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The Ninth Circuit Holds That Physical Manifestations of Emotional and Mental Distress Do Not Satisfy the Warsaw Convention's Bodily Injury Requirement - *Carey v. United Airlines*

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THE NINTH CIRCUIT HOLDS THAT PHYSICAL MANIFESTATIONS OF EMOTIONAL AND MENTAL DISTRESS DO NOT SATISFY THE WARSAW CONVENTION'S "BODILY INJURY" REQUIREMENT—*CAREY V. UNITED AIRLINES*

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IN *EASTERN AIRLINES, Inc. v. Floyd*,[1] the Supreme Court rejected the view that there can be any recovery for purely mental injuries under the limited liability provisions of the Warsaw Convention[2] and concluded that unless a passenger was made to "suffer death, physical injury, or physical manifestation of injury," an air carrier could not be held liable.[3] However, while the court effectively ruled out recovery for purely mental injuries, it expressly declined to state its views concerning whether passengers could recover for mental injuries accompanied by physical manifestations of injury,[4] leaving "open the question of whether such physical manifestations satisfy the 'bodily injury' requirement"[5] of the Warsaw Convention's Article 17.[6] Attempting to answer this question, the Court of Ap-

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1 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, Poland, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

3 *Floyd*, 499 U.S. at 552.

4 *Id.*

5 Carey v. United Airlines, 255 F.3d 1044, 1052 (9th Cir. 2001).

6 Article 17 of the Warsaw Convention states in part: "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." Warsaw Convention, *supra* note 2, art. 17. "From its inception [the bodily injury requirement] has proved contentious in its application as courts adjudicating claims under Article 17 have conservatively interpreted the phrase 'bodily injury' as either pure physical injury or mental suffering accompanied by physical injury where the latter was a causa-

peals for the Ninth Circuit determined that physical manifestations of emotional distress do not satisfy the bodily injury requirement and the Warsaw Convention, therefore, provides no remedy.[7] In reaching its conclusion, however, the court failed to make any reasonable distinction between Carey's physical manifestations of emotional distress and other cases wherein recovery was available to plaintiffs that could not demonstrate a physical injury, but were able, nevertheless, to satisfy the bodily injury requirement.[8]

During a flight from Costa Rica to Los Angeles en route to his home in Portland, a United Airlines ("United") flight attendant and an alleged representative of the Federal Airline Administration ("FAA") confronted Carey and an altercation ensued.[9] At different times in the flight, two of Carey's three daughters, assigned to seats in the coach section of the aircraft and hoping to relieve their earaches, sought pain medication from their father, seated in the first class cabin.[10] Referring to FAA regulations, a flight attendant warned Carey that it was impermissible for his children to enter the first class cabin and Carey complied despite the fact that his daughter was crying and in pain.[11] Carey's second child subsequently entered the first class cabin and the flight attendant proceeded to reprimand Carey and threatened arrest, stating that there was a representative of the FAA aboard the flight with the authority to do so.[12]

When Carey later confronted the alleged FAA representative and asked to see some identification, the alleged representative and the flight attendant both refused to give the alleged FAA agent's name.[13] This resulted in an altercation wherein Carey

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tive factor in bringing about the former." Ruwantissa I.R. Abeyratne, *Mental Distress in Aviation Claims—Emergent Trends*, 65 J. AIR L. & COM. 225, 225 (2000). Part of the difficulty arises from the tendency of courts to try to determine the intention of the drafters of the Warsaw Convention and their use of the French term "lesion corporelle" in Article 17. *See, e.g.*, Gregory C. Fisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle*, 25 TEX. INT'L L.J. 127 (1990).

[7] *Carey*, 255 F.3d at 1053.

[8] *Id.* at 1053-54.

[9] *Id.* at 1046. For the purposes of its summary judgment motion, United did not dispute Carey's allegations; therefore, the facts are Carey's version of events on the flight from Costa Rica to Los Angeles as presented in a letter from Carey to United's Chairman of the Board. *Id.* at 1046 n.1.

[10] *Id.* at 1046.

[11] *Id.*

[12] *Id.*

[13] *Id.*

was insulted, profaned, and humiliated in the presence of the other passengers.[14] Upon his return to Portland, Carey learned from a telephone conversation with the FAA that the alleged representative on the flight was probably not an FAA agent after all.[15] Following the incident Carey claimed not only to have suffered severe emotional and mental distress, but also nausea, cramps, perspiration, nervousness, tension, and sleeplessness.[16]

Carey sued United in the United States District Court for the District of Oregon alleging intentional infliction of emotional distress, negligent infliction of emotional distress, and false imprisonment.[17] United responded with a motion for summary judgment arguing, in part, that: (1) the Warsaw Convention precludes Carey's state law claims; (2) Carey has no claim under the Warsaw Convention because he did not suffer a bodily injury caused by an accident; and (3) even if there were an accident, Carey cannot recover for purely mental injuries.[18] Magistrate Judge Hubel, agreeing with United, concluded that the Warsaw Convention did, in fact, govern Carey's claims and that his injuries did not satisfy the requirements for carrier liability.[19] As a result, the district court granted United's motion for summary judgment.[20]

