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TREATMENT OF POSTTRAUMATIC STRESS DISORDER CLAIMS UNDER THE WARSAW CONVENTION

DON G. RUSHING*
WILLIAM D. JANICKI**

I. INTRODUCTION

FOR THREE-QUARTERS of a century, the liability of air carriers for accidents causing bodily injury that occur during international air transportation has been governed by a treaty known as the Warsaw Convention. The limits of air carrier liability for bodily injury under Article 17 of the Convention are outlined in a series of important Supreme Court decisions that define the terms “accident” and “bodily injury” and declare the Convention the sole remedy for injuries occurring in international air transportation. Lower court decisions have further defined the limits of recovery for bodily injury under the Convention.

* B.S., United States Air Force Academy, 1970; M.B.A., University of Southern California, 1973; J.D., University of California, Los Angeles, 1978. He is a member of the American Board of Trial Advocates, a certified civil trial advocate of the National Board of Trial Advocacy, and a member of the International Association of Defense Counsel. He is a partner in the San Diego office of Morrison & Foerster LLP. Mr. Rushing’s trial practice focuses on the defense of aviation, product liability, and toxic tort cases.

** B.S., United States Air Force Academy, 1989; M.S., Massachusetts Institute of Technology, 1991; J.D., McGeorge School of Law, 2001. He is a former U.S. Air Force KC-10 pilot. He is an associate in the Sacramento office of Morrison & Foerster LLP. Mr. Janicki’s practice focuses on the defense of aviation and product liability cases and intellectual property litigation.


Recently, these U.S. courts have been confronted with claims under the Warsaw Convention that a psychological disorder known as Posttraumatic Stress Disorder (PTSD) constitutes "bodily injury" within the meaning of Article 17. These claims are fed by developments in medicine's understanding of physiological changes to the body related to PTSD.

This paper briefly reviews the psychosophical history of psychosomatic disorders and the history of the development of PTSD as a diagnostic category of psychological disorders. We review the development of the definition of "bodily injury" under Article 17 of the Convention and analyze the judicial treatment of PTSD claims under United States case law. The paper concludes with a discussion of potential changes to air carrier liability for PTSD claims as a result of the recent entry into force of the Montreal Convention on November 4, 2003, replacing the air carrier liability framework of the Warsaw Convention.

II. PSYCHOSOMATIC DISORDERS AND PTSD

A. PSYCHOSOMATIC DISORDERS – THE MIND/BODY DICHOTOMY

The view that there is a separation in the human person between the mind and the body dates from the history of Western thought to Platonic dualism. Plato's dualist theory holds that there are actually two different worlds: the physical world of appearances and the higher world of intelligible Forms. For Plato, human beings live in a visible world of the sensible or physical and the invisible world of the intelligible or abstract. This Platonic dualism was carried forward into a similar separation in the human person between mind and body.

Early Judeo-Christian writings recognized a division between the physical and spiritual aspects of man. For example, Biblical

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3 "Psychosomatic medicine is an area of scientific investigation concerned with the relation between psychological factors and physiological phenomena in general and disease pathogenesis in particular." 2 BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1765 (7th ed. 2000).


6 Id.

7 Id.
stories of Job’s mental and physical trials to test his faithfulness, Jesus’s exorcism of spirits from the physical being of the tormented, and Paul’s writings to the first-century Christian churches teaching the distinction between the body and the spirit stand witness to the general acceptance of the notion of a conceptual divide between the realms of the body and the mind. The early Christian church fathers continued this dualistic view of the world. Augustine of Hippo’s Confessions traced his own movement from a life focused on the physical and the temptation of the flesh to a life focused on the spiritual and the contemplation of the divine. Thomas Aquinas believed that man’s spirit and natural body were distinguishable, but were twin aspects of a united whole, with the soul representing man’s basic nature, and the body composing man’s matter.

In the 17th Century, René Descartes gave dualism and the mind-body dichotomy a renewed impetus. Descartes argued that reality is made up exclusively of spirit and matter, and that these two substances meet only in the human soul. Descartes acknowledged that when the mind and body interacted, this interaction of affective states caused bodily conditions that were “somatic.”

Sigmund Freud’s psychoanalytic formulations and theories began to define the interaction between human mental and physical conditions. Freud confirmed the role of psychological factors in causing and determining physical manifestations, such as conversion reactions resulting in paralysis and blindness. Protégés of Freud, such as Sandor Ferenczi, applied the notion of confirmed conversion phenomenon to the autonomic nervous system and used Freud’s theory to explain such diseases as ulcerative colitis. Over time, these theories developed to describe the integration of the mind and body as an interactive whole. Walter Cannon, for example, was one of the first scien-

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8 Job 30:16-31 (King James).
9 See, e.g., Mark 5:1-17 (King James).
10 See, e.g., 1 Corinthians 15 (King James).
12 TARNAS, supra note 5, at 182.
13 Id. at 276.
14 Id. at 278; Theodore M. Brown, Cartesian Dualism and Psychosomatics, 30 Psychosomatics 322 (1989).
15 SADOCK, supra note 3, at 1766-67.
16 Id. at 1766.
17 Id.
tists to demonstrate the physiological effects of emotional states and to study the influence of the autonomic nervous system in modulating such responses.\textsuperscript{18} Although there is no generally accepted theoretical framework for a neurobiological basis for human emotion, neurobiological research may someday provide an integrated theory that emotion is comprised of bioelectrical signals in the brain that are mediated by chemical neurotransmitters.\textsuperscript{19}

Modern medicine has attempted, through psychosomatic-psychobiological research, to delineate the mechanisms by which experiences, although causing no immediate physical injury, cause certain types of physiological reactions that result in disease states.\textsuperscript{20} Physical correlates of human emotional responses in the form of activation of the sympathetic and parasympathetic nervous systems, including adrenergic and adrenocortical responses that cause the release of powerful hormones in the body, are well documented in the medical literature.\textsuperscript{21} The human body’s physical response to the over-activation of these systems, from exposure to extreme stress, can include hypertension, coronary artery disease, gastrointestinal conditions, and psychoneuroimmunological responses.\textsuperscript{22}

Historically, short-term and long-term psychological and physiological responses to life-threatening events producing extreme stress have not been well understood. However, severe psychological stressors that include traumatic events, such as violent assaults, serious accidents and combat situations, are now viewed as having the potential to cause a diagnosable disorder called Posttraumatic Stress Disorder.

B. PTSD – Characterization and Diagnosis

Following a severe trauma, any number of psychiatric illnesses may develop.\textsuperscript{23} One of these illnesses is Posttraumatic Stress Disorder (PTSD), first introduced into the official classification of psychiatric disorders in 1980.\textsuperscript{24} The American Psychiatric Association’s (APA) third Diagnostic and Statistical Manual of

\textsuperscript{18} Id.


\textsuperscript{20} Sadock, supra note 3, at 1769.

\textsuperscript{21} Id. at 1770.

\textsuperscript{22} Id. at 1770-74.

\textsuperscript{23} See generally L. Keiser, The Traumatic Neurosis 42 (1968).

\textsuperscript{24} Id. at 198-99.
Mental Disorders (DSM-III) included, for the first time, a diagnosis for PTSD: a mental disturbance that originates in response to an overwhelming encounter with severe trauma. This marked the beginning of serious contemporary research on the psychiatric and physiologic response to traumatic events.

Despite the relatively recent classification of PTSD as a mental disorder, stress reactions to trauma are not a newly recognized phenomenon. The effects of extreme stress have been chronicled for centuries. The psychological effects of war on combatants have been documented as far back as the American Revolutionary War. A substantial number of veterans from the World Wars, the Korean Conflict, and the Vietnam Conflict have experienced psychological symptoms that medicine has characterized as "shell shock," "combat fatigue," and "stress reaction." The APA's first Diagnostic and Statistical Manual of Mental Disorders in 1952 (DSM-I) included the classification of gross stress reaction, compelled by the prevalence of war-related psychiatric disease. While recognizing that exposure to extreme stress may induce significant psychological distress, the DSM-I did not provide operational criteria for formulating a gross stress reaction diagnosis.

