Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention Be Construed to Encompass Physical Manifestations of Emotional and Mental Distress

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CONTINUING QUESTIONS IN AVIATION LIABILITY LAW: SHOULD ARTICLE 17 OF THE WARSAW CONVENTION BE CONSTRUED TO ENCOMPASS PHYSICAL MANIFESTATIONS OF EMOTIONAL AND MENTAL DISTRESS?

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I. INTRODUCTION

AIR CARRIER LIABILITY under the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), has always been strictly limited; however, faced with a variety of tort claims arising from Article 17's carrier liability provision, courts have proceeded to place further limitations on recovery. One of the areas most directly impacted by these limitations is the compensability of emotional distress under the Warsaw Convention's limited liability regime. Courts have attempted for years to interpret and solidify the meaning of ambiguous phrasing and terminology, and the debate has yet to be resolved satisfactorily.

Ever since the Warsaw Convention was opened for signature seventy-three years ago, dissatisfaction has been so widespread that there have been numerous multilateral attempts to amend, supplement, and modify the convention's sometimes unreasonable provisions. One of these areas of dissatisfaction deals with whether compensation for damages arising from emotional distress is available under the Warsaw Convention. A number of

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2 See Warsaw Convention, supra note 1, art. 17. Specific monetary limitations are dealt with in Articles 20 and 22. See id. arts. 20 and 22.

decisions, most notably *Eastern Airlines, Inc. v. Floyd*, have indicated that there can be no recovery for purely mental injuries. In *Floyd*, for example, the Supreme Court not only rejected the view that there can be any recovery for purely mental injuries under the limited liability provisions of the Warsaw Convention, but also 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.

However, while *Floyd* effectively served to rule out recovery for purely mental injuries, the court expressly declined to state its views concerning whether passengers could recover for mental injuries accompanied by physical manifestations of injury. This left the court in *Carey v. United Airlines* to attempt to answer “the question of whether such physical manifestations satisfy the ‘bodily injury’ requirement” of the Warsaw Convention’s Article 17. The Court of Appeals for the Ninth Circuit determined that physical manifestations of emotional distress do not satisfy the bodily injury requirement, and the Warsaw Convention, therefore, leaves the plaintiff without remedy.

In reaching its conclusion, however, the *Carey* court failed to make any reasonable distinction between the plaintiff’s physical manifestations of emotional distress and other cases wherein recovery was available to plaintiffs unable to demonstrate claims flowing from a physical injury, but were able, nevertheless, to satisfy the bodily injury requirement. Consequently, while the court’s decision purports to resolve this issue, it affords more confusion than clarity.

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5 See *Terrafranca v. Virgin Atlantic Airways, Ltd.*, 151 F.3d 108, 112 (3d Cir. 1998) (characterizing the plaintiff’s injuries as “purely psychic injuries that do not qualify as bodily injuries under the Warsaw Convention”); *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170, 178 (S.D.N.Y. 2001) (absent any “physical wounds, impacts, or deprivations, or any alteration in the structure of an internal organ, then any subsequent shortness of breath, sleeplessness, or inability to concentrate may safely be characterized as psychosomatic and is not compensable”).
6 *Floyd I*, 499 U.S. at 552.
7 *Id.*
8 *Carey v. United Airlines*, 255 F.3d 1044, 1052 (9th Cir. 2001).
9 *Id.* at 1053.
10 *Id.* at 1053-54.
II. HISTORY OF THE WARSAW CONVENTION

Even before the first nonstop flight over the Atlantic in 1927, many world governments saw the potential associated with international commercial aviation and clamored to establish a regulatory regime to encourage the emergence and growth of the industry. As a result, international conferences were held with the objective of creating, by treaty, "a certain degree of unification in the legal rules governing international air transportation." The Warsaw Convention was the result of two such conferences—one held at Paris in 1925 and another held at Warsaw in 1929.

Established at the Paris convention, a permanent committee of air law experts, the Comite International Technique d'Experts Juridiques Aeriens ("CITEJA"), realized that "[c]ommon rules to regulate international air carriage ha[d] become a necessity." It was not only necessary to formulate a uniform system because of the "many countries of different languages, tariffs, and legal systems" affected, but it was also necessary to "protect airlines against potentially ruinous claims for compensation and against exorbitant insurance premiums" if the fledgling aviation industry were to survive.

Parties to the Warsaw Convention conferences, therefore, laid out two specific objectives: (1) to establish a uniform scheme of dealing with claims arising out of international transportation (including the assessment of liability for damages caused in the course of transportation, as well as resolving jurisdictional complications arising from such assessment); and (2) to limit potential air carrier liability in the event that damages resulted from a related accident. It was believed that the convention would create a more stable operating environment for the newly developing aviation industry thereby "afford[ing] the carrier a more

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11 Charles Lindbergh was the first aviator to pilot a nonstop flight over the Atlantic on May 20-21, 1927. 7 ENCYCLOPEDIA BRITANNICA 371 (15th ed. 1998).
12 Lowenfeld & Mendelsohn, supra note 3, at 498.
14 Id.
16 WARSAW CONVENTION, supra note 13, at 1.
17 Lowenfeld & Mendelsohn, supra note 3, at 498-99.
definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses." This would, in turn, prove beneficial for passengers and shippers through reduced transportation charges and a more definite basis of recovery.

The main objectives of the contracting parties were met and the treaty was concluded at Warsaw in 1929. The United States subsequently acceded to the Warsaw Convention in 1934, and although it denounced the agreement in 1965, that denunciation was later withdrawn. The Warsaw Convention, for nearly three quarters of a century, has governed the law of international commercial aviation and operated as the core legal apparatus through which air carriers have been afforded tremendous liability protection as well as the mechanism through which plaintiffs have been able to seek and recover damages for injuries sustained during international flights.

III. THE WARSAW CONVENTION SINCE 1929

A. WARSAW CONVENTION

As a comprehensive multilateral treaty designed to encompass "all international transportation of persons, baggage, or goods performed by aircraft for hire," the Warsaw Convention has enjoyed significant longevity, but not without controversy. Dissatisfaction with the convention in general, as well as particular dissatisfaction relating to the liability limitations of Article 22, led to repeated attempts to modify, amend, or circumvent by private agreement, the provisions viewed as unsatisfactory.

