Brooklyn Journal of International Law

Volume 2 | Issue 1 Article 6

1975

CASE COMMENT: *Rosman v. Trans World Airlines Inc.*

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Rosman v. Trans World Airlines, Inc.— The New York Court of Appeals relied on an English translation of Article 17 of the Warsaw Convention in holding that a passenger on a hijacked international flight must prove some objective bodily injury in order to recover damages for emotional harm.

The Federal Aviation Administration reported 159 hijackings of United States commercial airliners between January, 1961, and November, 1972;[1] the majority of these incidents occurred after 1967. Passengers seeking recovery for harm suffered as the result of a hijacking frequently assert their claims against only the airline carrier since few hijackers are available for suit or possessed of adequate assets to satisfy a judgment.[2] Airline carriers are attractive defendants not only because of the extent and accessability of their assets, but also because they are held to a standard of absolute liability for injuries sustained by passengers on international flights under both the Warsaw Convention, officially known as "Convention for the Unification of Certain Rules Relating to International Transportation by Air,"[3] and its subsequent modification, the Montreal Agreement.[4]

Most lawsuits arising out of hijacking incidents have been brought by passengers who, although not subjected to physical impact, have suffered emotional harm. When a hijacking occurs on an international flight, any successful legal action must fall within the purview of Article 17 of the Warsaw Convention. If United States courts construe Article 17 as precluding recovery for purely emotional harm, then most hijack victims are faced with the awesome task of proving the carrier's negligence under the law of the appropriate jurisdiction.

I. BACKGROUND: THE WARSAW CONVENTION

The Warsaw Convention, to which the United States ad-

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1. N.Y. Times, Nov. 19, 1972, at 3, col. 1.

2. Of the 218 people involved in hijacking the 159 planes, 124 persons are fugitives, five were killed during the hijackings, three committed suicide, 44 have been convicted of air piracy or other charges in this country, five have been convicted of such charges abroad, 19 were acquitted or had hijacking charges dropped, and 16 are in mental institutions (footnote omitted).
Comment, 6 N.Y.U.J. INT'L L. & POL. 555 n.3 (1973).

3. *Done* Oct. 12, 1929, 49 Stat. 3000 (1935-36), T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

4. 31 Fed. Reg. 7302 (1966); 49 U.S.C. § 1502, note (1970).

hered in 1934,[5] outlines rules and regulations of international air travel for the dual purpose of effecting uniform liability among adherent nations and of limiting the potential liability of air carriers.[6] The former was intended to create predictability and the latter to encourage investment in the young and developing aviation industry.[7] The Convention created a rebuttable presumption of liability[8] on the part of air carriers engaged in international transportation for injuries or death to their passengers, subject to the defense of contributory negligence.[9] This liability was limited to $8,300 per passenger.[10]

Concomitant with the growth of the aviation industry was an increase in public dissatisfaction with the low limit on passenger recovery.[11] The United States' dissatisfaction culminated on November 15, 1965,[12] with notification to the world community of its intention to withdraw from the Convention six months thereafter.[13] In order to avoid this imminent withdrawal, an international diplomatic conference produced the 1966 Montreal Agreement.[14]

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5. The declaration of adherence of the United States was deposited in Warsaw, Poland, on July 31, 1934. 49 Stat. 3000 (1935-36).

6. Eck v. United Arab Airlines, 15 N.Y.2d 53, 59, 203 N.E.2d 640, 642, 255 N.Y.S.2d 249, 252 (1964).

7. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-500 (1967).

8. The English translation of art. 20, para. 1, provides:

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

49 Stat. 3014, 3019 (1935-36), 49 U.S.C. § 1502, note (1970) [hereinafter cited as the English translation]. Criteria of liability are set forth in Article 17. *See* text accompanying notes 63-65 *infra*.

9. The English translation of art. 21 provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

10. The English translation of Warsaw Convention, art. 22, para. 1, provides:

> In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. [$8,300].