In the mid-1970s, the observation of a large number of combat-related stress disorders in Vietnam veterans prompted increased awareness and analysis of psychological problems arising in the wake of traumatic experiences. The resulting research led investigators to postulate that there was a common pattern of psychic reaction to traumatic events, and that a method of categorization was needed. When PTSD was finally

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27 Id. (citing Dr. Benjamin Rush, Results of Observation, 7 London Med. J. 77, 79 (1786) (reporting on soldiers returning from battle in apparent good health later experiencing "fevers," "sleeplessness," and "convulsions").)
30 Id.
31 Post-Traumatic Stress Disorder: Psychological and Biological Sequelae 60 (Bessel A. Van Der Kolk ed., 1984).
incorporated into DSM-III in 1980, for the first time, there were distinct diagnostic criteria for trauma-related stress disorder.\textsuperscript{33}

The current diagnostic features for PTSD are contained in the APA's fourth Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR):

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness or horror (or in children the response must involve disorganized or agitated behavior) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B); persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C); and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than one month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).\textsuperscript{34}

There are several key aspects to the required diagnostic features for PTSD that directly bear on the ability of passengers to recover damages for "bodily injury" under Article 17 of the Warsaw Convention. First, an essential feature of the disorder is "development of characteristic symptoms following exposure.\textsuperscript{35} The DSM-IV criteria explicitly recognize that symptoms follow exposure to trauma, and do not occur contemporaneously with exposure.\textsuperscript{36} Second, the diagnosis is based on a "person's response to the event" and must involve "intense fear, helplessness, or horror."\textsuperscript{37} The diagnostic criteria speak in terms of response to psychological stressors, and do not require an observable physical injury as a predicate to diagnosis of the disor-

\textsuperscript{33} Id.
\textsuperscript{34} Diagnostic and Statistical Manual of Mental Disorders § 309.81, 463-65 (4th ed. 2000).
\textsuperscript{35} Id. at 463.
\textsuperscript{36} See id.
\textsuperscript{37} Id.
der. Third, the characteristic symptoms resulting from the traumatic event include "persistent reexperiencing," "persistent avoidance of stimuli," and "persistent symptoms of increased arousal," that must be present for more than a month. This group of symptoms involves delayed psychological response to a traumatic event—an important consideration in determining whether PTSD may constitute a "bodily injury" under the Warsaw Convention.

III. DEVELOPMENT OF THE DEFINITION OF "BODILY INJURY" UNDER THE WARSAW CONVENTION

The Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, is the product of two international conferences—the first held in Paris in 1925 and the second in Warsaw in 1929. The Convention is an international agreement that governs the rights and responsibilities of passengers, shippers, and carriers in certain aspects of international air transportation. The document was drafted while the airline industry was still in its infancy and was designed to make it easier for carriers to obtain insurance and financial backing from investors by creating a uniform liability scheme, while balancing the interests of the passengers and the airlines. The Convention created a presumption of air carrier liability for personal injury but also contained strict limits on that liability.

Since the Warsaw Convention was opened for signature in 1929, it has been criticized for its severe monetary limitation on

38 Id.
39 Id.
40 Warsaw Convention, supra note 1.
42 Warsaw Convention, supra note 1.
43 In re Korean Air Lines, 932 F.2d 1475, 1484 (D.C. Cir. 1991) (citing E. Airlines Inc., v. Floyd, 499 U.S. 530, 546 (1991)) ("[T]he contracting states in 1929 believed that limitations on liability would promote the development of the fledgling commercial air industry by allowing the airlines to predict their exposure to monetary damages and thereby obtain needed capital and adequate insurance coverage.")
44 Floyd, 499 U.S. at 546.
the amount of a carrier's liability to injured passengers. This criticism has resulted in several amendments and private carrier agreements to raise or remove limits on carrier liability. These modifications include the Hague Protocol of 1955, the Montreal Inter-carrier Agreement of 1966, the Guatemala City Protocol of 1971, the Montreal Protocols of 1975, and the Inter-carrier Agreements of 1997. Each of these modifications sought to improve passenger recovery under the Convention and expand carrier liability. After decades of effort by the United States to expand carrier liability, the seventy-year-old Warsaw Convention ultimately was replaced by the Montreal Convention, which eliminated limitations on carrier liability. While the monetary limits on passenger recovery for wounding, death, or other bodily injury have increased over time or been eliminated altogether, the conditions under which an international air carrier may be held liable have remained largely unchanged.

A. Article 17 of the Warsaw Convention – The Conditions for Liability

The cause of action for wounding, death, or other bodily injury created by the Warsaw Convention is set forth in Article 17. Article 17 in the original French text reads as follows:

Le transporteur est responsable du dommage survenu en cas 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 opérations d'embarquement et de débarquement.

The English translation of the authentic French text, as ratified by the United States Senate in 1934, provides:

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

\[45\] Id. (providing for an initial maximum for recovery of $8,300 for an accident).

\[46\] For a discussion of the history of modifications to the liability limits of the Warsaw Convention, see 1 LEE S. KREINDLER, AVIATION ACCIDENT LITIGATION §10.02 (1994).

\[47\] Id.

\[48\] Montreal Convention, supra note 4.

\[49\] Warsaw Convention, supra note 1, at art. 17(1). The only authentic text of the Convention is in the French language. See Air Fr. v. Saks, 470 U.S. at 392, 397 (1985).
so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{50}

Thus, under Article 17, an air carrier is liable for passenger injury only when three conditions are satisfied: (1) there has been an accident in which, (2) the passenger suffered bodily injury, and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking.\textsuperscript{51}

B. THE SUPREME COURT'S WARSAW CONVENTION TRILOGY

1. Air France v. Saks – The "Accident" Requirement

The Supreme Court first developed a framework for interpreting the meaning of Article 17 in \textit{Air France v. Saks}, in construing the meaning of the term "accident."\textsuperscript{52} The Supreme Court began with an analysis of the authentic French text of the treaty and the context in which the written words were used.\textsuperscript{53} The Court then went on to consider the history of the treaty, the negotiations among the representatives, and the practical construction adopted by the parties in order to give the words of the treaty a meaning consistent with the shared expectations of the contracting parties.\textsuperscript{54} Under this framework, the Supreme Court determined that an "accident" occurs when a passenger's injury is "caused by an unexpected or unusual event or happening that is external to the passenger"\textsuperscript{55} and not from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."\textsuperscript{56}

2. Eastern Airlines, Inc. v. Floyd – The "Physical Injury" Requirement

Six years later, the Supreme Court considered the meaning of the term "lésion corporelle" in Article 17, parsing the meaning of the phrase "autre lésion corporelle subie par un voyageur," translated into English as "other bodily injury suffered by a passenger."\textsuperscript{57} In 1991, the Supreme Court granted certiorari in \textit{Eastern Airlines, Inc. v. Floyd} to resolve a conflict between lower

\textsuperscript{50} Warsaw Convention, \textit{supra} note 1, at art. 17(1).
\textsuperscript{52} 470 U.S. 392, 395 (1985).
\textsuperscript{53} \textit{Id.} at 398-400.
\textsuperscript{54} \textit{Id.} at 400-03.
\textsuperscript{55} \textit{Id.} at 405.
\textsuperscript{56} \textit{Id.} at 406.
courts on whether purely psychic trauma is compensable under Article 17 as a "bodily injury."\textsuperscript{58} The Supreme Court held that "Article 17 does not allow recovery for purely mental injuries."\textsuperscript{59}

In \textit{Floyd}, an Eastern Airlines flight, en route from Miami to the Bahamas, lost its three engines shortly after takeoff.\textsuperscript{60} The crew announced the plane would be ditched in the ocean, but then managed to restart one engine and land the plane safely at Miami.\textsuperscript{61} As a consequence of this ordeal, multiple plaintiffs alleged severe and permanent mental pain and anguish and sought recovery under Article 17.\textsuperscript{62}

Following the analytical structure developed in \textit{Saks}, the Supreme Court first considered the legal meaning of the term "lésion corporelle" by reference to bilingual French-English dictionaries, French legislation, French judicial decisions, French legal treatises and scholarly writing covering the period leading up to the Warsaw Convention.\textsuperscript{63} None of these materials indicated that "lésion corporelle" should be translated other than "bodily injury," thus excluding purely psychic injury.\textsuperscript{64} However, because a broader interpretation of "lésion corporelle" was plausible, and the term is both ambiguous and difficult to interpret, the Court looked to additional sources.\textsuperscript{65}

The Court next considered the negotiating history of the Convention and Article 17 in particular.\textsuperscript{66} The initial proposal for Article 17, offered at Paris in 1925, contained broad language holding carriers liable for an accident.\textsuperscript{67} This language was narrowed by adding the phrase "in the event of the death or wounding of a passenger or any other bodily injury" to the final version drafted in 1929.\textsuperscript{68} The Court concluded that it was reasonable to infer that the narrow language was adopted to limit the types of recoverable injuries.\textsuperscript{69} Furthermore, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time the Warsaw Convention

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 534.
\item \textsuperscript{60} Id. at 533.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. at 535-42.
\item \textsuperscript{64} Id. at 542.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 543-44.
\item \textsuperscript{69} Id. at 543.
\end{itemize}
\end{footnotesize}
was signed persuaded the Court that the signatories had no specific intent to include such a remedy in the Convention. A narrow reading of the term "lésion corporelle," excluding purely mental injury, is also consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. The Supreme Court concluded "that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury." The Court specifically declined to decide "whether passengers can recover for mental injuries that are accompanied by physical injuries." The Court’s concluding remarks, taken in combination with the exercise of judicial restraint in declining to decide an issue not squarely presented by the case before it, spawned inconsistent lower court decisions concerning the ability of claimants to recover damages for emotional injury accompanying but not caused by physical injury. Uncertainty about whether passengers can recover for mental injuries accompanied but not caused by physical injuries or for mental injuries that are accompanied by physical manifestations, largely was removed by the Supreme Court’s decision in El Al Israel Airlines, Ltd. v. Tseng.