Appealing the lower court's decision, Carey argued that the Warsaw Convention was not his exclusive remedy and that, even if it was, his injuries satisfied the bodily injury requirement of Article 17.[21] Reviewing the district court's grant of summary judgment de novo, the Ninth Circuit first looked to *El Al Israel Airlines, Ltd. v. Tseng*, noting that the Supreme Court reversed a court of appeals holding that although a plaintiff could not recover under the Warsaw Convention, it was not her exclusive remedy.[22] On the contrary, the Supreme Court held that "the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Con-

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[14] *Id.*

[15] *Id.* at 1046 n.2.

[16] *Id.* at 1046.

[17] Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165, 1167 (Or. 1999), *aff'd*, 255 F.3d 1044 (9th Cir. 2001).

[18] *Id.* at 1168-69.

[19] *Id.* at 1173-74.

[20] *Id.* at 1176.

[21] *Carey*, 255 F.3d at 1046.

[22] El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999), *rev'g*, 122 F.3d 99 (2d Cir. 1997).

vention."[23] Encouraged by the ruling in *Tseng*, the court went on to conclude that not only is the Warsaw Convention Carey's exclusive remedy, but also that there are no exceptions to this rule even in the case of an air carrier's intentional misconduct.[24]

Once the court determined the Warsaw Convention afforded Carey's only remedy, it broached the subject of whether Carey's injuries satisfied Article 17's bodily injury requirement.[25] This question is considerably more complex than the first and has led courts to treat the requirement with some measure of vagueness and ambiguity.[26] The *Carey* court, for example, began its analysis by pointing to the fact that there is a significant amount of case law suggesting that, under the Warsaw Convention, there can be no recovery for mental injuries unaccompanied by physical injuries.[27] At the same time, however, the court recognized that these cases were not directly on point, as they did not specifically address whether physical manifestations of emotional distress, as opposed to emotional distress flowing from physical injuries, satisfy the requirement.[28]

The court relies heavily on the conclusions drawn in *Terrafranca v. Virgin Atlantic Airways, Ltd.*,[29] particularly as they apply to the meaning of the French term "lesion corporelle,"[30] the legislative history of the Warsaw Convention, and the intent of the signatory nations.[31] Ultimately, the *Carey* court concluded that "[b]ecause the plaintiff could not 'demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or

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[23] *Id.* at 176.

[24] Even though the plaintiff in *Tseng* waived her challenge to the district court's finding that "willful misconduct" cannot be an "accident" under the Warsaw Convention, the Supreme Court included as dicta an indication that "intentional misconduct can fall under the definition of 'accident,' provided that the conduct otherwise meets the standard laid out in *Saks*." *Carey*, 255 F.3d at 1049. *See* Air Fr. v. Saks, 470 U.S. 392 (1985).

[25] *Carey*, 255 F.3d at 1051.

[26] *Compare Carey*, 255 F.3d 1044 (9th Cir. 2001) (physical manifestations of emotional distress do no satisfy the bodily injury requirement), *with* Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190 (D. Mont. 1999) (posttraumatic stress disorder resulting from biochemical reactions brought on by terror is considered a "bodily injury"), *and In re* Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997) (family members of crash victims recovered for mental injuries from *pre-impact* terror).

[27] *See, e.g., Floyd*, 499 U.S. at 534.

[28] *Carey*, 255 F.3d at 1051-52.

[29] Terrafranca v. Virgin Atlantic Airways, Ltd.,151 F.3d 108 (3d Cir. 1998).

[30] *See* discussion *supra* note 6.

[31] *Carey*, 255 F.3d at 1052. It should be noted that many of these conclusion were drawn, in turn, from *Floyd*.

anxiety,'" the conditions for imposing liability under Article 17 were left unsatisfied.[32] The court takes this argument to the extreme, writing: "To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories of the Warsaw Convention."[33]

The court's concern seems to arise from a fear that compensating plaintiffs suffering from physical manifestations of emotional distress would open the floodgates of litigation and would, in effect, transform the *Floyd* standard into an easily satisfied pleading formality.[34] The reality of the situation is that the floodgates have, in a sense, already been opened and, although the court does recognize this fact, it does so dismissively. For example, almost as an afterthought, the court notes that in *Weaver v. Delta Airlines, Inc.*[35] posttraumatic stress disorder meets Article 17's bodily injury requirement because the plaintiff in that case "had experienced biochemical reactions as a result of her terror."[36] Also, in *In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994*, family members of passengers received compensation for the terror suffered by the passengers prior to receiving their "injuries" in the crash.[37]