By 1935, CITEJA had already produced a draft revision of the Warsaw Convention and, in the years following World War II and the dissolution of CITEJA, the International Civil Aviation

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18 Id. at 499-500.
19 Id.
20 On October 12, 1929, there were twenty-three signatories to the Warsaw Convention but by March 15, 2000, 140 countries had ratified, adhered to, or acceded to the treaty. LAWRENCE B. GOHLIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 331 (2000).
22 GOLHIRSCH, supra note 20, at 7.
23 Warsaw Convention, supra note 1, art. 1.
24 "It is generally agreed that the major stumbling block in all efforts to modernize the Warsaw system has been the level of the passenger liability limit." Sven Brise, Some Thoughts on the Economic Significance of Limited Liability in Air Passenger Transport, ESSAYS IN AIR LAW 21 (Arnold Kean ed., 1982).
Organization ("ICAO") continued the efforts of revision by hosting international conferences at Cairo (1946), Madrid (1951), Paris (1952), Rio de Janeiro (1953), and other locations around the world. It was not until 1955, however, that a similar conference at The Hague resulted in any significant change.

B. HAGUE PROTOCOL

The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 ("Hague Protocol") did not amount to a complete revision of the Warsaw Convention's original provisions, as hoped, but merely added to them. The Hague Protocol raised the limits of liability (basically doubling the limitations established in 1929), provided for costs of litigation, simplified some documents of carriage, redefined certain terms, and extended the liability provisions of the convention to include agents of carriers. Even with these improvements, however, the United States considered the limits placed on carrier liability to be inadequate.

C. MONTREAL INTERIM AGREEMENT

Dissatisfaction with the Warsaw liability limits, even as increased by the Hague Protocol, led the United States, not only to refuse ratification of the Hague Protocol, but also to submit its notice of denunciation of the Warsaw Convention. In response, all major U.S. and foreign carriers serving the United States negotiated a private voluntary agreement under the auspices of the International Air Transport Association ("IATA").

25 WARSAW CONVENTION, supra note 21.
27 WARSAW CONVENTION, supra note 21, at 4.
28 GOLDHIRSCH, supra note 20, at 6.
29 S. TREATY Doc. No. 106-45. In order to improve the chances for ratification of the Hague Protocol, therefore, its proponents in the United States proposed a form of accident insurance legislation, which would apply fixed levels of compensation based upon the type of injury sustained, to be considered in conjunction with ratification of the Hague Protocol. The idea behind the proposed legislation was to supplement the relatively low liability limitations, establishing a more acceptable level of liability, and hope that this would remove any further objections to ratification. Ultimately, the legislation failed and the Hague Protocol, considered unsatisfactory without it, was never ratified.
30 Id.
The Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol ("Montreal Interim Agreement")\(^{31}\) took advantage of the provision in Article 22 allowing carriers and passengers to contract for higher liability limits.\(^{32}\) Most major air carriers chose to impose upon themselves a higher ceiling of liability hoping to foster an atmosphere of greater industry stability and cooperation among world governments. In accordance with long-standing U.S. demands, participating airlines raised the passenger liability limit to $75,000, inclusive of legal fees and costs.\(^{33}\) and allowed the possibility of even greater recovery if the injured party could demonstrate "willful misconduct." With these new contractual provisions in force, the airlines were able to gain the approval of the Civil Aeronautics Board, which led to the United States' withdrawal of its denunciation of the Warsaw Convention on May 14, 1966, a day before the denunciation was to become effective.\(^{34}\)

D. GUATEMALA CITY PROTOCOL

The Montreal Interim Agreement proved more acceptable to the United States than previous attempts to shore up the provisions of the Warsaw Convention, but attempts to revise and amend the Convention continued, particularly with respect to passenger rights. In 1971, for example, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 ("Guatemala City Protocol")\(^{35}\) sought to increase liability limits to $100,000.\(^{36}\)

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\(^{32}\) In addition to limiting the carrier liability with respect to the transport of passengers to 125,000 francs, Article 22 of the Warsaw Convention states in part: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." Warsaw Convention, \textit{supra} note 1, art. 22.

\(^{33}\) WARSAW CONVENTION, \textit{supra} note 13, at 6.

\(^{34}\) 1 U.S. AV. REP. 445 (1966).


\(^{36}\) S. TREATY DOC. NO. 106-45.
As an offset to this increase, however, participating airlines also sought to resurrect earlier attempts, as had already been seen in the Hague Protocol, to redefine Article 25's "willful misconduct" provision. In exchange for increasing liability limits and imposing a strict liability standard, the limitations themselves would be treated as "unbreakable," removing the possibility of greater recovery in the event of an air carrier's willful misconduct. Even if a plaintiff could demonstrate willful misconduct, with this provision in effect the plaintiff would have no recourse beyond the $100,000 ceiling. This protocol was never ratified by the United States and has never entered into force.

E. MONTREAL PROTOCOL NOS. 1-4

Despite the failure of the Guatemala City Protocol, the International Diplomatic Conference on Private Air Law was held at Montreal in 1975 and resulted in four additional protocols to the Warsaw Convention. Although the United States never signed the first and second protocols, by signing the third and fourth, it adopted some of the functions of the first two. These protocols, for example, altered the Warsaw Convention's treatment of the transportation of goods and converted from the use of the convention's gold standard to the International Monetary Fund's ("IMF") artificial Special Drawing Rights ("SDR") standard, designed to operate without regard to worldwide fluctuations in the rate of exchange.

Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 ("Montreal Protocol No. 3")

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39 Special Drawing Rights are currency units defined as a basket of national currencies. The relative values of each currency in the basket are intended to reflect the volume of export trade in each currency. Special Drawing Rights and the Warsaw Regime, at http://w.iata.org/legal (located under the Department of Legal and Corporate Secretary) (last visited Jan. 15, 2003).
40 Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, opened for signature Sept. 9, 1975,
incorporated not only conversion from the gold standard to the SDR standard "for the purpose of calculating all quantitative limitations on liability under the Warsaw Convention," but also incorporated the changes to the Warsaw Convention as seen in the Guatemala City Protocol.

However dismal the outcome of the first three protocols, Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 ("Montreal Protocol No. 4") was ratified by the Senate in 1998 and entered into force in 1999. Montreal Protocol No. 4 deals primarily with the elimination of outmoded cargo documentation provisions, but also adopts the Hague Protocol's substitution of Article 25 of the Warsaw Convention. This is significant because, although the United States never ratified the Hague Protocol, ratification of Montreal Protocol No. 4 has the effect of taking on the provisions of the Warsaw Convention, as amended by the Hague Protocol, and is now binding upon the United States.