3. El Al Israel Airlines, Ltd. v. Tseng – The “Exclusive Remedy” Limitation

In El Al Israel Airlines, Ltd. v. Tseng, the Supreme Court considered whether Article 17 provides the exclusive remedy for passenger injuries, thereby precluding state law claims. The plaintiff in Tseng was subjected to an intrusive security search prior to boarding an El Al Israel Airlines flight from New York to Tel Aviv. The plaintiff alleged psychic or psychosomatic injuries, but no bodily injury. The Court found that the Convention precludes an action under local law when a passenger’s claim fails to satisfy Article 17’s conditions for liability because

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70 Id. at 544-45.
71 Id. at 546.
72 Id. at 552.
73 Id.
75 Id. at 156.
76 Id. at 155.
77 Id.
either it entails no “bodily injury” or was not the result of an “accident.”

In *dicta*, the Supreme Court stated that even if an accident occurred, Tseng would be unable to recover under the treaty because “she sustained no ‘bodily injury’ and could not gain compensation under Article 17 for her solely psychic or psychosomatic injuries.” The injuries claimed by Tseng included “headaches, upset stomach, ringing in the ears, nervousness and sleeplessness” as a consequence of a search carried out by security officers. These injuries were physical manifestations of emotional injury. The Supreme Court noted its own “physical manifestation of injury” language in *Floyd*, but did not disturb the district court’s finding that these injuries simply did not constitute “bodily injury” under Article 17 of the convention.

C. LOWER COURT DECISIONS CONSIDERING EMOTIONAL INJURY RECOVERY

Since the Supreme Court’s trio of decisions in *Saks*, *Floyd*, and *Tseng*, the lower courts have been consistent in finding no liability under Article 17 for emotional injury when an accident has not caused a passenger to suffer a physical injury, but inconsistent in finding liability when emotional injury accompanies an actual physical injury, but is not caused by it, or when emotional injury is manifested in physical injury.

1. Emotional Injury Absent Physical Injury

Following the Supreme Court’s holding in *Floyd*, courts generally have found that emotional injury to a passenger without physical injury is not actionable under Article 17. For example, in *Fishman v. Delta Airlines, Inc.*, the plaintiff attempted to assert purely emotional distress claims under state law in order to avoid the bar to such claims under Article 17 of the Warsaw Convention.

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78 *Id.* at 160.
79 *Id.* at 172.
81 *Id.* at 158.
82 *Tseng*, 525 U.S. at 171.
83 *Tseng*, 919 F. Supp. at 160.
The Fishman case arose out of an incident aboard a Delta Airlines flight from Tel Aviv to New York with a stopover in Paris. During descent into Paris, one of plaintiff's children experienced ear pain. A flight attendant suggested that a cup containing a warm cloth be placed over the child's ear to relieve the pain. When the suggestion was followed and the cup was placed over the child's ear, scalding water dripped on the child's neck and shoulder, causing burns. The mother filed suit against Delta Airlines under New York law for negligent and intentional infliction of emotional distress and on an implied cause of action under a federal aviation regulation requiring the maintenance of first-aid kits for the protection of airline passengers.

Because the case was decided before the Supreme Court's decision in Tseng was handed down, the Second Circuit first was required to consider whether Article 17 of the Warsaw Convention preempted state or federal law claims not based upon the treaty. The court concluded that the emotional harm claims of the plaintiff were subject to Article 17 because the claims arose from an accident in the course of international air transport. The court then relied upon the Supreme Court's holding in Floyd and its own holding in Tseng v. El Al Israel Airlines, Ltd. to find that the plaintiff could not recover for purely emotional distress.

In Croucher v. Worldwide Flight Servs., Inc., in an effort to take the claims out of the ambit of the Warsaw Convention, a plaintiff attempted to attribute her emotional distress claims to a cleaning crew's negligence before an international flight. A passenger traveling onboard Korean Airlines from Newark to Seoul came in contact with an air sickness bag containing fluid left in the bag from a passenger on a previous flight. The minimal amount of fluid left in the air sickness bag was tested in Korea.

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85 132 F.3d 138, 141 (2d Cir. 1998).
86 Id. at 140.
87 Id.
88 Id.
89 Id.
90 Id. at 141.
91 Id.
92 Id. at 142.
93 Id. (citing Tseng v. El Al Isr. Airlines, 122 F.3d 99, 103 (2d Cir. 1997)).
94 Fishman, 132 F.3d at 142.
96 Id.
for the presence of human immunovirus (HIV) and Hepatitis B virus (HBV) and was found to be negative.\textsuperscript{97} The passenger was tested for HIV and HBV on a series of occasions thereafter with negative results.\textsuperscript{98} Nevertheless, the passenger sued the airline for negligence in the ground-handling services in failing to clean the cabin and clear waste.\textsuperscript{99} Although there was no physical injury, the plaintiff claimed severe emotional distress and mental anxiety.\textsuperscript{100}

In ruling on a summary judgment motion, the court determined that the plaintiff's exposure to waste in the air sickness bag was the result of services provided by a carrier pursuant to Article 1(2) of the Warsaw Convention and that the incident occurred onboard the aircraft during an international flight.\textsuperscript{101} The court, relying on Floyd, then determined that plaintiff's emotional distress and anxiety failed to constitute a "bodily injury" within the meaning of Article 17.\textsuperscript{102} Therefore, the court granted summary judgment in favor of the airline.\textsuperscript{103}

An effort to style emotional distress damages as "inconvenience" damages in order to avoid the "bodily injury" definition of Article 17 was unsuccessful in Lee v. American Airlines, Inc.\textsuperscript{104} In that case, the carrier brought a motion for partial summary judgment in a putative class action brought by the plaintiff on behalf of himself and others similarly situated who were ticketed on an international flight from New York's JFK International Airport to London's Heathrow International Airport.\textsuperscript{105} Departure was delayed, and ultimately canceled, placing the passengers in very inconvenient and uncomfortable circumstances.\textsuperscript{106} The claim, brought under Article 19 of the Warsaw Convention for damages occasioned by delay in the transportation of air passengers, asserted damages to the plaintiff for his "inconvenience" in being "trapped in a 'holding area' without adequate food, water, and restroom facilities," "being forced to spend the night in substandard, dirty and unsafe motels," "being subjected to repeated misrepresentations . . . by [the airline's] agents and

\textsuperscript{97} Id.  
\textsuperscript{98} Id.  
\textsuperscript{99} Id.  
\textsuperscript{100} Id. at 502.  
\textsuperscript{101} Id. at 506.  
\textsuperscript{102} Id. at 506-07 (citing E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991)).  
\textsuperscript{103} Id. at 507.  
\textsuperscript{105} Id. at *1.  
\textsuperscript{106} Id.
representatives,” “being required . . . to obtain alternative means of transportation,” and “loss of a refreshing and memorable vacation.”

The airline argued that the plaintiff’s “inconvenience” damages were not damages for delay under Article 19 at all, but rather disguised claims for emotional distress that were not permitted under Article 17. Plaintiff acknowledged that damages for emotional distress, absent physical injury, were not available under the Warsaw Convention but argued that the damages he was seeking to recover were quantifiable and were a type of economic loss recoverable under Article 19. The court analyzed plaintiff’s “inconvenience” damages pleaded in the complaint and determined that they fell under the rubric of “mental injuries.”

The type of damages pleaded was not easily quantifiable and did not result in real economic losses, but rather in mental anguish. After re-characterizing the plaintiff’s damages as non-economic in nature, the court granted the motion for summary judgment in favor of the airline, relying on the Floyd decision.

Thus, cases asserting a right to recover under the Warsaw Convention for emotional injuries, absent a physical injury, have been rejected by courts since the Supreme Court’s decision in Floyd, irrespective of the plaintiffs’ characterization of the claims.

2. Emotional Injury Accompanied by Physical Injury or Manifested in Physical Injury

After Floyd, courts have not been nearly as uniform in deciding cases where a passenger alleges emotional injury as a result of an accident occurring in international air travel and has either alleged a companion physical injury that is not the cause of the emotional injury, or has alleged physical injury as a manifestation of emotional injury. Most cases decided after Floyd require that the emotional injury be the product of the physical injury for the emotional damages to be recoverable. A few cases require only a predicate physical injury or manifestation of a physical injury in order for such damages to be recoverable.

