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John F. Easton
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Kent A. Radford

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POST TRAUMATIC "LÉSION CORPORELLE":
A CONTINUUM OF BODILY INJURY UNDER THE WARSAW CONVENTION

JOHN F. EASTON*
JENNIFER E. TROCK**
KENT A. RADFORD***

I. INTRODUCTION

THE PURPOSE of the Warsaw Convention1 is two-fold—to establish a uniform manner to regulate the conditions of international air transportation and to limit the liability of air carriers in the event of an accident.2 Despite a desire for uniformity, courts have not been uniform in awarding damages under the Warsaw Convention for emotional injury. While the Supreme Court has held that plaintiffs may not recover for pure psychic injury under Article 17 of the Warsaw Convention,3 the question of whether a plaintiff may recover for something other

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* B.S., Pennsylvania State University, 1984; M.A., University of Maryland, 1988; J.D., University of Maryland, 1996, with honors; Recipient of the American Jurisprudence Award for Excellence in Evidence; Order of the Coif; Assistant Editor, Maryland Law Review. Mr. Easton is a partner in the Houston office of Pillsbury Winthrop LLP. Mr. Easton has a general litigation practice, with an emphasis on products liability defense, oil and gas disputes, and aviation-related matters. He is a former U.S. Air Force F-16 and commercial airline pilot.

** B.S., Chemistry, Wheaton College, 1995, cum laude, J.D., University of Notre Dame, 1998; Associate Articles Editor, Journal of Legislation; National Moot Court Team. Ms. Trock is an associate in the Washington, D.C. office of Pillsbury Winthrop LLP.

*** B.S., West Texas State University, 1992, cum laude, M.A., University of New Mexico, 1995; J.D., The University of Texas School of Law, 2000, with honors. Mr. Radford is an associate in the Houston office of Pillsbury Winthrop LLP.


2 Id. at Preamble, 49 Stat. at 3014.

3 E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) ("We conclude 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.").

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than pure psychic injury has resulted in a wide range of opinions, some allowing no recovery at all and others allowing full recovery in certain circumstances. Far from being uniform, the outcome in those cases often depends upon how a plaintiff categorizes her injuries and the strength of the scientific or medical evidence offered in support of the plaintiff’s claims. This paper provides a summary and analysis of that case law.

II. THE WARSAW CONVENTION FRAMEWORK

The Warsaw Convention traces its origins back to the 1925 First Conference on Private Air Law in Paris (the “Paris Convention”) and the 1929 Second International Conference on Private Air Law held in Warsaw. A resolution was adopted at the Paris Convention to establish the Comité International Technique d’Experts Juridiques Aériens (“CITEJA”). The CITEJA was comprised of air law experts, with the stated purpose of “provid[ing] a continuous study of the problems involved in private liability resulting from the international operation of aircraft and to producing a codification of the law incident thereto.”

Four years after the Paris Convention – when civil aviation was still in its infancy and international air service was even less developed – a second international conference was held in Warsaw. The United States sent an observer to the conference, but did not participate in the negotiations. Mindful of the expansion of the infant civil aviation industry, the conference had two primary purposes, which were later embodied in the Warsaw Convention. The first goal was to establish uniformity in documentation and claims arising out of air transportation among air carriers serving different countries. The second and more important goal was to limit air carrier liability. When transmitting the Warsaw Convention to the United States Senate in 1934, then Secretary of State, Cordell Hull, wrote:

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5 CITEJA later dissolved, and its functions have been taken over by the International Civil Aviation Organization (ICAO), which was created by the Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].


8 Id. at 499.
It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expense for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.  

The Convention entered into force on February 13, 1933 and was adopted and entered into force in the United States on October 29, 1934. The Convention has been amended several times, and most recently, in September 2003, the United States' ratification of the Montreal Convention of 1999 will once again change the legal landscape for air carrier liability in cases involving international air travel. Effective November 4, 2003, the Montreal Convention raised the liability cap previously in effect under the Warsaw Convention and added as a fifth potential jurisdiction the passenger's place of residence. It did not, however, alter the basic requirements for recovering for injury under the Convention.

The liability structure of the Warsaw Convention is fairly straightforward. Article 17 sets forth the circumstances under which a plaintiff may seek damages arising out of an accident. Articles 20, 22, and 25 relate to limits on liability and available defenses to a claim. All claims arising during international air
travel must be brought under the Warsaw Convention, and if no such claim can be brought under the Convention, no claim can be brought at all.\textsuperscript{16} Article 29 of the Convention imposes a two-year statute of limitations in which to bring a claim.\textsuperscript{17}


\textsuperscript{17} "The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." Warsaw Convention, \textit{supra} note 1, at art. 29, 49 Stat. at 3021.
A. Article 17: Lésion Corporelle

The purpose of the Warsaw Convention and the limitations of liability contained in Article 17 and Article 22 were "designed to assure that only a regulated burden be borne by the air carriers and to afford a more definite basis for passenger recovery." The Convention's limitation on liability made it easier for air carriers to obtain insurance and financial backing from investors, while the recovery provisions also provided some relief for passenger victims and their families.