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ICAO Doc. 9147, reprinted in Goldhirsch, supra note 20, at 393 [hereinafter Montreal Protocol No. 3].


42 This latter incorporation led to a situation similar to the one arising out of the debate over the Hague Protocol. See supra note 29 and accompanying text. After signing Montreal Protocol No. 3, the United States "considered domestic legislation that would have established a Supplemental Compensation Plan providing for a $200,000 insurance based supplement to the Montreal Protocol No. 3 carrier liability limit for passengers (increasing total recovery to approximately $300,000)." S. Treaty Doc. No. 106-45. Like the proposed supplemental accident insurance legislation accompanying the Hague Protocol, this Supplemental Compensation Plan also failed and resulted in non-ratification.


44 Jacobson, supra note 37, at 278.


46 Warsaw Convention, supra note 38, at 12. The new language of Article 25 "delineates the conduct or omission of a carrier that will be sufficient to break the limited liability under Article 22," "no longer uses the term 'willful misconduct,'" and "also adopts the Hague Protocol limit of liability of $16,600 for passenger injury or death." Rodriguez, supra note 45, at 36. For the text of the Warsaw Convention as Amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975, see Goldhirsch, supra note 20, at 515.
It may seem surprising that the United States would agree to such low liability limits given its history of dissatisfaction with similarly low limits; however, the limit of $16,600 “will have no effect in the United States because all U.S. airlines and a majority of foreign airlines [had already] signed and implemented the 1996 IATA Intercarrier Agreements.”

F. IATA Intercarrier Agreements

Prior to the United States’ ratification of Montreal Protocol No. 4, IATA proposed several new intercarrier agreements, collectively referred to as the IATA Intercarrier Agreements. These new agreements were similar to the Montreal Interim Agreement in that they were designed to supplement existing treaty law and modernize the liability regime available to passengers. Airlines contracted to participate in a two-tiered liability scheme wherein they voluntarily waived the Warsaw Convention’s Article 22 liability limitations and accepted strict liability for damages up to $130,000. For damages in excess of $130,000, however, airlines may bar recovery if they demonstrate that they took all necessary steps to avoid the damage.

Even with more than ninety percent of the international air transport industry having signed the IATA Intercarrier Agreement on Passenger Liability (“IATA Intercarrier Agreement”), it still fails to provide a permanent or satisfactory replacement for the Warsaw System since it neither alters the text of the treaty nor does it have the binding effect of treaty law. This means that, due to the voluntary nature of the IATA Intercarrier Agreement, airlines can withdraw, and smaller international carriers may never feel obligated to subject themselves to the requirements of the agreement. Only a multilateral treaty that

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47 Id.
48 Jacobson, supra note 37, at 278.
49 Id.
50 IATA Intercarrier Agreement on Passenger Liability, at http://www.iata.org/legal/_files/iia.pdf (last visited Jan. 15, 2003), reprinted in Goldhirsh, supra note 20, at 577 [hereinafter IATA Intercarrier Agreement]. The IATA Intercarrier Agreement was designed as an “umbrella accord” encompassing all subsequent IATA intercarrier agreements relating to passenger liability. While this agreement provided the general principles of accord, subsequent agreements were meant to spell out the precise legal rights and responsibilities of the signatory carriers. See, e.g., Agreement on Measures to Implement the IATA Intercarrier Agreement, at http://www.iata.org/legal/_files/mia.pdf (last visited Jan. 15, 2003).
51 Jacobson, supra note 37, at 279.
incorporates the achievements of the Warsaw Convention and its progeny and, at the same time, establishes supremacy over them will provide a successful replacement for the Warsaw system.

G. MONTREAL CONVENTION

Although a large number of States have adopted the Warsaw Convention either in its original form or have become parties to any number of its amended forms or private supplemental agreements relating to liability, the result is a convoluted and almost unmanageable complex of instruments.\(^5\) For this reason, and in response to years of criticism about the current liability regime, or regimes, the ICAO decided to attempt a complete revision of the Warsaw Convention, incorporating the best aspects of its large progeny of amendments, protocols, and agreements. The Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention")\(^5\) represents this most recent attempt.

The Montreal Convention was designed "to replace the Warsaw Convention and all of its related instruments and to eliminate the need for the patchwork of regulation and private voluntary agreements."\(^5\) To this end, Article 55 of the Montreal Convention states that it "shall prevail over any rules which apply to international carriage by air" including the Warsaw Convention, the Hague Protocol, the Guatemala City Protocol, and Montreal Protocol Nos. I-4.\(^5\) Most notably, the Montreal Convention includes the following features:

1. It removes all arbitrary limits on recovery for passenger death or injury; (2) it imposes strict liability on carriers for the first 100,000 SDR [approximately $135,000] of proven damages in the event of passenger death or injury; (3) it expands the bases for jurisdiction for claims relating to passenger death or injury to permit suits in the passenger's homeland if certain conditions are met; (4) it clarifies the obligations of carriers engaged in code-sharing operations; and (5) it preserves all key benefits achieved for the air cargo industry by Montreal Protocol No. 4.\(^5\)

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\(^5\) Montreal Convention, supra note 53, art. 55.  
Despite the fact that many of these changes have been long sought-after and represent significant successes, when the Montreal Convention enters into effect, the original liability provisions of Article 17 of the Warsaw Convention will remain substantially unaffected.

IV. ARTICLE 17 AND THE "BODILY INJURY" REQUIREMENT

A. OVERVIEW

Article 17 of the Warsaw Convention states in part: "The carrier shall be liable for damage sustained in the event of . . . bodily injury suffered by a passenger." The term "bodily injury," as used in this context, has given rise to much litigation, disputing not only its meaning but also its scope of application. It has been noted that:

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 causative factor in bringing about the former.

Most courts have applied this standard and have been unwilling to venture beyond the requirement that a passenger be made to "suffer death, physical injury, or physical manifestation of injury" before permitting recovery against an airline for bodily injury under the Warsaw Convention. Only recently have courts attempted to answer the question of whether mental injuries accompanied by physical manifestations of injury are within the purview of Article 17.

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57 Article 53 of the Montreal Convention states: "This Convention shall enter into force on the sixtyieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument." Montreal Convention, supra note 53, art. 53. As of the writing of this commentary, twenty-five countries have ratified, accepted, approved, or acceded to the Montreal Convention. Convention for the Unification of Certain Rules for International Carriage by Air, at http://www.icao.int/icao/en/leb/mt99.htm (last visited Jan. 15, 2003).