107 Id. at *3.
108 Id.
109 Id.
110 Id. at *4.
111 Id.
112 Id. at *5.
a. Majority View – Emotional Injury Flowing from Physical Injury

The majority of courts following *Floyd* have found that recovery for emotional injury is permitted only if it “flows from” a bodily injury.\(^{113}\) This position was initially articulated in *Jack v. Trans World Airlines*, \(^{114}\) a case decided by the Northern District of California three years after *Floyd*. In *Jack*, passengers suffered minor physical injuries and emotional distress following an aborted takeoff and subsequent evacuation of a Trans World Airlines flight.\(^{115}\) The district court considered several approaches to the question of whether the plaintiffs could hold the carrier liable under the Warsaw Convention for mental injuries that were not caused by bodily injuries.\(^{116}\) The *Jack* court concluded on summary judgment that damages for emotional distress are allowed only for distress that flows from a bodily injury, reasoning that it would prevent inequities among the passengers, in that “[t]he happenstance of getting scratched on the way down the evacuation slide [did] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash.”\(^{117}\) Under this approach, a plaintiff can recover for emotional distress caused by and flowing from a physical injury, but not for the emotional distress caused by and flowing from the accident itself.\(^{118}\)

In *Rothschild v. Tower Air, Inc.*, the Eastern District of Pennsylvania considered this issue in the context of a post-trial motion.\(^{119}\) Rothschild, a passenger on a flight from Tel Aviv to New York, received a puncture wound to her right index finder from a hypodermic needle when she reached into the magazine pouch adjacent to her seat.\(^{120}\) The plaintiff’s husband also


\(^{114}\) 854 F. Supp. 654, 668 (N.D. Cal. 1994). The *Jack* decision is generally identified as the mainstream view on this issue. See Ehrlich v. Am. Airlines, 360 F.3d 366, 376 (2d Cir. 2004); see also *In re Air Crash at Little Rock*, 291 F.3d at 509.

\(^{115}\) *Jack*, 854 F. Supp. at 657.

\(^{116}\) Id. at 665.

\(^{117}\) Id. at 668.

\(^{118}\) Id.


\(^{120}\) Id.
claimed loss of consortium damages.\textsuperscript{121} The jury returned a verdict in favor of the plaintiff in the amount of $10,000, but in favor of the defendants on the husband’s loss of consortium claim.\textsuperscript{122} In post-trial motions, the plaintiff contended that the court erred in granting defendants’ motion\textit{ in limine} to preclude her from introducing any testimony concerning her fear of contracting AIDS or Hepatitis from the needle prick.\textsuperscript{123}

The court, relying on \textit{Floyd}, stated that passengers may not recover for purely emotion injuries but may only recover for mental injuries that are accompanied by physical injuries.\textsuperscript{124} The court noted that while Ms. Rothschild suffered a physical injury, the needle prick, she was not entitled to recover for all emotional distress that occurred as a result, but only the emotional distress related to and flowing from her physical injury.\textsuperscript{125} The court noted that any emotional distress related to fear of contracting AIDS or Hepatitis was unrelated to the needle prick because she could not show any exposure to those diseases and permitting a recovery under these circumstances would be purely speculative.\textsuperscript{126}

A year later, the Southern District of New York considered this issue in \textit{Longo v. Air France} on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the plaintiff’s claims for mental injury.\textsuperscript{127} The Longos were traveling aboard Air France on their honeymoon and were ticketed round-trip between New York and Tahiti.\textsuperscript{128} The Air France aircraft on which they were traveling landed long and skidded off the runway into the ocean.\textsuperscript{129} All of the passengers evacuated into the water by emergency slides.\textsuperscript{130} Ms. Longo bruised her thigh during the landing and stepped on a sea urchin during evacuation.\textsuperscript{131} Mr. Longo bruised his knee during the evacuation.\textsuperscript{132} Both alleged they

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at *2.
\textsuperscript{126} Id.

\textsuperscript{128} Id. at *1.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
suffered mental injuries in that they were apprehensive of death before the crash and were later afraid to fly.\footnote{Id.}

Citing Floyd, the district court held that Article 17 of the Convention “did not allow recovery for purely mental injuries because” such “injuries were not encompassed in the term bodily injury.”\footnote{Id. at *2.} The court carefully parsed the language of Floyd that appeared to leave open the question whether emotional distress is compensable under Article 17 if accompanied by bodily injury.\footnote{Id. (citing E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991)).} The court noted that the Longos had alleged mental injury that, although accompanied by physical injury, was unrelated to the physical injury—mental distress that flowed from their fear of death during the crash and continued fear of flying—and not emotional injuries related to their physical injuries.\footnote{Id. at *1.} The court noted that the Longos had alleged mental injury that, although accompanied by physical injury, was unrelated to the physical injury—mental distress that flowed from their fear of death during the crash and continued fear of flying—and not emotional injuries related to their physical injuries.\footnote{Id. see also Wencelius v. Air Fr. Inc., No. SACV95-359-AHS, 1996 WL 866122, at *1, (C.D. Cal. Feb. 29, 1996) (holding that the plaintiff's claims for emotional distress were limited to damages caused by physical injuries, while claims for any other emotional distress, including those from the accident itself, were dismissed).}

The Northern District of California next examined this issue in Hermano v. United Airlines.\footnote{No. C-99-0105-SI, 1999 WL 1269187, at *1-3 (N.D. Cal. Dec. 21, 1999).} The court granted summary judgment in favor of the airline in a situation where a Brazilian citizen and resident of the United States boarded a United Airlines flight in Los Angeles with the intent to fly to Miami to connect with another flight to Brazil.\footnote{Id. at *1, *6.} The plaintiff checked four parcels that contained some motorcycle parts.\footnote{Id. at *1.} After boarding and before departure, an airline official approached the plaintiff and asked if he was carrying a firearm in his checked baggage.\footnote{Id.} After he replied, “no,” Hermano was taken off of the airplane, brought to the ticket counter, and had his luggage re-\footnote{Id.} x-rayed.\footnote{Id.} When it became clear that the plaintiff’s luggage did not contain a gun, the airline apologized, and the plaintiff was booked on an alternative flight to Miami.\footnote{Id.} There, he joined his flight to Brazil and arrived on schedule with his luggage and without further delay.\footnote{Id.} The plaintiff filed suit against United
Airlines alleging damages for unlawful arrest and detention, defamation, and negligent infliction of emotional distress.\textsuperscript{144}

The court noted that Hermano's only recovery must be under the Warsaw Convention, citing Tseng.\textsuperscript{145} The court then noted that under Floyd and Article 17, air carriers may not be liable for emotional or psychological injuries under the Warsaw Convention's Article 17.\textsuperscript{146} Brushing aside plaintiff's arguments that symptoms stemming from his emotional distress included physical manifestations of injury, such as headaches, nausea, panic attacks, trembling, and palpitations, the court found that these symptoms did not qualify as a physical injury under Article 17 of the Warsaw Convention.\textsuperscript{147}

The court focused on the language of the district court decision in Tseng v. El Al Israel Airlines, noting that the claims of the plaintiff in that case included headache, upset stomach, ringing in her ears, nervousness and sleeplessness as a consequence of the search carried out by a security officer.\textsuperscript{148} The Tseng court acknowledged that the Floyd court had said that "physical manifestations of injury" may be a type of compensable injury, but the Hermano Court pointed out that the Supreme Court in Tseng had interpreted that same language to not disturb the lower "court's finding that the plaintiff's injuries did not constitute 'bodily injury' under the Convention."\textsuperscript{149} From this, the Hermano court concluded that the plaintiff could not bring a claim for these kinds of injuries under the Convention.\textsuperscript{150}

Circuit courts that have considered this issue consistently have required that emotional injuries flow from a physical injury to be compensable under the Convention. In Carey v. United Airlines,\textsuperscript{151} the Ninth Circuit considered such an emotional injury claim based on later physical manifestations in an appeal of an order granting the airline's motion for summary judgment. The plaintiff argued that his physical manifestations of nausea, cramps, perspiration, nervousness, tension, and sleeplessness, which resulted from a confrontation with a flight attendant, con-

\textsuperscript{144} Id.
\textsuperscript{145} Id. at *3 (citing El Al Isr. Airlines v. Tseng, 525 U.S. 155, 161 (1999)).
\textsuperscript{146} Id. at *4.
\textsuperscript{147} Id.
\textsuperscript{148} Id. (citing Tseng v. El Al Isr. Airlines, 919 F. Supp. 155, 157 (S.D.N.Y. 1996)).
\textsuperscript{149} Id. (citing Tseng, 525 U.S. at 176).
\textsuperscript{150} Id.
\textsuperscript{151} 255 F.3d 1044, 1045-46 (9th Cir. 2001).
stituted a bodily injury.\textsuperscript{152} The Ninth Circuit held that physical manifestations of emotional and mental distress do not satisfy the "bodily injury" requirement in Article 17.\textsuperscript{153}

Recently, the Second Circuit expressed a similar view regarding emotional injury in \textit{Ehrlich v. American Airlines}.\textsuperscript{154} In \textit{Ehrlich}, an American Airlines flight landed at New York's JFK International Airport at a high rate of speed and overran the end of the runway.\textsuperscript{155} An arrestor bed abruptly stopped the plane from plunging off the end of the runway into Thurston Bay.\textsuperscript{156} The plaintiffs claimed to suffer bodily and mental injuries during the course of the overrun landing and ensuing evacuation.\textsuperscript{157}