Article 17 of the Warsaw Convention states in the original French:

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 cause le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

The English translation, as ratified by Congress in 1934, reads as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury.

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18 Article 22 limited liability to 125,200 Poincaré (gold) francs, which was approximately $8300 (U.S.) at the time. Id. at art. 22, 49 Stat. at 3019. The Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, approved by CAB Order No. E-23680, reprinted at 49 U.S.C. App. § 1502 note (1976) [hereinafter Montreal Agreement] raised the limit to $75,000 and allowed for negotiation between carriers and passengers for higher limits. The Montreal Agreement was strictly contractual – it did not have the force of law of a treaty. On September 5, 2003, the United States delivered its ratification of the 1999 Montreal Convention to the ICAO. As the 30th country to ratify the Montreal Convention, the Convention will take effect in 60 days, on November 4, 2003. The Montreal Convention raises the liability cap to approximately $135,000 with no limits on recoveries above that amount for proven damages. See Montreal Convention of 1999 on Compensation for Accident Victims Set to Enter Into Force (Sept. 5, 2003), available at http://icao.org/cgi/goto.pl?icao/en/na/pio200314.htm.

19 Rosman v. Trans World Airlines, 314 N.E.2d 385, 396 (N.Y. 1974) (citing Eck v. United Arab Airlines, 203 N.E.2d 640 (N.Y. 1964) and letter of Secretary of State Cordell Hull dated March 31, 1934, Senate Committee on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, SEN. EXEC. DOC. NO. 73-G, 3-4 (1934)).

20 Lowenfeld & Mendelsohn, supra note 4, at 499-500.

21 Warsaw Convention, supra note 1, at art. 17, 49 Stat. at 3005 (emphasis added). On its face, there appears to be very little substantive or contextual difference with respect to the use of the word "accident" in the new Convention as compared to the Warsaw Convention. Accordingly, case law interpreting the meaning of "accident" as used in Article 17, should have the same precedential value under the new Convention.
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.\textsuperscript{22}

\section*{B. Treaty History and Construction}

\subsection*{1. Treaty Construction}

When interpreting a treaty, courts begin with the text of the treaty and the context in which the written words are used.\textsuperscript{23} Courts use the authentic language text of the treaty to guide their analysis\textsuperscript{24} and consider the "legal meaning" of the terms used in the treaty for guidance as to the shared expectations of the parties.\textsuperscript{25} Where the original text of the treaty is written in one language only, the text of the treaty in that language is controlling.\textsuperscript{26}

One way in which courts may ascertain the legal meaning of a particular term is to consider a proper translation of that term into their own language.\textsuperscript{27} Courts, however, recognize that dictionary definitions may be too general for purposes of treaty interpretation.\textsuperscript{28} Courts turn, in such cases, to the legal materials of the country in whose language the treaty was written to determine whether that country's contemporary legal understanding and application of a particular term differed from the term's translated meaning.\textsuperscript{29} Where the meaning of a treaty is ambiguous, courts will look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.\textsuperscript{30} As the Supreme Court explained in \textit{Zicherman v. Korean Air Lines Co.}, because "a treaty ratified by the United States is not only the law of this land. . . . but also [it is] an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and draft-

\textsuperscript{22} Id. at art. 17, 49 Stat. at 3018 (emphasis added) (English translation of Article 17).


\textsuperscript{25} Id. at 399.


\textsuperscript{27} Saks, 470 U.S. at 399.

\textsuperscript{28} \textit{Floyd}, 499 U.S. at 537.

\textsuperscript{29} Id.

ing history (travaux preparatories) and the post-ratification understanding of the contracting parties." Finally, a fundamental principle of treaty construction is that treaties should receive a liberal interpretation to give effect to their apparent purpose.  