58 Warsaw Convention, supra note 1, art. 17 (emphasis added).


60 Floyd I, 499 U.S. at 552.

61 See, e.g., Carey, 255 F.3d at 1051-52.
Part of the difficulty arises from the tendency of courts to try to determine the intention of the drafters of the Warsaw Convention and the meaning of the French term *lesion corporelle* (translated into English as "bodily injury") incorporated into the original treaty document.\(^{62}\) The Carey court, for example, relied heavily on the conclusions drawn in *Terrafranca v. Virgin Atlantic Airways, Ltd.*,\(^ {63}\) wherein the court agreed with the Floyd analysis that *lesion corporelle* was correctly translated as "bodily injury" and held that because the plaintiff could not demonstrate direct, concrete, bodily injury, it did not satisfy the conditions for liability under the Warsaw Convention.\(^ {64}\)

Despite the contention arising from the language of Article 17, the majority of proposed changes and amendments to the Warsaw Convention have dealt with the liability limitations of Articles 20 and 22.\(^ {65}\) The limited debates addressing the language of Article 17 have not centered on the bodily injury requirement, but on the distinction between the application of the term "accident" as opposed to such alternate terms as "occurrence" or "event."\(^ {66}\) Nevertheless, early drafts of the Montreal Convention’s Article 17 would have expressly included liability for mental injury.\(^ {67}\) Later drafts even introduced the element of personal injury designed to encompass both physical and mental injuries.\(^ {68}\) For example, the provision (then Article 16) of the first draft of the Montreal Convention corresponding to Article 17 of the Warsaw Convention read:

The carrier is liable for damage sustained in case of death or bodily injury or mental injury of a passenger upon condition only that the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not

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\(^ {63}\) *Terrafranca v. Virgin Atlantic Airways, Ltd.*, 151 F.3d 108 (3d Cir. 1998).

\(^ {64}\) *Carey*, 255 F.3d at 1052. It should be noted that many of these conclusions were drawn, in turn, from *Floyd I*.

\(^ {65}\) See Warsaw Convention, *supra* note 1, arts. 20 and 22.


\(^ {67}\) Rodriguez, *supra* note 45, at 27.

\(^ {68}\) Abeyratne, *supra* note 59, at 227.
liable if the death or injury resulted solely from the state of health of the passenger.69

Other drafts of the convention even included the term “personal injury”; however, after further deliberations, the ICAO removed both “mental injury” and “personal injury” from the provision, choosing, instead, to leave the language virtually unchanged. As it stands, Article 17, paragraph 1, 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.”70

B. The Courts’ Search for Clarity

1. Purely Mental Injuries

The current understanding of the application and scope of Article 17’s bodily injury requirement has been established by two main cases before the Supreme Court and has been both strengthened and weakened through the cases that have followed. In *Air France v. Saks,*71 the court set the standard for properly interpreting the provisions of the Warsaw Convention as an international treaty. In *Floyd,* the court determined that “bodily injury” was the correct interpretation of the French term *lesion corporelle* and held, therefore, that purely mental injuries do not satisfy Article 17.72 Since that time, however, and despite subsequent holdings by two Courts of Appeals that emotional and mental distress is not compensable under the Warsaw Convention, whether or not accompanied by physical manifestations, courts continue to find that “there could be recovery for egregious incidents of intentional misconduct where there is no concrete or visible ‘bodily injury.’”73

In *Floyd,* multiple damages claims for purely mental injuries arose from an incident that took place aboard an Eastern Airlines (“Eastern”) flight from Miami, Florida to Nassau, Bahamas. During the flight, one of the aircraft’s three engines lost oil pressure and the flight crew responded by shutting down the

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70 Montreal Convention, *supra* note 53, art. 17.
72 *Floyd I,* 499 U.S. at 534.
73 *Carey,* 255 F.3d at 1053 n.47.
failing engine and turning back toward the Miami International Airport. Shortly thereafter, the remaining engines failed and the flight crew informed the passengers of their intention to "ditch" the plane in the Atlantic Ocean. After this announcement, and having lost power and altitude, however, the flight crew's continued efforts resulted in restarting one of the engines and safely returning to the airport.

The issue before the court was whether the types of injuries allegedly sustained by the passengers, and characterized by the court as being purely mental, were encompassed in the Warsaw Convention's bodily injury requirement. The District Court, by relying on another federal court's analysis with respect to the text and negotiating history of Warsaw Convention, reached the conclusion that such injuries were not compensable under Article 17. This decision was subsequently reversed by the Court of Appeals, which, "after careful consideration of the French legal meaning of the treaty terms, the concurrent and subsequent legislative history and conduct of the parties, the case law and the policies underlying the Warsaw Convention," found that Article 17 encompassed purely mental injuries. This decision resulted in conflict between the Eleventh Circuit and the New York Court of Appeals' decision in *Rosman v. Trans World Airlines, Inc.*, which held that purely mental injuries were not compensable under the Warsaw Convention. In order to resolve this, and other conflicts, the Supreme Court granted Eastern's petition for certiorari.

Following the procedure for treaty interpretation laid out in *Saks*, the Supreme Court began its analysis "with the text of the treaty and the context in which the written words are used."
and proceeded by looking to the French text as “the only authentic text of the Warsaw Convention.” The French text of Article 17, as ratified by the United States, reads: “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 reads:

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

Essentially, in order for a plaintiff to recover under Article 17, it must demonstrate that there has been (1) an accident (2) in which the plaintiff has suffered death, wounding, or bodily injury and (3) the injury took place on board the aircraft or in the course embarking or disembarking. The only issue before the court, however, was whether lésion corporelle was properly interpreted to mean “bodily injury” and, if so, whether the requirement could be satisfied by a purely mental injury.

The court began its analysis of the foreign text by looking to bilingual dictionaries and concluding that, if the translations are correct, they suggest that Article 17 does not permit recovery for purely mental injuries. However, recognizing that “dictionary definitions may be too general for purposes of treaty interpretation,” the court then turned its analysis to French legal materials “to determine whether French jurists’ contemporary understanding of the term ‘lésion corporelle’ differed from its translated meaning.” Examination of legislation, judicial decisions, and scholarly treatises ultimately proved fruitless and the court was forced to conclude that, in French law in 1929, the term lésion corporelle was neither a widely used legal term nor did it appear to specifically encompass mental injuries.