Following the framework of \textit{Saks, Floyd}, and \textit{Tseng}, the \textit{Ehrlich} court conducted a thorough examination of the text of the Warsaw Convention, the negotiations that led to the adoption of the treaty, the goals its provisions aim to address, French law, the opinions of sister Convention signatories, and the meaning attributed to Article 17 of the Convention by the Executive Branch.\textsuperscript{158} The court then stated, "[o]ur exhaustive examination of these sources leads us to conclude that a carrier may be held liable under Article 17 for mental injuries only if they are caused by bodily injuries."\textsuperscript{159} The \textit{Ehrlich} court specifically rejected the notion that emotional distress injuries that flow from an accident or that become manifest in physical injuries constitute a "bodily injury" under Article 17 of the Convention.\textsuperscript{160}

b. Minority View – Emotional Injury Accompanied by Physical Injury or Physical Manifestation

Some cases have found that emotional injury damages may be recoverable as long as they are accompanied by physical injuries. For example, the court in \textit{In re Aircrash Disaster Near Roselawn} relied upon language in \textit{Floyd}, expressing no view whether passengers can recover for mental injuries accompanied by physical injuries, and found that the physical injury of death allowed for

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Id.} at 1051.
  \item \textit{Id.} at 1051-52.
  \item 360 F.3d 366, 366-67 (2d Cir. 2004).
  \item \textit{Id.} at 367.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} 370-400.
  \item \textit{Id.} at 400.
  \item \textit{Id.} at 386-87.
\end{enumerate}
\end{footnotesize}
recovery of the mental injury of pre-death pain and suffering.\textsuperscript{161} The Roselawn court determined that a causal connection is only required between the damage sustained and the accident, thus dispensing with the necessity for a causal connection between the physical injury and the emotional injury.\textsuperscript{162}

Several district court cases deciding dispositive motions have found that the simple notice pleading of emotional injury accompanied by physical injury is sufficient to survive motions to dismiss for failure to state a claim, and that some evidence of such an injury is sufficient to survive motions for summary judgment. For example, in Chendrimada \textit{v.} Air-India, the court denied partial summary judgment to the air carrier in a case in which the passengers alleged physical injury and emotional injury as a result of confinement on an airplane for 11½ hours without food during a delay caused by heavy fog.\textsuperscript{163}

The air carrier moved for summary judgment, arguing that the plaintiffs' claims amounted to nothing more than emotional distress injuries that were not compensable under Article 17 of the Convention.\textsuperscript{164} In denying the summary judgment motion, the court focused on the Supreme Court's statement in \textit{Floyd} that it was not expressing a view whether passengers could recover for mental injuries accompanied by physical injuries.\textsuperscript{165} The Chendrimada court then raised the question whether the plaintiffs had adequately alleged a physical injury to prevent a summary judgment.\textsuperscript{166} The court concluded that it must accept the contention that a physical injury had occurred as a result of deprivation of food, based on a plaintiff's affidavit that he had become "weak, experienced nausea, suffered severe cramps, pain and anguish, and suffered malnutrition as well as mental injury."\textsuperscript{167}

\textsuperscript{161} \textit{In re} Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997).
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} 802 F. Supp. 1089, 1090 (S.D.N.Y. 1992) (noting that the aircraft was delayed for eleven and one half hours due to heavy fog during a stop in Delhi, India, on an international flight from New York to Bombay, India. The plaintiffs claimed that confinement by airline on the aircraft during the delay without food caused physical and emotional injury).
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 1091 (citing E. Airlines, Inc. \textit{v.} Floyd, 499 U.S. 530, 553 (1991)).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 1092; \textit{see also} Chukwu \textit{v.} Air Fr., 218 F. Supp. 2d. 979, 1983 (N.D. Ill. 2002) (denying motion to dismiss by airline where plaintiff alleged that airline deprived her of food and beverages during international flight and denied her access to a wheelchair to accommodate her apparent physical disability);
A few cases decided after a trial on the merits since *Floyd* have concluded that emotional distress accompanied by physical injury or manifesting in physical injury is sufficient to allow recovery of damages under Article 17. In *Gonzalez v. TACA International Airlines*, the court entered judgment after trial in favor of a plaintiff who, while on a flight from New Orleans to San Salvador, had the contents of a meal tray spilled on him, was served a beverage containing a small piece of plastic, and was forced to check carry-on luggage that contained his medications. In reviewing evidence presented by doctors for the plaintiff that his pre-existing critical coronary disease could be triggered by anxiety, and that the conditions to which he was exposed during the flight were the likely cause of his angina, the court awarded a nominal sum of damages for plaintiff's "bodily injury."

In ruling on post-trial motions, the court in *McCaskey v. Continental Airlines* concluded that, in the face of *Floyd* and *Tseng*, a physical injury is only a "gateway" requirement under Article 17 in order for emotional injury damages to be awarded. In *McCaskey*, a husband and wife flew on a Continental Airlines flight from Houston to Newark en route to their ultimate destination.

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Weinerth v. El Al Isr. Airlines, No. CV-97-6356, 1999 WL 718087, at *1 (E.D.N.Y. July 7, 1999) (denying motion to dismiss by airline where plaintiffs alleged that lost luggage contained medications, and the husband, who suffered from elevated blood sugar, alleged chest pains throughout the flight and required medical attention in Israel after the flight); Hunt v. TACA Int'l Airlines, Inc., No. Civ.A. 96-3064, 1997 WL 738594, at *1 (E.D. La. Nov. 17, 1997) (denying motion for summary judgment by airline where the plaintiff alleged injuries to his head and back during emergency landing which exacerbated his pre-existing posttraumatic stress disorder, sustained as a result of previous airline accident with the same defendant, and the onset of Creutzfeldt-Jakob disease from which plaintiff ultimately died). The medical evidence offered in support of these injuries created a genuine issue of material fact as to whether the plaintiff's mental distress related to physical manifestation of injuries.); Ratnaswamy v. Air Afrique, No. 95-C 7670, 1998 WL 111652, at *1, *3-4 (N.D. Ill. Mar. 3, 1998) (denying motion for partial summary judgment by airline in "bumping" incident in Darfur, Sudan, where plaintiffs alleged anxiety and distress with physical symptoms that included nausea, diarrhea, and fever caused by incident).

169 Id. at *3.
170 Id. at *3, *5.
of Frankfurt. During the flight from Houston to Newark, the husband experienced a stroke. The husband was taken off the plane in Newark and hospitalized. After recuperating for several weeks in the hospital, the husband died while returning to Tulsa by train.

The wife brought suit for the husband's physical injury and death and for her own emotional distress, arguing that the airline's failure to properly deal with her husband's stroke en route from Houston to Newark constituted an "accident," giving rise to damages under the Convention. The McCaskey court agreed that a reasonable finder of fact could conclude that the husband had suffered a physical injury aboard the aircraft as a result of an accident under Article 17. The court found that because the Warsaw Convention was a "pass-through," allowing the application of the law that would govern in the absence of the Warsaw Convention, the husband's injury was a sufficient "gateway" to "bodily injury" under Article 17 to allow the wife, who had not been physically injured, to recover for her own emotional injury where applicable state law allowed such a recovery.

Against the backdrop of these divergent views on when emotional injury damages may be recovered as a component of "bodily injury" under Article 17, several courts have considered claims specifically based upon PTSD.

IV. JUDICIAL ANALYSIS OF PTSD CLAIMS UNDER THE WARSAW CONVENTION

Since PTSD was first recognized in 1980 as a psychological disorder that can be isolated and diagnosed, legal and factual issues have emerged regarding the classification of the disorder as a "bodily injury" under Article 17. In an effort to satisfy the physical injury requirement established by Floyd, plaintiffs have claimed PTSD has led to physical symptoms such as nausea, cramps, weight loss, anxiety, increased heart rate, sleeplessness,

172 Id. at 565.
173 Id. at 566.
174 Id. at 568.
175 Id.
176 Id. at 568-72.
177 Id. at 574.
178 Id. at 576. In so finding, the McCaskey court did not require that either the husband or wife meet the threshold Article 17 requirement of a "bodily injury."
and headache. In these cases, recovery is often denied by courts that characterize these symptoms as a physical manifestation of emotional distress not compensable under the Warsaw Convention. More recently, plaintiffs have sought recovery for PTSD by claiming that PTSD is, itself, a physical injury causing changes to the architecture and function of the brain. Courts that have considered PTSD claims in this context generally either reject the theory that PTSD is, itself, a physical injury to the brain or conclude that there is no evidence to support a nexus between the plaintiff's symptoms and a brain injury. Both approaches result in analyzing PTSD claims as an emotional injury or as a physical manifestation of emotional injury. The greater weight of authority appears to follow the distinction drawn by the Supreme Court in Floyd and Tseng, and observed in the majority of lower court cases decided in their wake, that damages for emotional injury and physical manifestation of emotional injury are not recoverable under the Convention unless they flow from a physical injury. Thus, recovery for PTSD by a majority of courts would be allowed only to the extent that PTSD was the result of palpable and conspicuous physical injury to the body.

