inherent in any accident case have been well illustrated:

> The ice began to form on the wings over Pennsylvania; the wrong handle was pulled in the air over Maryland so that the de-icer broke down over West Virginia and the plane fell in Virginia.

Knauth, *Renvoi and Other Conflicts Problems in Transportation Law*, 49 COLUM. L. REV. 1, 19 (1949). While a trend toward courts' use of the law of the place with most significant contacts, rather than the law of the place of the accident (lex loci delecti), has eliminated some of the "randomness" inherent in air accident cases, *see* Note, *supra*

As suggested by the foregoing analysis, there is a distinct opportunity for forum shopping by an air passenger seeking recovery for mental anguish without bodily injury. These plaintiffs would have to engage in a two-step process in that they would first have to determine which state's substantive law allowed recovery for mental anguish, and then determine which state's conflicts of law rule would result in the application of the favorable substantive law.[98] There is obviously much uncertainty in such a process, but the opportunity for forum shopping is enhanced greatly by the Convention itself, which provides for a number of jurisdictions in which an injured passenger may sue.[99] Forum shopping aside, the conflicts problems with which courts will be presented may further complicate this type of litigation.[100]

Whatever difficulties *Husserl* created, its expansive interpretation of Article 17 of the Convention at least placed actions for mental anguish, where recognized, into an established legal framework for recovery.[101] If *Husserl* is reversed on appeal and mental anguish is held not compensable under the terms of Article 17 of the Convention, the Second Circuit will still be faced with the question of what to do with the cause of action. Should an action for mental anguish be permitted completely outside the Convention, as *Husserl* suggested?[102] This would benefit plaintiffs in certain cases, but might conflict with a treaty intended to comprehensively regulate air carrier liability.[103] Should an action for mental anguish alone be precluded completely, as in *Rosman*, so that no plaintiff could recover?[104] This

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note 93, at 1129–34, *Husserl* injects a new variable in that only a limited number of states recognize a cause of action for mental anguish alone. *See* PROSSER, *supra* note 5, § 54, at 328–29, 332. *See also* note 5 *supra*.

[98] The *Husserl* court itself performed this two-step process in deciding that New York's conflicts principles would result in an application of New York substantive law, and that under New York law mental anguish alone was a recognized cause of action. 388 F. Supp. at 1252.

[99] Article 28 of the Convention provides that

> [a]n action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Warsaw Convention, *supra* note 3, art. 28, § 1, 49 Stat. at 3020, 137 L.N.T.S. at 27–29. For an analysis of Article 28 see Lowenfeld I, *supra* note 3, at 522–26.

[100] *See* Lowenfeld I, *supra* note 3, at 583–86.

[101] *See* 388 F. Supp. at 1252–53.

[102] *See* note 67 *supra* and accompanying text.

[103] *See* 34 N.Y.2d at 398–99, 314 N.E.2d at 856, 358 N.Y.S.2d at 108. *See also* Lowenfeld I, *supra* note 3, at 499–500; note 6 *supra* and accompanying text.

[104] *See* 34 N.Y.2d at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 109–10.

alternative would have the virtues of simplicity and uniformity of application as the Convention dictates, but it would deprive plaintiffs of a cause of action ordinarily maintainable under the otherwise applicable substantive law.[105] Whichever way the issue is ultimately resolved, the outcome may have far-reaching ramifications with respect to the differing legal interests and rights of air passengers and carriers alike.

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[105] *See* 388 F. Supp. at 1251. The *Husserl* court disagreed with the *Rosman* and *Burnett* decisions, which had disallowed claims for mental anguish, stating its belief that

> mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action. To hold otherwise . . . would not only create confusing problems of proof but also limit the effectiveness of the Warsaw system in achieving its purpose.

Id.