84 Floyd I, 499 U.S. at 535.
85 Warsaw Convention, supra note 1, 49 Stat. 3000, 3005.
86 Id. at 5018.
87 Floyd I, 499 U.S. at 535-36.
88 Id. at 536.
89 Id. at 537.
90 Id.
91 Id.
It is significant, nevertheless, to note the court’s acknowledge-
ment that the French civil law of damages at the time the War-
saw Convention was being drafted did, in fact, allow recovery for
emotional and mental distress. But because this was deemed a gen-
eral proposition of French tort law and because the court’s re-
ponsibility was “to give the specific words of the treaty a mean-
ing consistent with the shared expectation of the contracting
parties,” the court found it unlikely that the contracting par-
ies would have displaced their “apparent understanding of the
term ‘lesion corporelle’. by a meaning abstracted from the
French law of damages.” Since the court’s examination failed
to demonstrate that lesion corporelle specifically encompassed
mental injuries, it determined that the contracting parties would
not have used the term to express such an expansive
proposition.

This conclusion is problematic for several reasons. First, the
court’s analysis yielded no “apparent” understanding of the
term that could be “displaced.” If it had, the analysis would have
ended long before the court’s discussion moved to the conven-
tion’s textual structure and negotiating history and the ongoing
debate as to the drafters’ intent would at last have been laid to
rest. Second, the court, both in Saks and in Floyd, espoused the
controlling nature of the French legal meaning of the Warsaw
Convention. The court reasoned that because continental ju-
rists drafted it in French we must “look to the French legal
meaning for guidance as to [the shared expectations of the con-
tracting parties].” To acknowledge that French law permitted
tort recovery for mental distress alone and then discount this
information because it is a general principle not specifically en-
compassed in the chosen terminology is to completely ignore
the controlling nature of the French legal meaning. While the
term lesion corporelle may not specifically include the broader in-
terpretation encompassing mental injuries, the evidence cer-
tainly does not suggest that mental injuries were to be
specifically excluded.

After its exhaustive search for a correct interpretation, the
court was forced to confess that “there [was] no evidence that
the drafters or signatories of the Warsaw Convention specifically

92 Id.
93 Saks, 470 U.S. at 399 (emphasis added).
94 Floyd I, 499 U.S. at 540.
95 Id.
96 Saks, 470 U.S. at 399; Floyd I, 499 U.S. at 535-36.
considered liability for psychic injury or the meaning of 'lesion corporelle'" and listed two possible explanations for why the subject of mental injuries never arose. These reasons were: "(1) many jurisdictions did not recognize recovery for mental injuries at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury."

Citing these explanations, the court noted that "the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery." It is just as plausible, however, if not more so, that the drafters did not specifically address liability for mental injuries because it was already encompassed in lesion corporelle as provided by the general principles of French civil law.

Dismissing the fact that French law recognized recovery for mental distress long before the Warsaw Convention was drafted, the court seemed to focus more on the fact that many common law jurisdictions excluded recovery for mental distress in 1929. By doing so, the court’s analysis repeats the same error of some of the lower courts by ignoring the fact that France’s civil law system makes no distinction between mental and physical injuries and inappropriately imports the common law view that there is a distinction. In fact, "[t]here is no counterpart in French law to the common law doctrine which distinguishes between physical injury (compensable), and purely mental or emotional injury unaccompanied by physical injury (not compensable). To the contrary, French law permits recovery for any damage whether material or moral."

The court’s primary concern seems to be that if the broader interpretation were adopted, which would allow recovery for mental injuries, the Warsaw Convention’s purpose of "limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry" would be upset. This concern may be allayed with the realization that courts will not

97 Floyd I, 499 U.S. at 544.
98 Id.
99 Id. at 545.
101 Floyd I, 499 U.S. at 545 n.10.
102 Floyd II, 872 F.2d at 1478.
103 Id. at 1472.
104 Floyd I, 499 U.S. at 546.
allow recovery for every claim for mental injury up to the limits imposed by Articles 20 and 22, or even by private agreements external to the Warsaw Convention; the damages actually sustained by a plaintiff must still be proved.\(^{105}\) Another of the convention's purposes, to establish a uniform scheme of dealing with claims arising out of international transportation (including the assessment of liability for damages caused in the course of transportation, as well as resolving jurisdictional complications arising from such assessment),\(^{106}\) would also be better achieved if the French legal meaning were allowed to control.

The Supreme Court, upon reaching the conclusion that "there [was] no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of 'lesion corporelle,'"\(^{107}\) could have decided the issue either way. In the interest of promoting uniformity, one of the expressly stated purposes of the convention, the court could have followed the only other signatory nation to address this specific issue.\(^{108}\) Instead, the language of the convention was construed so 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."\(^{109}\)

2. Physical Manifestations of Emotional and Mental Distress

Borrowing from the analysis in \textit{Floyd}, the Third and Ninth Circuit Courts of Appeals later expanded the Supreme Court's holding that "Article 17 does not allow recovery for purely mental injuries"\(^{110}\) by concluding that even physical manifestations of emotional and mental distress are insufficient to satisfy the Warsaw Convention's bodily injury requirement.\(^{111}\) While these conclusions suggest agreement and uniformity, the courts' seeming approval of and failure to adequately distinguish between cases wherein plaintiffs have been permitted or denied

\(^{105}\) \textit{Floyd II}, 872 F.2d at 1480.
\(^{106}\) Lowenfeld & Mendelsohn, \textit{supra} note 3, at 498-99.
\(^{107}\) \textit{Floyd I}, 499 U.S. at 544.
\(^{108}\) The Supreme Court of Israel adopted the view that the more expansive interpretation of \textit{lesion corporelle} was preferable and concluded that purely mental injuries were compensable under the Warsaw Convention. \textit{See} Cie Air France v. Teichner, 39 Revue Francaise de Droit Aerien, at 243, 23 EUR. TR. L., at 102.
\(^{109}\) \textit{Floyd I}, 499 U.S. at 552.
\(^{110}\) \textit{Id.} at 534.
\(^{111}\) \textit{See} Terrafranca, 151 F.3d at 111; Carey, 255 F.3d at 1051.
recovery for emotional distress based upon a showing of, or failure to show, subsequent physical injury demonstrates that the perception of agreement and uniformity is merely superficial.