11. Lowenfeld & Mendelsohn, *supra* note 7, at 504, 545-46.

12. 53 DEP'T STATE BULL. 923 (1965).

13. The English translation of Warsaw Convention, art. 39, para. 2, states:

> Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

14. 31 Fed. Reg. 7302 (1966); 49 U.S.C. § 1502, note (1970).

The Montreal Agreement retained all but two of the provisions of the Warsaw Convention. The monetary limitation of $8,300 was raised to $75,000. In addition, all defenses under Article 20(1)[15] of the Warsaw Convention were waived, thus replacing the presumption of liability with absolute liability.[16]

Judicial application of the absolute liability standard has been inconsistent. Cases such as *Rosman v. Trans World Airlines, Inc.*[17] exemplify the problems faced by a hijacked passenger who suffers emotional, as opposed to physical, injury. The New York Court of Appeals was called upon to decide whether the defendant airline's absolute liability for "de mort, de blessure, ou de toute autre lésion corporelle"[18] entitled plaintiffs to recover damages for purely psychic trauma suffered on board a hijacked aircraft.[19] The *Rosman* court's refusal to employ the official French text of the Warsaw Convention did not foster a consistent and dynamic approach to treaty interpretation. The court also failed to recognize the appropriateness of applying modern principles of tort liability.

II. The Rosman Case: Fact Pattern

On September 6, 1970, a Trans World Airlines [TWA] 707 was hijacked en route from Tel Aviv to New York City by members of the self-styled Popular Front for the Liberation of Palestine.[20] As passengers on this aborted flight, the plaintiffs in *Rosman* were held captive in the desert for six days. None of the plaintiffs were actually struck. They were, however, subjected to extreme temperatures, confined for long hours in their seats, and placed in continual fear for their lives; they claimed to have suffered severe emotional anguish in addition to relatively minor physical ailments.[21]

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15. *See* note 8 *supra*.

16. 1 L. Kreindler, Aviation Accident Law § 12A.01 (1971).

17. 40 App. Div. 2d 963, 338 N.Y.S.2d 664 (1st Dep't 1972), *rev'd*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974) [hereinafter cited as *Rosman*], *consolidated on appeal with* Herman v. Trans World Airlines, Inc., 69 Misc. 2d 642, 330 N.Y.S.2d 829 (Sup. Ct.), *rev'd* 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (2d Dep't 1972), *rev'd* 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974) [hereinafter cited as *Herman*].

18. Warsaw Convention, art. 17. This phrase has been unofficially translated as "death or wounding . . . or any other bodily injury . . . ." 49 Stat. 3014, 3018 (1935-36). *See* text accompanying notes 63-65 *infra* (for both the authorized French text and unofficial English translation of Article 17 in its entirety).

19. 34 N.Y.2d at 388, 314 N.E.2d at 849, 358 N.Y.S.2d at 99.

20. *Id.*, 314 N.E.2d at 850, 358 N.Y.S.2d at 100.

21. *Id.* at 388-89, 314 N.E.2d at 850, 358 N.Y.S.2d at 100-01. Edith Rosman alleged

On September 25, 1971, Edith Rosman and her two minor children brought a personal injury action against TWA.[22] There was no allegation of negligence;[23] the claim was predicated on the liability provisions of the Warsaw Convention, as modified by the absolute liability provisions of the Montreal Agreement.

Plaintiffs moved for summary judgment on the issue of liability and the Supreme Court, New York County, granted the motion.[24] The Appellate Division, First Department,[25] reversed the lower court on the ground that "a triable issue of fact" was presented as to the precise meaning of the official French text of Article 17 of the Warsaw Convention,[26] which concerned the liability of the carrier. The Court of Appeals reversed the First Department and affirmed the holding of the trial court that liability could be determined as a matter of law. Although plaintiffs were granted summary judgment,[27] the decision has been described as a mere "Pyrrhic victory"[28] since the court held that physical injury must be present before emotional injury is compensable.[29]

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that as a result of the experience she had become extremely nervous, tense, and depressed. She also claimed to have developed a backache, swollen feet, and discoloration of her legs and back. Her daughters claimed to have developed boils and skin irritations, as well as the same mental injuries. *Id.*

22. In addition, Edith Rosman's husband, Eliezer Rosman, sued in his representative and derivative capacities for medical expenses and loss of services. *Id.* at 388 n.1, 314 N.E.2d at 850 n.1, 358 N.Y.S.2d at 100 n.1.