A. THE MAJORITY VIEW – PTSD AS EMOTIONAL INJURY

1. Terrafranca v. Virgin Atlantic Airways, Ltd.

The majority of courts confronted with PTSD claims framed in terms of physical symptoms have rejected these claims as physical manifestations of emotional distress. The Third Circuit in Terrafranca v. Virgin Atlantic Airways Ltd. was the first court of appeals to analyze a PTSD claim within the framework of Floyd. In Terrafranca, plaintiff learned of a bomb threat while traveling on an international flight to London, England, and


180 See, e.g., Terrafranca, 151 F.3d at 112.


182 See, e.g., In re Air Crash at Little Rock, Ark. on June 1, 1999, 291 F.3d 503, 511 (8th Cir. 2002); Bobian, 93 Fed. Appx. at 408; Ligeti v. British Airways, No. 00-Civ.- 2936, 2001 WL 1356238, at *5 (S.D.N.Y. Nov. 5, 2001).

183 49 AM. JUR. POF 2d Post-Traumatic Stress.

184 151 F.3d 108 (3d Cir. 1998).
subsequently claimed to suffer from PTSD complicated by anorexia. The plaintiff argued that her seventeen-pound weight loss was a physical manifestation of injury and therefore compensable under the Warsaw Convention.

Plaintiff relied upon the Supreme Court's conclusion in Floyd that "an air carrier cannot be liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury." In ruling on a summary judgment motion brought by the airline, the Third Circuit concluded that Floyd's "physical manifestation" language refers only to "bodily injury." The plaintiff's PTSD claim alleged a physical manifestation of an emotional injury and, therefore, was not compensable under the Convention. However, in Terrafranca, the Third Circuit was not confronted with allegations that PTSD was, itself, a physical injury to the brain.


The Southern District of New York considered a claim for PTSD in Alvarez v. American Airlines, Inc. The plaintiff alleged that he suffered slight bruising of his knees and buttocks and PTSD as a result of an emergency evacuation. Plaintiff alleged that PTSD is not purely a psychic injury, but also a physical injury, the physical manifestations of which include increased heart rate, elevated blood pressure, and disruptions to normal life as a result of changes in the brain and nervous system.

The district court considered the physical aspects of PTSD in ruling on a motion for summary judgment brought by the airline, but determined that the injury was a purely psychological or emotional injury. The court granted summary judgment, concluding that the physical manifestations of PTSD were not

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185 Id. at 109.
186 Id.
187 Id. at 111 (citing E.Airlines, Inc. v. Floyd, 499 U.S. 530, at 552 (1991)).
188 Id.
189 Id. at 112. The Third Circuit opinion in Terrafranca directly addressed differences in the way the Supreme Court expressed the holding in Floyd at 499 U.S. at 534, and dicta in the conclusion of that opinion at 499 U.S. at 552, concluding that the "imprecise dictum at the end of the opinion" meant that "the 'physical manifestation' language refers only to 'bodily injury.'" Terrafranca, 151 F.3d at 111.
191 Id. at *1.
192 Id.
193 Id. at *5.
proximately caused by the physical injury suffered by plaintiff during the accident.\textsuperscript{194}

On appeal, in a Rule 60(b)(1) motion, the plaintiffs urged that "PTSD is a physical, and not merely a psychological injury," citing an affidavit of a medical expert.\textsuperscript{195} The court noted that plaintiff's expert witness did not state that any relevant "physical changes" in plaintiff's brain or nervous system resulted from physical trauma suffered during the evacuation.\textsuperscript{196} The court reasoned that if physical manifestations of psychic distress, such as increased heart rate and elevated blood pressure, could support a recovery under the Convention, any passenger frightened by turbulence could recover, and the distinction between psychological and physical injuries would disappear.\textsuperscript{197} If that were the rule, the holding of Floyd that Article 17 does not allow recovery for purely psychological injuries would be converted into a mere pleading formality.\textsuperscript{198}

3. Turturro v. Continental Airlines

The Southern District of New York reached a similar result one year later. In Turturro v. Continental Airlines, the plaintiff alleged that she suffered from the physical injury of PTSD as a result of an airline employee's treatment of her when she asked to deplane prior to departure because of anxiety.\textsuperscript{199} The plaintiff alleged she suffered physical symptoms, including sweating, nausea, accelerated heartbeat, and stomach pain.\textsuperscript{200}

In ruling on a summary judgment motion brought by the airline, the district court found that these symptoms "arose solely from her emotional distress, as opposed to having an independent physical genesis in the accident itself," and granted the air-

\textsuperscript{194} Id. (The Alvarez court stated that:
[\textit{P}laintiffs have not claimed that the psychological and emotional injuries Alvarez has allegedly suffered . . . have been proximately caused by his physical injuries. To the contrary, the record shows that the trauma that has allegedly left Alvarez with post-traumatic stress disorder . . . is the evacuation of Flight 587, not the slight bruising of his knees and buttocks that accompanied the evacuation."

\textit{Id.} at *5.
\textsuperscript{196} Id. at *3.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 3.
\textsuperscript{200} Id. at 173-74.
line’s summary judgment motion. However, the Turturro court expressly acknowledged that, in recent lawsuits, victims of chronic PTSD have tendered evidence that the disorder constitutes a physical injury to the brain. “New technology has allowed doctors to perceive that extreme stress, such as a near-death experience or being taken hostage, can actually change brain cell structure and cause a specific area of the brain to atrophy.” Recovery was denied in Turturro because the plaintiff did not advance evidence of “either a brain-lesion theory of PTSD or individualized proof of such lesions.” The court stated that the plaintiff had not adequately pleaded PTSD as a bodily injury to survive a motion for summary judgment.

4. Ligeti v. British Airways

The Southern District of New York again considered a PTSD claim in Ligeti v. British Airways PLC. In this case, the plaintiff alleged she suffered from PTSD as a result of physical injuries to her side and elbow and her confinement in the lavatory during a period of turbulence. The district court noted that an accident victim’s PTSD can itself constitute a physical injury because it results in discernable physical changes to the structure of the brain, quoting its decision in Turturro and other cases for this proposition. However, the court ruled on summary judgment that plaintiff could not recover damages on the theory that PTSD is a bodily injury, because she failed to offer evidence that her brain underwent any physical changes as a result of the incident.

201 Id. at 178.
203 Turturro, 128 F. Supp. 2d at 178.
204 Id. at 179.
205 Id.
206 No. 00-Civ.-2936(FM), 2001 WL 1356238, at *1 (S.D.N.Y. Nov. 5, 2001).
207 Id. at *1-2.
208 Id. at *5 (citing Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190 (D. Mont. 1999)). The Ligeti decision was also filed on November 5, 2001, before Weaver was vacated on April 25, 2002. Weaver, 211 F. Supp. 2d at 1252.
5. In re Air Crash at Little Rock Arkansas

The Eighth Circuit considered a passenger’s claim that PTSD was a compensable injury under the Convention in In re Air Crash at Little Rock. An American Airlines flight crashed on the runway at Little Rock Airport, killing the pilot and ten passengers. The plaintiff survived the crash by crawling out of a burning hole in the wreckage. In the process, the plaintiff suffered smoke inhalation, deep cuts to her lower legs, injuries to her quadriceps, and was later diagnosed with PTSD. After a jury trial, the district court entered judgment in favor of the plaintiff on a $6.5 million jury verdict.

American Airlines moved for judgment notwithstanding the verdict, arguing that the plaintiff’s mental injuries, including PTSD, are not recoverable under the Warsaw Convention or, in the alternative, that if they are recoverable, they are recoverable only to the extent that they flow from physical injuries. The trial court allowed recovery for plaintiff’s PTSD based on three alternatives. First, the district court found that any physical injury is sufficient to trigger recovery for all emotional damages, regardless of the causal connection between the two. Second, the district court reasoned that the plaintiff adequately established a nexus between her physical injuries and her mental injuries sufficient to justify a $6.5 million verdict. Finally, the court offered the position that PTSD was itself a physical injury to the brain within the meaning of Warsaw, allowing for complete recovery.