In Terrafranca, the plaintiff alleged no specific bodily injury, but argued that weight loss, brought on by posttraumatic stress disorder and complicated by anorexia, was a physical manifestation of mental injury, sufficient to satisfy the bodily injury requirement of Article 17.112 This emotional distress developed as the result of a bomb threat announcement made when the plaintiff was on an international Virgin Atlantic Airway's flight en route to London, England.113 In accordance with the airline's policy, the flight crew relayed to the passengers that they had received a "nonspecific warning which could be related to one or more targets but where there could be doubt as to its credibility or about the effectiveness of existing security measures."114 The plaintiff became so concerned about the safety of her son and so upset and frightened by the incident that she was unable to return to the United States with her family as planned and, instead, remained in England for an additional six weeks.115

The Third Circuit summarized the Floyd court's analysis of the limitations contained in Article 17, and concluded that:

After the Court's exhaustive examination of the French text of the Warsaw Convention, its legislative history, French dictionaries, French civil law, the intent of the signatory nations, treatises, and similar international treaties, and the Court's determination that Article 17 requires 'bodily injury,' Mrs. Terrafranca's argument is simply not persuasive. . . .

. . . [T]he repeated emphasis on 'physical injury' underscores the central holding of Floyd: a passenger cannot recover absent bodily injury.116

Because the Third Circuit found the holding in Floyd to be distinctly physical in scope, it required little more to decide whether physical manifestations of emotional and mental distress were sufficient to satisfy the bodily injury requirement. The court simply held that a plaintiff must demonstrate "direct,
concrete, bodily injury as opposed to mere manifestation of fear or anxiety.”

3. Mental Injury as Physical Injury

Several federal district courts have had to wrestle with similar
issues, but have not been able to reach a consensus. For example, in In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994, sixty-eight people were killed when their airplane tragically crashed. The dispute focused on whether pre-impact fear and terror were properly characterized as purely mental injuries, thereby barring recovery under Floyd. The court agreed with this characterization, but argued that the Supreme Court’s holding merely made physical injury a precondition to liability and that once that precondition was met, there was nothing in Floyd stating that damages were unavailable for mental injuries. In addition, “Article 17 itself expressly requires a causal link only between ‘damage sustained’ and the accident” and in no way implies that mental injuries are compensable only if caused by bodily injuries. As a result, the court permitted recovery for pre-impact terror notwithstanding the fact that the mental injuries did not flow from the physical injuries.

Two years later, the court in Alvarez v. American Airlines, Inc. disagreed with the conclusions drawn in Roselawn. The issue arose from the plaintiff’s claim of emotional and psychological trauma resulting from an incident where the passengers aboard an American Airlines flight were required to evacuate their smoke-filled airplane while it was still sitting on the tarmac of New York’s John F. Kennedy International Airport. The

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117 Id.
120 Id. at 176.
121 Id.
122 Id. at 178.
123 Id. at 179.
124 Id.
plaintiff received slight injuries when sliding down the inflated emergency slide and was later diagnosed as having posttraumatic stress disorder.\footnote{126} After briefly summarizing the opposing views in various jurisdictions, the \textit{Alvarez} court held with the majority of courts that “to recover for psychological injuries” there must be “a causal link between the alleged physical injury and the alleged psychological injury.”\footnote{127} The court reasoned that to do otherwise would undermine the holding in \textit{Floyd} and, as a practical matter, would allow plaintiffs to skirt the bar on recovery for purely mental injuries simply by alleging physical injuries, no matter how slight.\footnote{128} To prevent this back door from opening, the court determined that “a plaintiff may recover compensation for psychological and emotional injuries only to the extent that these injuries are proximately caused by his or her physical injuries.”\footnote{129}

The same year that \textit{Alvarez} was decided, the United States District Court for the District of Montana arrived at a unique conclusion, significantly distinct from the holdings in other federal district courts and even the Third Circuit’s decision in \textit{Terrafranca}. The issue before the court in \textit{Weaver v. Delta Airlines, Inc.}\footnote{130} was essentially the same as in the cases previously discussed; it addressed a claim of posttraumatic stress disorder arising from the emergency landing of a Delta Airlines flight necessitated by mechanical problems.\footnote{131} Unlike the analysis in other decisions, however, this court sought to answer the issue of liability, not by trying to find the existence of an accompanying physical injury or even the causal connection between posttraumatic stress disorder and an accompanying physical injury, but by treating the disorder, heretofore deemed a “mental in-

\footnote{126} \textit{Id.}\footnote{127} \textit{Id.} at *3.\footnote{128} \textit{Id.} at *4.\footnote{129} \textit{Id.} at *5.\footnote{130} \textit{Weaver v. Delta Airlines, Inc.}, 56 F. Supp. 2d 1190 (D. Mont. 1999), \textit{vacated}, 211 F. Supp. 2d 1252 (D. Mont. 2002). Almost three years after the decision in \textit{Weaver}, the original order was vacated pursuant to the parties’ joint and stipulated motion. \textit{Weaver v. Delta Airlines, Inc.}, 211 F. Supp. 2d 1252 (D. Mont. 2002). It should be noted, however, that it is the court’s analysis, not the precedential value of its decision, that is significant. The court, relying on the increased sophistication of medical science, reasoned that chronic posttraumatic stress disorder resulting from biochemical reactions brought on by terror was, in and of itself, a “bodily injury.” \textit{Weaver}, 56 F. Supp 2d at 1192.\footnote{131} \textit{Weaver}, 56 F. Supp. 2d at 1190-91.
jury,” as a “physical injury.”132 By characterizing posttraumatic stress disorder in this way, it would then be encompassed within the bodily injury requirement of Article 17.

The court found the action distinguishable from previous cases and justified its treatment of posttraumatic stress disorder as a physical injury by relying on “recent scientific research explaining that [the disorder] evidences actual trauma to brain cell structures.”133 Accepting this evidence, the court went on to acknowledge the Supreme Court’s determination that purely mental injuries are precluded from recovery under the Warsaw Convention, but reasoned as follows:

Granted, Weaver’s injury manifests itself in ways that are similar to the ‘injuries’ previously found not compensable in similar cases under the Warsaw Convention. However, the central factor here is not legal, but medical. The legal question in this case is simply whether the Warsaw Convention allows recovery for this particular kind of bodily injury, i.e., a brain injury (even with slight physical effects). The answer must be yes.134

Making such a pronouncement is significant because, despite the long-held belief that mental injuries and physical injuries are wholly distinct, the court clearly identified the fact that there is a relationship linking the two. In addition, the Weaver court discounted the contention of some other courts addressing this issue, explaining: “[N]o floodgates of litigation will be opened by allowing for claims such as Weaver’s, which are based on a definite diagnosis of a disorder that arises from a physical injury that is medically verifiable. Fright alone is not compensable, but brain injury from fright is.”135

The Ninth Circuit Court of Appeals later addressed this issue in Carey. 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.136 At different times in the flight, two of Carey’s

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132 Id. at 1192.
133 Id.
134 Id.
135 Id.
136 Carey, 255 F.3d at 1046. Note also that 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.
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.\textsuperscript{137} 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. 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.