23. Although the Rosmans brought their claim under the absolute liability provision of the Warsaw Convention, they also had a potential cause of action grounded in negligence under New York law.

24. The New York Supreme Court, in granting summary judgment to the plaintiffs in both *Rosman* and *Herman*, concluded that there were no triable issues of fact as to defendants' liability, but directed hearings as to the amount of damages for both physical injuries and psychic trauma.

25. The appellate division reversed the lower court decisions in both *Rosman* and *Herman* and found that triable issues of fact were presented as to the precise meaning of the French text of Article 17.

26. *See* text accompanying note 63 *infra* (for Article 17 in the original French).

27. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

28. Kreindler, *Hijacking and Emotional Trauma*, 171 N.Y.L.J. no. 120, 1, 3, col. 5 (1974).

29. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974). The order of the supreme court granting summary judgment to the plaintiffs on the issue of liability was reinstated. The case was remitted for trial on the issue of damages which were limited to

> palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.

Id. at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 110.

III. METHODS OF TREATY INTERPRETATION

A fundamental problem facing the *Rosman* court was the choice of an appropriate approach to treaty interpretation.[30] The Warsaw Convention was written in one official language, French.[31] English was never an authorized language, and the United States adhered to the French version. According to the American Law Institute's *Restatement (Second) of Foreign Relations Law of the United States*,

> [t]he extent to which an international agreement creates, changes or defines relationships under international law is determined in case of doubt by the interpretation of the agreement. The primary object of interpretation is to ascertain the meaning intended by the parties *for the terms in which the agreement is expressed*, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in light of all relevant factors.[32]

The court referred to this section of the *Restatement* in its opinion, but ignored its directives in reaching a decision.[33] By using a translation rather than the original French text, the court acted contrary to generally accepted international and American theories of treaty interpretation.[34] Unless a translation is an authorized text, it can never be a fair substitute for the original text of a treaty.[35]

The two major schools of treaty interpretation are textualism and contextualism. The former focuses on the treaty and the "ordinary meaning" of its terms while the latter focuses on the

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30. *See generally* Draft Convention on the Law of Treaties, 29 AM. J. INT'L L. 653 (Supp. 1935).

31. Warsaw Convention, art. 36.

32. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 146 (1965) (emphasis added).

33. After quoting from the RESTATEMENT, the court stated that,

> [t]he parties agree that the translation of Article 17 contained at 49 Stat. 3018 is accurate and we will refer therefore to the English terms.

34 N.Y.2d at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 106. The fact that the parties agreed upon the use of an English translation should not have been accepted as conclusive by the court. *See* text accompanying note 39 *infra*.

34. *See generally* Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323 (1968); Fitzmaurice, Vae Victis *or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?*, 65 AM. J. INT'L L. 358 (1971); Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. INT'L L. 72 (1961).

35. *See* Todok v. Union State Bank, 281 U.S. 449 (1930).

treaty and all related material, including working drafts.

The Vienna Convention on the Law of Treaties[36] adopted the textual approach to treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[37] Determining the "ordinary meaning" of a word in one's own language is problematic, but the task becomes formidable when the treaty is in a foreign language. The only article in the Vienna Convention offering guidelines is Article 33, which simply provides: "A version of the treaty in a language other than one of those in which the text is authenticated shall be considered an authentic text only if the treaty so provides or the parties [*i.e.*, the signatories] so agree."[38] The plaintiff and defendant in *Rosman* mutually agreed upon an English translation of Article 17,[39] which the court too readily adopted. Such mutual agreement did not confer upon the court the authority to rely upon an unofficial translation which was not endorsed by the signatories, any more than consent to jurisdiction by both parties would confer jurisdiction on a court. Although the textual approach to treaty interpretation is not an absolute rule of law, its application by the *Rosman* court would have been appropriate as it would have compelled the court to refer to the original text.