2. Negotiating and Drafting History  

Although the negotiating history of the Warsaw and Montreal Conventions offers no definitive guidance on what, if any, psychic injuries should be compensable under the Convention, it does suggest that the drafters of both conventions did not intend that purely emotional injury be compensable. First, the treaty that became the Warsaw Convention was drafted at an international conference in Paris in 1925. The final protocol of the Paris Conference contained an article specifying that: "The carrier is liable for accidents, losses, breakdowns, and delays. Such "expansive provision, broadly holding carriers liable in the event of an accident," is believed to "almost certainly have permitted recovery for all types of injuries, including emotional distress." In revising the Paris protocol for the Warsaw Convention, the CITEJA revised this language and introduced the phrase "en cas de mort, de blessure ou de toute autre lésion corporelle." This language was ultimately adopted by the Warsaw Convention in Article 17. Although there is no definitive evidence explaining why the CITEJA drafters chose this narrower language, it is reasonable to infer that the Conference adopted the narrower language to limit the types of recoverable injuries.  

Second, although there is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of "lésion corporelle," it is reasonable to assume that the signatories had no specific intent to include purely psychic injury in the Convention because compensation for such injury was unavailable in many common law

32 Todok, 281 U.S. at 453.  
33 Flood, 499 U.S. at 544-45.  
34 Saks, 470 U.S. at 401.  
35 Flood, 499 U.S. at 542.  
37 Id. at 543.  
38 Id.  
39 Id.
and civil law countries at the time of the Warsaw Conference.\textsuperscript{40} Finally, early drafts of the Montreal Convention's Article 17 expressly included liability for mental injury, included the term "personal injury," and even introduced the element of personal injury designed to encompass both physical and mental injuries.\textsuperscript{41} However, after deliberations, the ICAO removed both "mental injury" and "personal injury" from the provision, choosing, instead to retain the original Warsaw Convention language.\textsuperscript{42}

In sum, historical legal context of the Warsaw Convention as well as the changes made in the course of Warsaw and Montreal Convention draft revisions seem to indicate that purely emotional injury was not meant to be compensable under the Convention. However, the negotiating history offers no guidance for determining whether emotional injury damages can be recoverable when they are preceded, accompanied, or followed by a physical injury.

III. THE RELATIONSHIP BETWEEN PSYCHIC AND PHYSICAL INJURY

Previously recognized distinctions between purely psychic and physical injuries have become somewhat blurred, as the scientific and medical understanding of purely psychic injuries has evolved. For example, physical manifestations of post traumatic stress disorder ("PTSD") are reported to include: "neurobiological alterations in both the central and autonomic nervous systems, such as altered brainwave activity, decreased volume of the hippocampus, and abnormal activation of amygdala, ... hyperarousal of the sympathetic nervous system, increased sensitivity of the startle reflex, ... sleep abnormalities ..., abnormal levels of key hormones," impact on thyroid function, and increased likelihood of co-occurring psychiatric disorders.\textsuperscript{43} The symptoms of PTSD may also include headaches, gastrointestinal complaints, immune system problems, dizziness, chest pain and discomfort.\textsuperscript{44}

\textsuperscript{40} Id. at 544.
\textsuperscript{41} Alldredge, supra note 11, at 1369-70.
\textsuperscript{42} Id.
\textsuperscript{44} Id.
In recent cases construing Article 17, plaintiffs have offered evidence that PTSD itself constitutes physical injury, citing new technology that allows 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." As medical technology continues to advance, it is likely that plaintiffs will be able to claim physical injury for injuries such as PTSD and other injuries that have traditionally been classified as "purely psychic" or "emotional injuries." As plaintiffs' claims become more technologically sophisticated, the meaning of the term "lésion corporelle" will continue to evolve.

IV. ANALYSIS OF "LÉSION CORPORELLE"

A. UNITED STATES COURTS: BODILY INJURY ON THE CONTINUUM

1. Recovery for Pure Emotional Injury Unaccompanied by Physical Injury or Physical Manifestation of Injury

Prior to the Supreme Court's decision in Floyd, courts were split as to whether a plaintiff could recover for pure psychic injuries. In one of the earlier cases, Rosman v. Trans World Airlines, Inc., New York's highest court considered the claims of passengers involved in the hijacking of a flight from Tel Aviv to New York. The claims were brought under Article 17 for emotional injury accompanied by physical injury. The plane was hijacked on September 6, 1970, and plaintiffs were held hostage for six days by guerrillas armed with rifles and hand grenades. Plaintiffs claimed that they suffered "severe psychic trauma" and that they were damaged "by the physical circumstances of their imprisonment aboard the aircraft." Additionally, plaintiffs alleged that they suffered physical injury as a result of the forced immobility, inadequate sanitary facilities, and scarcity of food and water. The alleged physical injuries included backache, swollen feet, boils, skin irritation, weight loss, dehydration, and sleep deprivation. The defendant airline argued that the liability scheme of the Warsaw Convention did not allow recovery because physical injury, "with or without palpable physical manifestation," is not

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46 Floyd, 499 U.S. at 530.
48 Id. at 850.
49 Id.
"bodily injury" within the meaning of Article 17, and that "the physical injuries claimed did not result from any impact and in any case are so slight as not to amount to compensable 'bodily injury.'"50