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.\textsuperscript{138} This resulted in an altercation wherein Carey was insulted, profaned, and humiliated in the presence of the other passengers. 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.\textsuperscript{139} Following the incident Carey claimed not only to have suffered severe emotional and mental distress, but also nausea, cramps, perspiration, nervousness, tension, and sleeplessness.\textsuperscript{140}

Carey brought suit against 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.\textsuperscript{141} When the district court granted United's motion for summary judgment,\textsuperscript{142} Carey then appealed the decision, arguing 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.\textsuperscript{143} Reviewing the district court's grant of summary judgment \textit{de novo}, the Ninth Circuit not only agreed that Carey's claims were governed solely by the Warsaw Convention,\textsuperscript{144} but also that there are no exceptions to

\begin{itemize}
\item \textsuperscript{137} Id. at 1046.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 1046 n.2.
\item \textsuperscript{140} Id. at 1046.
\item \textsuperscript{141} Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165, 1167 (Or. 1999), aff'd, 255 F.3d 1044 (9th Cir. 2001).
\item \textsuperscript{142} Id. at 1176.
\item \textsuperscript{143} Carey, 255 F.3d at 1046.
\item \textsuperscript{144} Id. at 1048. "[T]he Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when [the] claim does not satisfy the conditions for liability under the Convention." Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165, 1167 (Or. 1999), aff'd, 255 F.3d 1044.
\end{itemize}
this rule even in the case of an air carrier's intentional misconduct.\textsuperscript{145}

Once the court determined the Warsaw Convention afforded Carey's only remedy, it broached the subject of whether Carey's injuries satisfied the requirements of Article 17.\textsuperscript{146} The court adopted the bulk of reasoning articulated in \textit{Terrafranca}, holding that "physical manifestations of emotional and mental distress do not satisfy the 'bodily injury' requirement," and added that to hold otherwise would undermine the ruling in \textit{Floyd}.\textsuperscript{147} However, the court went a step further by supporting its holding with what it characterized as strong dictum in \textit{El Al Israel Airlines, Ltd. v. Tseng}.\textsuperscript{148}

In \textit{Tseng}, the Supreme Court noted that the plaintiff "sustained no 'bodily injury' and could not gain compensation under Article 17 for her solely psychic or psychosomatic injuries."\textsuperscript{149} The \textit{Carey} court then determined to ascertain the Supreme Court's meaning in using this language and found the following: "Psychosomatic is defined as ['o]f or relating to phenomena that are both physiological and psychological' and as 'one who experiences bodily symptoms because of mental conflict.'"\textsuperscript{150} The court then took these definitions, used in the context of the discussion in \textit{Tseng}, "as a strong indication that the Supreme Court would hold that physical manifestations purely descended from emotional and mental distress do not satisfy the 'bodily injury' requirement in Article 17."\textsuperscript{151}

While this may be an accurate prediction of the Supreme Court's response to claims of mental injuries accompanied by physical manifestations of such injuries, the \textit{Carey} court fails to recognize the significance of the \textit{Weaver} and \textit{Roselawn} decisions.

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(9th Cir. 2001) (quoting El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 176 (1999)).

\textsuperscript{145} Even though the plaintiff in \textit{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 \textit{Saks}.” \textit{Carey}, 255 F.3d at 1049; see Air France v. Saks, 470 U.S. 392 (1985).

\textsuperscript{146} \textit{Carey}, 255 F.3d at 1051.

\textsuperscript{147} \textit{Id.} at 1052.


\textsuperscript{149} \textit{Id.} at 172.

\textsuperscript{150} \textit{Carey}, 255 F.3d at 1053 n.51 (quoting \textit{WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY} 950 (1994)).

\textsuperscript{151} \textit{Carey}, 255 F.3d at 1053.
The court attempts to distinguish these cases; however, it cannot be ignored that the claims in Weaver and Roselawn were compensable despite the fact that the mental injuries involved did not flow from any form of physical injury. In its response to Weaver, the court even left open the possibility that a plaintiff who experiences "biochemical reactions" resulting from emotional distress may recover damages, not realizing that 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 most reasonable explanation for this is that the Carey court, like so many before it, simply accepted the common law idea that mental injuries are completely separate and distinct from physical injuries, with only the latter being compensable. By following the lead of Weaver, however, a holding recognizing the relationship that exists between mental and physical injuries "has the potential of allowing for more valid actions under the Warsaw Convention, with the increase attributable only to the increased sophistication of medical science."

C. CONTINUING QUESTIONS

By retaining language virtually mirroring the original text of the Warsaw Convention, and because the court in Floyd expressly refused to state its opinion, the question remains whether physical manifestations of emotional and mental distress satisfy the bodily injury requirement of either the Warsaw or Montreal Convention. If the drafters had opted to leave in the early draft language, it is clear that mental injuries would have been compensable under the new convention; however, by failing to keep the addition, we are left to wonder at the drafters' intentions.

It is arguable whether emotional and mental distress were meant to be specifically excluded from the Montreal Convention because the addition of the words "mental injury" in early drafts of the convention were later removed from the final draft. One commentator has suggested that "[t]he reintroduction of the words 'bodily injury' and the removal of 'personal and mental injury' could be interpreted either way—that the final draft intended retaining exclusively physical injury with no hint

152 Id. at 1054.
153 Weaver, 56 F. Supp. 2d at 1192; Roselawn, 954 F. Supp. at 179.
154 Carey, 255 F.3d at 1053 n.47.
155 Weaver, 56 F. Supp. 2d at 1192.
of mental injury, or, that mental injury is imputed to bodily injury, taking into consideration the emergent trend of linking mental injury with a tangible bodily injury.” 156 Since the intentions of the drafters remains unclear, and the text can be construed to have either meaning, the Montreal Convention leaves the issue open to the same debate that existed under the Warsaw Convention.