Although it was rejected by the drafters of the Vienna Convention, the contextual approach to treaty interpretation[40] is the most widely accepted technique in the United States.[41] Myres S. McDougal has reaffirmed a characterization of this approach which was made forty years ago:

> A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the

36. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as Vienna Convention]. The text of Vienna Convention may also be found at 8 INT'L LEG. MAT'S 679 (1969); 63 AM. J. INT'L L. 875 (1969).

37. Vienna Convention, art. 31.

38. *Id.*, art. 33.

39. 34 N.Y.2d at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 106.

40. *See generally* M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND THE WORLD PUBLIC ORDER 50 (1967).

41. *See generally* articles cited note 34 *supra*. Although the *Rosman* court adopted neither the contextual nor the textual approach, the United States District Court for the Southern District of New York considered the contextual approach to be part of New York law. Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238 (S.D.N.Y. 1975).

> treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty intended to serve.[42]

To contextualists, language is merely one indication of meaning;[43] to textualists, language is paramount. However, despite the theoretical variances between the two schools both firmly believe that what must be interpreted is the treaty in its original language.

The use of an English translation of the Warsaw Convention by the *Rosman* court clearly negated the well-accepted and sound theories of both the textual and contextual methods of treaty interpretation. Its failure to take cognizance of the original French text represents a regression in the uniform and logical development of treaty interpretation. By examining the treaty in the official French text, the court could have reached the same decision and, more importantly, would have preserved a legally sound methodology. It is this judicial lapse of methodology which undermines *Rosman*.

IV. The Right to Recover for Psychic Trauma

Mental injuries, like physical injuries, can be debilitating and can result in substantial economic loss.[44] Judicial acknowledgement in the United States of a legal right to be compensated for mental injuries may be historically linked to the development by modern medicine of techniques to not only identify mental distress but also to establish a causal relationship between emotional disturbance and physical injury.[45] Courts and juries recog-

42. McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality* Redivivus, 61 Am. J. Int'l L. 992, 999-1000 (1967), *quoting* Draft Convention on the Law of Treaties, art. 19(a), 29 Am. J. Int'l L. 653, 937 (Supp. 1935).

43. Larsen, *The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement*, 61 Am. J. Int'l L. 496 (1967). The words become the axis around which the whole wheel of language, intent, and subsequent events involves." *Id.* at 512.

44. *See* Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922); Note, *The Right to Mental Security*, 16 U. Fla. L. Rev. 540 (1964). *See also* Hargis v. Knoxville Power Co., 175 N.C. 31, 94 S.E. 702 (1917).

45. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 (1944); Note, *supra* note 44.

nized that any serious injury to the body is likely to have a concomitant effect on the mental state of the victim, but recovery for mental distress was granted only when physical injury was demonstrated to exist.[46] In the late nineteenth century, cases such as *Mitchell v. Rochester Railway Co.*[47] and *Spade v. Lynn & Boston Railroad Co.*[48] established the rule that in order to recover for mental distress there had to be an "impact." This theory was defined by a Georgia court to mean that "the right to recover for a mental condition induced by the tortious act of another is dependent upon the existence of a physical injury."[49]

The impact rule was consistent with three practical problems regarding compensation for psychic trauma: determining appropriate damages, identifying valid claims, and avoiding a potential flood of litigation. The main concern was the prevention of false claims.[50] Yet when a physical injury was not apparent, the courts strained to find an impact when circumstances compelled them to compensate a victim for obvious mental suffering.[51] *Zelinsky v. Chimics*[52] exemplifies this judicial maneuvering. Apparently feeling that the plaintiff's claim that she suffered from a serious nervous disorder was genuine, the court construed the "jarring and jostling" of a minor automobile accident as the requisite impact to justify recovery of damages for subsequent mental injuries.[53] As Dean Prosser has stated:

> The only valid objection against recovery . . . is the danger of vexatious suits and fictitious claims . . . . It is entirely possible

46. Authorities cited note 50 *infra*.

47. 151 N.Y. 107, 45 N.E. 354 (1896).