The court argues that the issues raised in *Weaver*, *Roselawn* and *Carey* are entirely different.[38] The fact remains, however, that the plaintiffs in these cases suffered some form of emotional distress not flowing from a physical injury, and in both *Weaver* and *Roselawn* the courts found the claims compensable.[39] The court tried to distinguish these two cases from *Carey* by contending that the plaintiffs in *Roselawn* recovered damages because the emotional distress of the crash victims was closely associated with the injuries actually incurred in the crash.[40] This reasoning ignores the fact that the emotional distress suffered by the passengers prior to impact was detached from the injuries the victims inevitably received when the aircraft did crash. In its response to *Weaver*, the court left open the possibility that a plaintiff who

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[32] *Id.*

[33] *Id.* at 1053.

[34] *Id.* at 1052.

[35] Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190 (D. Mont. 1999).

[36] *Carey*, 255 F.3d at 1053 n.47.

[37] In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997).

[38] *Carey*, 255 F.3d at 1054.

[39] *Weaver*, 56 F. Supp. 2d at 1192; *Roselawn*, 954 F. Supp. at 179.

[40] *Carey*, 255 F.3d at 1054.

experiences "biochemical reactions" resulting from emotional distress may recover damages.[41]

These types of reactions are no different from Carey's claim that physical manifestations arose from the emotional distress brought on as a result of his mistreatment by United. The difficulty arises from the reluctance of courts to recognize as actionable claims that are extremely difficult to prove. After all, "[m]ere pain of mind has hitherto been recognized as being abstract and indefinable in terms of visual assessment."[42] As medical diagnostic tools have improved, however, direct connections have been made between emotional agitation (including anxiety and fear) and "a general disruption of the internal organs of the human body," including reactions such as imbalances in the digestive process and dryness of mouth.[43] The connections between Carey's emotional condition and the physical manifestations that arise from it are at least as clear as those recognized in *Weaver* and *Roselawn*, albeit of an entirely different degree.

Despite the court's conclusion that the signatories of the Warsaw Convention left no remedy for plaintiffs like Carey, "no matter how egregious the airline's conduct,"[44] Judge Nelson contradicted his own reasoning by agreeing that cases like *Weaver* have left open the possibility that there can be "recovery for egregious incidents. . .where there is no concrete or visible 'bodily injury.'"[45] As a result, it appears that the only difference noted by the court is one measured by the degree of harm to the plaintiff. Courts should not, therefore, conclude that the decision in *Carey* excludes all claims of mental distress under the Warsaw Convention whether accompanied by physical manifestations or not. Instead, the notion of mental distress must be "viewed with circumspection, which could be done," not by excluding the claim altogether, but "by imposing stringent stan-

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[41] *Id.* at 1053 n.47.

[42] Abeyratne, *supra* note 6, at 228.

[43] *Id.* at 230 (citing WALTER B. CANNON, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE: AN ACCOUNT OF RECENT RESEARCHES INTO THE FUNCTION OF EMOTIONAL EXCITEMENT 253-326, 325-26 (2d ed. 1953); WALTER B. CANNON, THE WISDOM OF THE BODY 286 (revised and enlarged ed. 1939); Roy R. Grinker, *The Physiology of Emotions, in* THE PHYSIOLOGY OF EMOTIONS: REPORT OF THE THIRD ANNUAL SYMPOSIUM OF THE KAISER FOUNDATION HOSPITALS IN NORTHERN CALIFORNIA, SAN FRANCISCO 3 (Alexander Simon et al. eds. 1961)).

[44] *Carey*, 255 F.3d at 1053.

[45] *Id.* at 1053 n.47.

dards of proof of injury on the plaintiff."[46] Depending upon the severity or egregiousness of the act leading to alleged physical manifestations of emotional distress, a plaintiff's burden of proof would then vary in degree of difficulty. For example, it is much easier to imagine the emotional ramifications associated with a flight attendant threatening to crash an aircraft into a mountain than it is to imagine the emotional ramifications of the same flight attendant verbally abusing and threatening to arrest a passenger.

In the court's eagerness to define an objective bright-line rule regarding whether physical manifestations of emotional distress satisfy the Warsaw Convention's bodily injury requirement, it fails to sufficiently distinguish the reasoning of other courts and the exceptions they have made affecting air carrier liability. Other than the degree of severity or egregiousness of the event leading to a plaintiff's emotional distress, there seems to be little connection between cases like *Weaver* and *Roselawn*, where plaintiffs have been able to recover for emotional distress not flowing from physical injury. Therefore, rather than use the bodily injury requirement to exclude all claims of emotional distress accompanied by physical manifestations, the courts should permit plaintiffs, at the very least, the opportunity to address a high and stringent burden of proof.

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[46] Abeyratne, *supra* note 6, at 230.


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