Whether or not mental injury was meant to be expressly included or excluded under the Montreal Convention, it seems most likely that mental injury is still implicated through the use of the words “bodily injury.” In Zicherman v. Korean Airlines Co., 157 the court determined that the French word dommage could be construed broadly and that it was used by the drafters of the Warsaw Convention in the sense of a legally cognizable harm. 158 This decision “incontrovertibly brings to bear the compelling significance of legally cognizable harm as being a compensable element and therefore admits of mental injury as damage under Article 17, if the domestic law applicable to a case were to deem mental injury as such.” 159 While this may be true, the difficulty in the United States stems from the courts’ traditional treatment of physical and mental injuries as wholly distinctive and their hesitancy to “adjudicate upon anything which was not apparent or proven on an empirical basis.” 160 As a result, mental injuries not flowing from physical injuries have typically been rejected because it was thought that “mental suffering and its consequences [were] so evanescent and intangible that they [could not] be foreseen or anticipated and for that reason have no reasonable proximate causal connection with the act of [a] defendant.” 161

Even so, a minority of jurisdictions have altered this traditional treatment and permitted recovery for damages resulting from mental injuries that do not flow from accompanying physical injuries. Some states like Illinois, for example, which once adhered to the common law principle that recovery for mental injuries must flow from physical injuries, have radically altered their positions to provide increased protection of freedom from

156 Abeyratne, supra note 59, at 227.
158 Abeyratne, supra note 59, at 227.
159 Id.
160 Id. at 233.
161 Id. at 242 (quoting Bartow v. Smith, 78 N.E.2d 735, 740 (Ohio 1948) (Hart, J., dissenting)).
emotional distress. Other states like Kansas and Louisiana have accepted the view that mental distress is independently compensable and requires neither a demonstration of an intentional act nor that there be any accompanying physical injuries.

Despite the fact that some jurisdictions have recognized mental injuries as an independently compensable cause of action, most jurisdictions still require that a mental injury flow from a physical injury before it can be compensable. One of the reasons the majority of jurisdictions still adhere to the latter requirement stems from the difficulty in legally defining and proving the existence of a mental injury. Medical science, however, has debunked this legal attitude by clearly identifying mental disturbance. By doing so, the difficulties associated with legally defining mental injury apart from a more apparent and tangible physical injury have all but disappeared as, from a medical perspective, mental injury is simply a form of physical injury. Unfortunately, “although in many areas of the law academic opinion and judicial decisions have been symbiotic, the courts did not heed the comments of Prosser, Bohlen, and may others who at an early stage recognized mental injury as independent injury which infringes the interest of peace of mind.”

When Floyd reached the Court of Appeals for the Eleventh Circuit, the court seemed to recognize the subtle relationship between mental and physical injuries when it held that mental injury was compensable under the Warsaw Convention. This relationship was again recognized, and more clearly stated, when the court in Weaver noted that the central determining factor was not a legal question, but a medical question. With these decisions, the courts were “transcending the bounds of judicial parochialism and actually recognizing that there are other

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162 Id. at 244.
163 Id. at 245.
164 Id. at 259.
167 Weaver, 56 F. Supp. 2d at 1192.
fields of human expertise that become relevant in the adjudication of human disputes."168 When reviewing the Court of Appeals' decision in Floyd, however, the Supreme Court was unable to ascertain the same relationship, refused to acknowledge that mental injury is separately definable and independent of the traditional understanding of physical injury, and consequently reversed the Eleventh Circuit.169 This leads to the conclusion that, although medical science has progressed to a point where it has clearly identified mental disturbance, "the courts have not taken the trouble to seek a definition for mental injury and this ha[s] made their treatment of the injury misguided and often erroneous."170

Even if the majority of courts should continue to find that mental injury is not a "legally cognizable harm" imputed in the use of "bodily injury" as suggested by the decision in Zicherman, the question would remain whether physical manifestations of emotional and mental distress satisfy the bodily injury requirement of Article 17. By adhering to the traditional view that mental injuries must flow from a physical injury, in the event that the physical manifestation itself were to satisfy the bodily injury requirement, the mental injury could not be construed as flowing from the physical manifestation, but would merely be closely associated with it. This may create additional jurisprudential difficulties since some courts have found certain circumstances to be so egregious as to warrant recovery even for emotional distress preceding (i.e., not flowing from) any sort of physical injury.

V. CONCLUSION

Despite the apparent uniformity stemming from the Supreme Court's decision in Floyd, courts appear confused in their approach to dealing with mental injuries under the Warsaw Convention and, because Article 17's language is almost mirrored in the Montreal Convention, this confusion will probably continue. It is unclear whether mental injuries are included in, or were meant to be included in Article 17, and courts, while attempting to establish some measure of uniformity, have failed to provide a clear answer. This is because they have not adequately distinguished those cases wherein plaintiffs have been permitted to

168 Abeyratne, supra note 59, at 255-56.
170 Abeyratne, supra note 59, at 260.
recover damages for mental injuries closely related to, but not flowing from their physical injuries.

The difference between cases like Weaver and Roselawn, in which plaintiffs' claims were compensable, and Carey, in which there was no recovery available, is one measured only in the degree of harm. Regardless of the close association of the Roselawn crash victims' emotional distress to the actual injuries incurred\textsuperscript{171} or the "biochemical reactions" resulting from emotional distress in Weaver\textsuperscript{172} the fact remains that the plaintiffs in these cases suffered some form of emotional distress not flowing from physical injury but were allowed to recover anyway. This directly contradicts the Ninth Circuit's conclusion that the signatories of the Warsaw Convention left no remedy for those claiming physical manifestations of emotional and mental distress "no matter how egregious the airline's conduct."\textsuperscript{173} What is more surprising is that the court seemed acutely aware of this discrepancy when it admitted that there can be "recovery for egregious incidents... where there is no concrete or visible 'bodily injury.'"\textsuperscript{174}

Such an admission does not at all support the conclusion that physical manifestations of emotional and mental distress are not encompassed in Article 17. It suggests, instead, that such claims can be considered within the meaning of "bodily injury" if they satisfy a high threshold requirement. For this reason, the notion of mental distress should be "viewed with circumspection, which could be done," not by excluding the claim altogether, but "by imposing stringent standards of proof of injury on the plaintiff."\textsuperscript{175} This would not transform the Floyd standard into an easily satisfied pleading formality opening the floodgates of litigation,\textsuperscript{176} as some have suggested, but allow the courts to scrutinize more carefully the evidence before them.

\textsuperscript{171} Carey, 255 F.3d at 1054.
\textsuperscript{172} Id. at 1053 n.47.
\textsuperscript{173} Id. at 1053.
\textsuperscript{174} Id. at 1053 n.47.
\textsuperscript{175} Abeyratne, supra note 59, at 230.
\textsuperscript{176} Carey, 255 F.3d at 1052.