48. 168 Mass. 285, 47 N.E. 88 (1897).

49. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680, 681 (1928).

50. *See, e.g.*, Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958); Brisboise v. Kansas City Pub. Serv. Co., 303 S.W.2d 619 (Mo. 1957); Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897). *See also* 13 U. MIAMI L. REV. 370 (1966); 39 TEMP. L.Q. 229 (1966).

51. Porter v. Delaware, Lackawanna & W.R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eye); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (a jolt); Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945) (a jolt). An extreme example may be found in *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928). The court found that there was sufficient physical impact when the defendant's horse, during a circus performance, "evacuated his bowels" onto plaintiff's lap and allowed recovery for the resultant "embarrassment, mortification, and mental pain and suffering." *Id.*, 144 S.E. at 681.

52. 196 Pa. Super. 312, 175 A.2d 351 (1961).

53. *Id.* Mrs. Zelinsky testified that "she did not sustain any physical injuries in the accident other than the nervous condition." *Id.* at 314, 175 A.2d at 352. Mr. Zelinsky, who also sued for injury in the form of a neurosis, testified that "[t]here were no cuts on his body as a result of the accident and he *wasn't physically* hurt." *Id.* (emphasis added).

> to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case.[54]

Under the impact theory, courts were able to calculate compensation for purely mental elements of injuries which included physical impact.[55] Since the law could provide a remedy for mental injury which was preceded by physical injury, it was eventually recognized that the law should provide a remedy when mental injury occurs alone. The very courts which established the arbitrary "impact" rule to distinguish between real and false claims have subsequently discarded the doctrine.[56]

The fear that courts would be flooded with litigation if purely mental injuries were compensable has not been supported by subsequent experience.[57] The genuineness of any claim, whether it be a stiff neck from an automobile accident or a psychoneurosis from a hijacking experience, must be legally established before damages will flow.[58] Interposed between the plaintiff and recovery are principles of tort law and requirements of evidence. Plaintiff must show a duty owed and breached, causation, and damages. The practice of denying valid claims for fear of potentially fraudulent ones was discarded as illogical and unjust by the New York Court of Appeals in *Battalla v. State*.[59] The court observed that such an argument

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54. W. PROSSER, LAW OF TORTS 328 (4th ed. 1971).

55. *See, e.g.*, Baltimore & O.R.R. v. McBride, 36 F.2d 841 (6th Cir. 1930); Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); Canning v. Inhabitants of Williamstown, 55 Mass. (1 Cush.) 451 (1848). A pre-existing tendency toward an illness which the incident in question may exacerbate will not, and has not, precluded assessment of damages. The problems posed by this situation relate to the extent of plaintiff's recovery, not defendant's liability. *See* Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176 (1974).

56. *See* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970), *overruling* Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

57. *See* Gulf, C & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900).

58. [R]ecovery for emotional harm to one subjected directly to the tortious act may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a "guarantee of genuineness" to which the court referred in the *Ferrara* case . . . .

Johnson v. State, 37 N.Y.2d 378, 383-84, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 643 (1975), *quoting* Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 1000 (1958).

59. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

> from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.[60]

If there is a substantial wrong, an injured party should have the right to bring an action.[61]

The *Rosman* court failed to reconcile its interpretation of the Warsaw Convention with the growth in recognition of the right to recover for purely psychic trauma. Although the impact rule is obsolete in New York,[62] the *Rosman* court chose to revive it.

V. Rationale for the Rosman Decision

In the *Rosman* case, the issue of whether a passenger of a hijacked aircraft could recover against the air carrier for psychic trauma alone depended upon the court's interpretation of Article 17 of the Warsaw Convention.