On appeal, the Eighth Circuit considered both the majority position regarding mental injuries expressed by the Northern District of California in Jack and the minority position expressed

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210 In re Air Crash at Little Rock, Ark., on June 1, 1999, 291 F.3d 503, 506 (8th Cir. 2002).
211 Id. at 506.
213 In re Air Crash at Little Rock, Ark., 291 F.3d at 507.
214 Id. at 508.
215 Id. at 509.
216 Little Rock, 118 F. Supp. 2d at 925.
217 Id.
218 Id.
219 Id. at 924-25. The Little Rock decision by the district court was filed on October 27, 2000, before Weaver was vacated on April 25, 2002. Weaver v. Delta Airlines, Inc., 211 F. Supp. 2d 1252 (D. Mont. 2002).
by the Northern District of Illinois in *Roselawn*.\(^{220}\) The Eighth Circuit became the first circuit court to adopt the approach articulated in *Jack* that damages for mental injuries under the Warsaw Convention must proximately flow from physical injuries caused by the accident.\(^{221}\) The Eighth Circuit reversed in part the district court's decision, and found that the plaintiff is allowed recovery for mental injuries, including PTSD, only to the extent the emotional damages "flow from" or are caused by the injuries to her legs and smoke inhalation.\(^{222}\) The circuit court rejected the notion that the plaintiff established a sufficient nexus between her relatively insignificant physical injuries and her very significant mental injuries.\(^{223}\) The court also rejected the plaintiff's contention that PTSD itself was a physical injury to the brain.\(^{224}\) The court noted that there was a complete lack of proof that the plaintiff suffered changes to her brain as a result of chronic PTSD.\(^{225}\) No brain imaging was conducted, and no blood tests were performed to establish that the plaintiff experienced any damage to her brain.\(^{226}\) The symptoms of disrupted sleep, inability to concentrate, and flashbacks were not adequate to establish a physical change to the plaintiff's brain.\(^{227}\)

6. Bobian v. CSA Czech Airlines

The Third Circuit again considered a claim for PTSD under the Warsaw Convention in *Bobian v. CSA Czech Airlines* where plaintiffs alleged they suffered from PTSD after flying through forty-five minutes of severe turbulence associated with a hurricane.\(^{228}\) Unlike *Terrafrance*, the plaintiffs characterized PTSD as a physical injury to brain "cells as a result of the excessive release of excitatory neurotransmitters that produce a local excitotoxic reaction and over-abundant release of glucocorticoids."\(^{229}\) These biochemical releases, which occur during extreme stress, were

\(^{220}\) In re Air Crash at Little Rock, Ark., 291 F.3d at 509-11 (adopting the reasoning in *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 665 (N.D. Cal. 1994), and rejecting the holding in *In re Aircrash Disaster Near Roselawn, Ind.*, 954 F. Supp. 175, 178-79 (N.D. Ill. 1997)).

\(^{221}\) Id. at 509-10.

\(^{222}\) Id. at 506, 511.

\(^{223}\) Id. at 511.

\(^{224}\) Id.

\(^{225}\) Id.

\(^{226}\) Id.

\(^{227}\) Id.


\(^{229}\) Id. at 407.
alleged to physically damage and kill cells within the brain, resulting in physical destruction (atrophy) of portions of the hippocampus.\textsuperscript{230}

Despite this expert testimony, the Third Circuit upheld a grant of summary judgment by the district court in favor of the airline, finding that it was bound by their decision in \textit{Terrafranca}, which specifically rejected PTSD as a Warsaw Convention-compensable injury.\textsuperscript{231} Although \textit{Terrafranca} did not concern a claim that PTSD was, itself, a physical injury, the \textit{Bobian} court reasoned that the relationship between the physical and emotional dimensions of human existence was well known to the drafters of the Warsaw Convention, who nonetheless required "lésion corporelle."\textsuperscript{232} In the Third Circuit's view, the "plaintiffs' position on [PTSD] would abolish the requirement for a palpable and conspicuous physical injury, [which] can only be done by a change to the language of the Convention."\textsuperscript{233} Further, the Court noted that none of the plaintiffs had "brought forward cognizable evidence that his or her brain changed physically from an earlier state."\textsuperscript{234}

\section*{B. The Minority View – PTSD as Bodily Injury}

\subsection*{1. Weaver v. Delta Airlines}

The only case that appears to have explicitly found that PTSD constitutes a physical injury to the brain, thus allowing recovery of damages for bodily injury under Article 17, is \textit{Weaver v. Delta Airlines, Inc.}\textsuperscript{235} In \textit{Weaver}, the plaintiff suffered from chronic PTSD as a result of an emergency landing due to a mechanical malfunction.\textsuperscript{236} Plaintiff alleged that her PTSD was a physical injury for purposes of the Warsaw Convention and attached several articles from scientific journals and expert reports in support of his allegations.\textsuperscript{237} Weaver argued that recent medical evidence demonstrates "that extreme stress causes actual physi-

\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.} at 408.
\textsuperscript{232} \textit{Id.} at 407-08.
\textsuperscript{233} \textit{Id.} at 408.
\textsuperscript{234} \textit{Id.}
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.} at 1190-91.
cal brain damage,” such as “physical destruction or atrophy of portions of the hippocampus.”

The district court held that Weaver’s chronic PTSD was a “bodily injury” for purposes of the Convention. The court stated that this claim was distinguishable from previous cases denying recovery because Weaver’s claim was presented as a physical injury supported by “recent scientific research explaining that [PTSD] evidences actual trauma to brain cell structures.” The decision was later vacated pursuant to a joint stipulation of the parties.

Since Weaver, several courts have acknowledged recent medical research regarding the physical aspects of PTSD, thus leaving open the possibility for recovery under Article 17 of the Convention. The Ninth Circuit’s decision in Carey v. United Airlines acknowledged in a footnote that one district court case had recognized PTSD as a “bodily injury” for purposes of the Warsaw Convention. While this had no effect on the decision in Carey because there were no allegations of biochemical reactions in the brain as the result of terror, the Ninth Circuit nevertheless noted that a possibility for recovery remains where there is no visible “bodily injury” based on this theory. Likewise, the district court in Turturro acknowledged that the brain’s physical architecture can undergo transformations related to PTSD and that under some circumstances a diagnosis of chronic PTSD may fall within the Convention’s definition of “bodily injury.” Again, this recognition did not affect the court’s decision because such a brain injury was not alleged.

238 Id. at 1191.
239 Id. at 1192.
240 Id.


242 255 F.3d 1044, 1053 n.47 (9th Cir. 2001) (citing Weaver, 56 F. Supp. 2d at 1190). The Carey decision was filed on July 3, 2001, before Weaver was vacated on April 25, 2002. Weaver, 211 F. Supp. 2d at 1252.

243 Carey, 255 F.3d at 1053.

244 Turturro v. Cont’l Airlines, 128 F. Supp. 2d at 179 (citing Weaver, 56 F. Supp. 2d at 1190). The Turturro decision was filed on Jan. 16, 2001, before Weaver was vacated on April 25, 2002. Weaver, 211 F. Supp. 2d at 1252.
2. Potential Proof Problems

Although several courts have acknowledged the possibility of recovery for PTSD under the Warsaw Convention based on the theory that PTSD is, itself, a bodily injury, with the reversal of the district court’s decision in *Little Rock* and the vacatur of the district court’s decision in *Weaver*, there is no judicial precedent for this proposition. Moreover, advocates of this theory are presented with several evidentiary obstacles if they hope to prevail in litigation.\footnote{See *In re Air Crash at Little Rock, Ark.*, 291 F.3d 503, 513-15 (8th Cir. 2002).}

Litigants must not only allege a brain injury as a result of PTSD to survive summary judgment, but must also prove that they have suffered a physical change to their brain as a result of the accident. The first obstacle to overcome is a *Daubert*\footnote{Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993); see FED. R. EVID. 702 (providing *Daubert* criteria for expert testimony); *In re Air Crash at Little Rock, Ark.*, 291 F.3d at 514 (an applying the *Daubert* criteria to a PTSD case arising under the Warsaw Convention).} hearing to determine whether the theory that physical changes to the brain resulting from PTSD is recognized in the psychiatric community.\footnote{See, e.g., *M.C. v. Yeargin*, 11 S.W.3d 604, 618-20 (Mo. Ct. App. 1999) (finding that an expert’s testimony that plaintiff suffered brain damage in the form of decreased hippocampal volume due to post traumatic stress disorder related to her attack in a hotel room was inadmissible to show damages in negligence action against hotel, absent trial court finding that expert’s theory was based on scientific principles generally accepted in the relevant scientific community).}

Next, the plaintiff must establish a nexus between the scientific theory and a physical change in the plaintiff’s brain supported by objective scientific tests.\footnote{*In re Air Crash at Little Rock, Ark.*, 291 F.3d at 514-15.} As noted by the Second Circuit in *Little Rock*, magnetic resonance imaging (MRI),\footnote{M.R.I. produces images of brain structure by passing a strong magnetic field and a varying radio signal through the head and detecting a radio signal emitted from atomic nuclei in response to that signal. See K.K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 PROC. NAT’L ACAD. SCI. 5675 (1992).} positron emission tomography (PET)\footnote{PET scans measure changes in glucose metabolism or blood flow associated with brain function by detecting positrons, positively charged particles emitted by radioactively labeled substances, which have been injected into the body. See Joseph A. Ricker & Ross D. Zafonte, *Functional Neuroimaging and Quantitative Electroencephalography in Adult Traumatic Head Injury: Clinical Applications and Interpretive Cautions*, 15 J. HEAD TRAUMA REHAB. 859-68 (2000).} scans, and single photon...
emission computed tomography (SPECT) scans are all utilized to measure brain structure and function, while blood tests may detect elevated levels of cortisol or other hormones, which could indicate a dysfunctioning hypothalamus or thyroid. These techniques are beset by evidentiary shortcomings in the diagnosis of PTSD. Currently, the primary use of these techniques in the context of PTSD is as a scientific research tool rather than as a medical diagnostic tool. They each take a snapshot of the brain’s structure or function at a moment in time. In order to show physical change in the brain over time, particularly as a result of a discrete incident, there must be baseline information concerning the condition of the brain at an earlier point in time to serve as a control. Furthermore, unique brain scan patterns have yet to be developed for specific illnesses, and scans can be affected by a myriad of extraneous variables. All of these evidentiary barriers must be overcome to prevail on a claim that PTSD is a physical injury to the brain.