> Le transporteur est responsable du dommage survenue en case de mort, de blessure, ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes operations d'embarquement et de débarquement.[63]

The English translation, which was considered by the parties in *Rosman* to be accurate but which is of no binding force since French is the only authoritative language of the Convention,[64] is as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[65]

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60. *Id.* at 241, 176 N.E.2d at 731, 219 N.Y.S.2d at 37, *quoting* Green v. T.A. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909).

61. *Id.* at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.

62. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). In a recent case, *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975), the court held that the daughter of a patient in a State hospital could recover for anxiety neurosis suffered as a direct result of her receipt of a telegram negligently sent by the hospital misinforming her of the death of her mother who was in fact alive and well.

63. The French text is the only text with official, binding status. Warsaw Convention, art. 36.

64. *See* text accompanying note 31 *supra*.

65. 49 Stat. at 3018.

A. *Significance of the French Text of the Warsaw Convention*

The threshold question in *Rosman* was the significance, if any, of the official French text of the Warsaw Convention. The court cited the holding in *Block v. Compagnie Nationale Air France*[66] that "the binding meaning of the terms of the Convention is the French legal meaning";[67] however, the *Rosman* court did not refer to the French legal system for an interpretation of the legal significance of the terms at issue (*i.e.*, "de mort, de blessure, ou de toute autre lésion corporelle"). Rather, the court indicated that the English translation would suffice, based upon both the agreement of the parties and the court's finding that the translation was accurate.[68]

The use of a translated version of a treaty is contrary to recognized principles of treaty interpretation. The *Rosman* court stated that it was "aware"[69] of the Supreme Court's holding in *Todok v. Union State Bank*[70] that "where the text of a treaty is drawn in only one language, that language is controlling."[71] *Todok* exemplifies the questionable value of translations in a situation similar to that in *Rosman*. The only official text of the treaty under consideration in *Todok* was in French and both parties agreed that the English translation was accurate. The legal connotations of the terms at issue, however, raised several questions which led the Supreme Court to rely on the original French text in order to reach a decision.[72]

The *Rosman* court, faced with the same predicament, inexplicably acted contrary to the principle laid down in *Todok* and thus negated the effect of an important affirmative decision made by the drafters and signatories of the Warsaw Convention in stipulating that the only official text of the Convention would be in the French language.[73] As emphasized by Drion, "in legal think-

66. 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

67. *Id.* at 330.

68. 34 N.Y.2d at 396, 314 N.E.2d at 855, 358 N.Y.S.2d at 106.

69. *Id.* at 392, 314 N.E.2d at 852, 358 N.Y.S.2d at 103.

70. 281 U.S. 449 (1930).

71. *Id.* at 454.

72. The French phrase "fonds et biens" has been translated as "goods and effects." At common law "goods" did not include real estate, while at civil law "biens" did. Judicial decisions in the United States generally interpret "goods and effects" to include real estate. The *Todok* Court did the same and, in applying the civil law concept of "goods and effects," it thus relied upon the actual French rather than upon a translation. *Id.*

73. Warsaw Convention, art. 36.

ing even more than in other matters, choice of a language implies a choice of approach. The mere using of the English language sets its stamp on the way of one's legal thinking."[74] Accordingly, the deliberate selection of the French language set its personal stamp upon the Convention.

There is even compelling evidence that the English translation selected by the parties in *Rosman* was inaccurate. Although the parties agreed to a translation equating "lésion corporelle" with "bodily injury," the formal Notice of Denunciation of Warsaw which the United States sent to Poland in 1965 referred to the Article 17 liability of the airlines as including "death or *personal* injury," not "*bodily* injury."

> The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or *personal* injury provided in the Warsaw Convention.[75]

"Personal injury" suggests inclusion of psychic trauma, while "bodily injury" may not. Clearly, uniformity of interpretation is doomed if courts use unofficial translations of the text of treaties. The use of an English translation, especially when the decision turned on the nuances of a particular phrase, greatly minimizes the value of the *Rosman* decision.

B. *Cause of Action and its Relationship to Local Law*

The Warsaw Convention does not create a cause of action;[76] Article 17 merely creates a presumption of liability and leaves to local law the determination of whether a justiciable claim exists.[77] *McMahon v. United States*[78] defined a cause of action as "a legal wrong, the thing which becomes a ground for suit."[79] The Convention "does not 'exclusively regulate' the relationship between passenger and carrier on an international flight, but rather sets limits

74. D. BILLYOU, AIR LAW 1 (2d ed. 1964) *quoting* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL LAW vii (1954).

75. 53 DEP'T STATE BULL. at 924 (emphasis added).

76. Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); Komlos v. Campagnie Nationale Air France, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954).

77. 34 N.Y.2d at 398, 314 N.E.2d at 856, 358 N.Y.S.2d at 108. *See* cases cited note 76 *supra*.

78. 186 F.2d 227 (3d Cir. 1950), *aff'd*, 342 U.S. 25 (1951).

79. *Id.* at 230.

on and renders uniform certain of the aspects of that relationship."[80]

The *Rosman* court recognized that the Warsaw Convention specifically defers to the law of the forum in questions of contributory negligence,[81] procedure,[82] the method of determining the statute of limitations,[83] and the standard of willful misconduct.[84] By refusing to give recognition to the significance of local law and to extend its application to the area of liability for mental injuries, the court lost an opportunity to foster a consistent and dynamic interpretation of the Warsaw Convention. Justification for this approach can be found in the observation of Andreas F. Lowenfeld, Chairman of the United States Delegation to the Montreal Conference, that definition of the terms "blessure" and "de toute autre lésion corporelle" in Article 17 is an area which the Convention left to local law.[85] Contemporary cases demonstrate that local New York law includes recovery for purely mental injuries. This approach was suggested in Judge Hopkins' dissent in *Herman v. Trans World Airlines, Inc.*:[86]

> It is not without significance that at the time of execution [of the Montreal Agreement] in 1966 the holding in *Battalla v. State of New York*, permitting recovery for fright without physical impact, had been in existence since 1961 and that, indeed, as Judge Burke in *Battalla* pointed out, damages for emotional disturbance were then allowed in England and in a majority of American jurisdictions.[87]

The majority opinion in *Rosman* contains an inherent con-

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80. Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

81. Warsaw Convention, art. 21. *See* note 9 *supra*.

82. The English translation of Warsaw Convention, art. 28, para. 2 provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted."

83. The English translation of Warsaw Convention, art. 29, para. 2 provides that "[t]he method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted."

84. The English translation of Warsaw Convention, art. 25, para. 1 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.

85. Lowenfeld, *Hijacking, Warsaw and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. 346, 347 (1972).

86. 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (2d Dep't 1972).

87. *Id.* at 852-53, 337 N.Y.S.2d at 831 (citations omitted).

tradiction. The court recognized the principle that the Warsaw Convention does not create a cause of action, but instead defers to local law.[88] The court then acknowledged that local law provided a cause of action for purely psychic trauma[89] but refused to allow recovery on that cause of action on the ground that it was not provided for in the Warsaw Convention.[90]

C. *The Spirit of the Warsaw Convention*

The *Rosman* court justified its refusal to interpret the Warsaw Convention according to its French legal meaning by stating 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."[91] However, in the court's attempt to construe the key phrases in the unofficial English translation, it stated that: "[w]e deal with the term as used in an international agreement written almost fifty years ago."[92] One wonders what were the court's points of reference: French law or English law? Fifty years ago or today?

This internal contradiction in *Rosman* undermines not only the holding but also any hope for uniformity, as has subsequently become apparent in a contrary holding by the United States District Court for the Southern District of New York in *Husserl v. Swiss Air Transportation Co.*[93] [hereinafter referred to as *Husserl II*]. This case involved facts similar to those in *Rosman* and a claim for recovery for mental anguish and fright under the same Article of the Warsaw Convention. In his first opinion [hereinafter referred to as *Husserl I*],[94] Judge Tyler denied defendant's motion for summary judgment and dismissal of the complaint on the ground that a hijacking is an "accident" within the meaning of the Convention. The judge added: "I must confess to having some difficulty reading [Article 17 of] the Warsaw Convention to permit recovery for mental anguish and suffering alone."[95] Citing Judge Tyler's dictum as support, the *Rosman*

88. 34 N.Y.2d at 398, 314 N.E.2d at 856, 358 N.Y.S.2d at 108. *See* cases cited in note 76 *supra*.