V. THE POTENTIAL IMPACT OF THE MONTREAL CONVENTION ON PTSD CLAIMS

The Warsaw Convention has been modified several times over the years through amendments and private agreements. Almost all of these changes were made to appease the United States’ objections to the low liability limits set by the Convention. In response to a growing discontent with the Warsaw Convention’s

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251 SPECT is a technique similar to PET, that measures blood flow to tissue by detecting photons from radioactive tracers injected into the body. See Report of the Therapeutics & Tech. Assessment Subcomm. of the Am. Acad. of Neurology, Assessment of Brain SPECT, 46 NEUROLOGY 278-85 (1996).

252 In re Air Crash at Little Rock, Ark., 291 F.3d at 511.

253 See Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000) (holding that the district court did not abuse its discretion in refusing to allow PET scan evidence where the state’s expert testified that the use of PET scans to diagnose chronic PCP abuse is not generally accepted by the scientific community); see also Penney v. Praxair, Inc., 116 F.3d 330, 333-34 (8th Cir. 1997) (holding that the plaintiff failed to establish sufficient foundation for admission of PET scan of his brain, which the expert used to compare to the control group, where it was not clear that the control group would provide accurate comparisons).


255 See generally Ricker, supra note 250, at 859-68.

256 See Society of Nuclear Medicine, supra note 254, at 1257-58.

limitations, the International Civil Aviation Organization (ICAO), an agency of the United Nations, convened the International Conference on Air Law in Montreal in May 1999 with the goal of drafting a comprehensive replacement to the seventy-year-old Warsaw Convention. The ICAO’s efforts culminated with the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, on May 28, 1999 (commonly known as the “Montreal Convention”).

The Montreal Convention entered into force in the United States on November 4, 2003, and its provisions will govern future PTSD claims by international air passengers. The major feature of the Montreal Convention is the concept of unlimited liability for air carriers. This is considered a vast improvement over the liability regime of Warsaw, relative to passenger rights in the event of an accident. Among other benefits to passengers, the Montreal Convention eliminates the cap on carrier liability for passenger injury or death, holds carriers strictly liable for proven damages, up to 100,000 Special Drawing Rights, changes the basis for unlimited liability from an intent to cause damage or recklessness standard to a rebuttable presumption of negligence standard, and expands the ba-

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258 Montreal Convention, supra note 4.
262 Id.
264 Article 25 of the Convention lifts the limitation on liability under certain conditions. Husain v. Olympic Airways, 316 F.3d 829, 839 n.7 (9th Cir. 2002). The Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air (1975), amends Article 25...
sis for jurisdiction for claims to permit suits in the passenger’s homeland if certain conditions are met.\textsuperscript{265} The preamble to the Montreal Convention makes explicit the importance of ensuring the protection of consumer interests and the need for equitable compensation based upon the principle of restitution. Hence, many commentators have described the Montreal Convention as a treaty that favors passengers rather than airlines.\textsuperscript{266}

Despite the many benefits to passengers that flow from the Montreal Convention, in terms of removal of damages caps and greater access to favored forums through expanded jurisdictional grounds, the Montreal Convention does not expand the conditions for passenger recovery for bodily injury. The new language of Article 17 of the Montreal Convention provides:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{267}

To a large degree, this language is identical to the language of Article 17 of the Warsaw Convention and leaves its liability structure, which was developed from extensive judicial precedent, unchanged. When the delegates at the Montreal Conference discussed the scope of the proposed Article 17, they specifically considered extending the carrier’s liability to “mental injuries.”\textsuperscript{268} An extensive review of the Conference’s drafting history conducted by the Second Circuit in \textit{Ehrlich} concluded that the delegates conveyed a wide range of opinions on whether mental injuries should be expressly included, and their discussion did not lead to a general consensus on the subject.\textsuperscript{269}

\textsuperscript{265} Id.

\textsuperscript{266} Id.


\textsuperscript{268} Id. at 391-92.
ble to reach a common understanding, the Conference ultimately left unchanged the "bodily injury" language of the Warsaw Convention.270

Because English is one of the six authentic texts of the Montreal Convention, interpretation of the French term "lésion corporelle" may no longer be relevant to determine the extent of carrier liability for mental injury.271 However, as stated in the explanatory Article 17 of note to the Montreal Convention, upon submission to the Senate, the legal framework developed under the Warsaw Convention's "lésion corporelle" language was left unchanged by the Montreal Convention.

Following extensive debate, the Conference decided not to include an express reference to recovery for mental injury, with the intention that the definition of "bodily injury" would continue to evolve from judicial precedent developed under Article 17 of the Warsaw Convention, which uses that term.272

This treaty history was before the Senate at the time of ratification and suggests the intent of the signatories, particularly the United States, was that the language of Article 17 of the Montreal Convention works no change to the definition of "bodily injury" as the courts have interpreted it under the Warsaw Convention.273 Thus, carrier liability under the Montreal Convention will continue to require "bodily injury" as interpreted under Warsaw Convention jurisprudence, allowing recovery for mental injuries only if they are caused by bodily injuries.

VI. CONCLUSION

Developments in medical science likely will continue to improve our understanding of PTSD and the nature of the psychological injury that produces related physical effects. In the future, medical science also may be able to define the precise mechanisms that produce these physical effects. However, the Supreme Court in Floyd considered but rejected the idea that

270 Montreal Convention, supra note 4.

271 See text following Montreal Convention, supra note 4, at art. 57. Hosaka v. United Airlines, 305 F.3d 989, 996 n. 8 (9th Cir. 2002).

272 Montreal Convention, supra note 4, at art. 17(1) explanatory note; see also 1999 U.S.T. LEXIS 175, at *12 (explaining that efforts were made in the negotiations and drafting to retain existing language and substance of other provisions to preserve judicial precedent relating to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention and its related protocols).

273 1999 U.S.T. LEXIS 175, at *12.
modern medicine has obliterated the distinction between physical and mental injury. Legislative and judicial line-drawing under the Warsaw Convention has maintained the traditional mind-body distinction embodied in Western thought, despite the considerable medical advances in this area.

The current state of the law after Saks, Floyd, and Tseng requires that mental injuries must proximately flow from physical injuries caused by an accident. This approach is consistent with Floyd, yet provides full compensation for the victim within the bounds established by the Warsaw Convention. Emotional injuries unrelated to physical injuries or emotional injuries that are manifested in physical symptoms are insufficient to trigger recovery under both the letter and spirit of Floyd. This approach is also consistent with the dicta in Tseng that denies recovery for psychic or psychosomatic injury.

The sweeping changes brought by the Montreal Convention to passenger injury claims do not alter this conclusion. The bodily injury requirement for recovery of damages under the old Warsaw Convention standard is carried forward into the new treaty's liability scheme. Article 17 of the Montreal Convention uses the same "bodily injury" language as the English translation of the Warsaw Convention, and the expressed intent of the U.S. Senate in ratifying the Montreal Convention was to leave un-

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274 E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991). The respondent in the Floyd case specifically advanced the idea that there is no meaningful distinction between the mind and body, a view rejected by the Supreme Court in its holding. Brief for Respondent, E. Airlines, Inc. v. Floyd (1990) (No. 89-1598), 1990 WL 511332, at *5-6. The respondent argued, "[a]fter all, a mental injury is an injury to the brain, and the brain is certainly an organ of the body." Id. There was a time in the not so distant past of human evolution, of course, when the mind and the body were considered to be separate and distinct entities. Modern scientific developments have clearly put that mythic view of our being to rest, however. And although the precise mechanisms of our thoughts and feelings remain largely uncharted, there is general scientific agreement that the sophisticated mental processes of our brain are, in actuality, mere physiological processes involving electrical charges and chemical reactions. In short, "the current view of the human life form is that anxiety, fear, mental anguish, psychic trauma and the like [except where caused by innate physiological abnormality] are physiological reactions to external stimuli - i.e., that a 'mental injury' is, in fact, a 'bodily injury.'" Id. at *6.

275 Tseng v. El Al Isr. Airlines, Ltd., 919 F. Supp. 155, 158 (S.D.N.Y. 1996); see also Turturro v. Cont'l Airlines, 128 F. Supp. 2d 170, 176 n.3 (S.D.N.Y. 2001) (quoting Webster's New Universal Unabridged Dictionary 156 (1996) to define psychosomatic as "1. of or pertaining to a physical disorder that is caused by or notably influenced by emotional factors; and 2. pertaining to or involving both the mind and the body.")
changed the judicial precedents interpreting Article 17 of the Warsaw Convention.\footnote{Montreal Convention, supra note 4, at art 17(1) explanatory note. \textit{See also} 1999 U.S.T. LEXIS 175, at *12.}