89. 34 N.Y.2d at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107.

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

91. *Id.* at 394, 314 N.E.2d at 853, 358 N.Y.S.2d at 105.

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

93. 388 F. Supp. 1238 (S.D.N.Y. 1975).

94. 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

95. *Id.* at 708.

court precluded recovery for purely psychic trauma.[96]

In *Husserl II*, subsequent to *Rosman*, a new motion by defendant carrier for summary judgment and dismissal of the complaint was heard by Judge Tyler.[97] In addition to denying the motion, Judge Tyler stated that, "[t]o the extent those courts' [*e.g.*, *Rosman*] citations of that opinion [*Husserl I*] indicated some small reliance on this court's dictum concerning the phrase at issue, I proffer my apologies."[98] His reevaluation was founded on alternative propositions: that "the drafters [of Article 17] believed that the phrase at issue comprehended all personal injuries involving the organic functioning of a human being,"[99] or that they "neglected to consider injuries not comprehended by the phrase."[100]

> If they intended the former, Article 17 should be interpreted to comprehend mental and psychosomatic injuries. If they had no specific intention, Article 17 should be interpreted in the manner most likely to effect the purposes of the Convention.[101]

This leaves one question: what is the Convention's purpose? Fortunately, *Eck v. United Arab Airlines*[102] answered that question more than a decade before these decisions.

> The purposes were to provide uniform rules of limitation concerning the liability of international air carriers to their passengers and to provide a uniform remedy for these passengers to the extent that this remedy would not burden the carrier more than the Convention provisions allowed.[103]

Therefore, if the Convention's language is construed broadly, as Judge Tyler suggests, it would encompass all injuries not specifically barred[104] and create uniform liability. Judge Tyler also dis-

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96. 34 N.Y.2d at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 110.
97. 388 F. Supp. 1238.
98. *Id.* at 1251.
99. *Id.* at 1248.
100. *Id.*
101. *Id.*
102. 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).
103. *Id.* at 59, 203 N.E.2d at 642, 255 N.Y.S.2d at 252.
104. 388 F. Supp. at 1250.

> To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17.

Id.

cussed the application of local law to the cause of action. He held that to the extent that *Battalla* provides a cause of action for such emotional injuries, plaintiff can recover if he successfully meets the requirements of modern tort liability: duty, breach, proximate cause, and damages.[105]

Husserl II, like *Rosman*, did not apply accepted principles of treaty interpretation in that Judge Tyler also relied on the English translation of the Warsaw Convention.[106] Even though the *Husserl II* opinion reaches a conclusion more consistent with modern principles of tort liability[107] than did *Rosman*, its methodological inadequacies limit its contribution to international jurisprudence.

VI. CONCLUSION

"The least one can ask of an opinion is that it illuminate the situation and add to our comprehension of the direction in which we are being pulled. . . . To be less is simply to add to chaos, to increase the noise."[108] The *Rosman* decision, as well as *Husserl II*, failed to meet this standard of clarity. *Rosman* not only refused to recognize the applicability and appropriateness of modern tort liability but also ignored fundamental, well-reasoned principles of treaty interpretation in relying on an unauthorized text in its determination of the meaning of Article 17 of the Warsaw Convention. These two decisions leave future victims at the mercy of both the hijackers and the courts.

Jacalyn Fischer Barnett

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105. *Id.* at 1252.

106. *Id.* at 1245.

107. *See* text accompanying note 57 *supra*.

108. Larsen, *Between Scylla & Charybdis in Treaty Interpretation*, 63 AM. J. INT'L L. 108, 110 (1969).