The court began by examining the meaning of Article 17 in its original French and found that there was no dispute that the words "mort, de blessure, ou de toutes autres lésion corporelle" were properly translated as "death or wounding or any other bodily injury."51 For purposes of the plaintiffs' claims, the meaning of "bodily injury" was at issue. The court acknowledged that the French legal usage of the term lésion corporelle should be considered, but declined to apply French law to determine the meaning of the term.52 The first step in the court's analysis was to determine whether "the treaty's use of the word 'bodily,' in its ordinary meaning, can fairly be said to include 'mental.'"53

The court found that the ordinary meaning of the term "bodily injury" connotes "palpable, conspicuous physical injury, and excludes mental injury with no observable 'bodily,' as distinguished form 'behavioral,' manifestations."54 Given the plain meaning of the term, the court concluded that "the compensable injuries must be 'bodily' but there may be an intermediate causal link which is the 'mental' between the cause - the 'accident' - and the effect - the bodily injury."55 Once the causal link is established, the court reasoned, damages sustained as a result of the 'bodily injury' - whether mental or physical - are compensable under the Warsaw Convention.56 The court found that the airline was liable for the palpable, objective bodily injuries, "including those caused by the psychic trauma of the hijacking," and for the damages caused by them, but not "for the trauma as such or for the non-bodily or behavioral manifestations of that trauma."57

On the other hand, in Floyd v. Eastern Airlines, Inc.,58 the Court of Appeals for the Eleventh Circuit held that the phrase "lésion corporelle" in the authentic French text of Article 17 encom-

50 Id. at 852.
51 Id.
52 Id.
53 Id. at 855.
54 Id.
55 Id. at 857.
56 Id.
57 Id.
58 Floyd v. E. Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989).
passed purely emotional distress.\textsuperscript{59} Similarly, a host of trial courts interpreted the Convention to permit damages for purely emotional injury.\textsuperscript{60}

Although the Supreme Court had decided cases under the Warsaw Convention several times before,\textsuperscript{61} it was not until its review of the Eleventh Circuit's decision in \textit{Floyd v. Eastern Airlines},\textsuperscript{62} that the Court established the framework for the recovery of emotional injuries under the Warsaw Convention. The case was brought by passengers of an Eastern Airlines flight from Miami to the Bahamas. Shortly after takeoff, one of the engines lost oil pressure and, as part of the normal emergency protocol, the flight crew shut down the engine and returned to Miami. The two remaining engines then failed, and the flight crew informed the passengers that the plane would be "ditched" in the Atlantic Ocean. As the plane was descending, the crew was able to restart one of the engines and the plane landed safely at Miami International Airport.\textsuperscript{63} The passengers brought suit to recover damages solely for their mental distress. The district court concluded that pure psychic injury was not compensable under the Warsaw Convention.\textsuperscript{64} The Eleventh Circuit reversed, holding that the phrase "\textit{lésion corporelle}" encompassed "purely emotional distress."\textsuperscript{65} The Supreme Court granted certiorari to resolve the conflict between the Eleventh Circuit and the New York Court of Appeals decision in \textit{Rosman v. Trans World Airlines}.\textsuperscript{66} The Supreme Court reversed the Eleventh Circuit, ultimately holding that recovery for pure psychic injury was not permitted under the Warsaw Convention.

The Court applied long-accepted methods of treaty interpretation, considering the text of the treaty, its context, as well as the "history of the treaty, the negotiations, and the practical con-

\textsuperscript{59} \textit{Id.} at 1471.


\textsuperscript{63} \textit{Id.}


\textsuperscript{65} \textit{Floyd}, 872 F.2d at 1480.

\textsuperscript{66} \textit{See} Rosman, 314 N.E.2d at 850 (holding that purely psychic trauma is not compensable under Article 17); \textit{see also} discussion, \textit{supra} section IV(A)(1).
struction adopted by the parties.”67 Beginning with the French text, the Court set forth the three part test for determining when an air carrier is liable for passenger injury: “(1) there has been an accident, in which (2) the passenger suffered ‘mort,’ ‘blessure,’ ‘ou . . . toute autre lésion corporelle,’ and (3) the accident took place on board the aircraft or ‘in the course of operations of embarking or disembarking.’”68 The narrow issue reviewed by the Supreme Court was whether mental or psychic injury alone satisfies the requirements of condition two – in other words, did the passenger suffer “lésion corporelle.”69

The Court examined the French text and its English translation. French dictionaries, the English translation of the treaty as ratified by Congress, and the United Kingdom’s translation of the term all define the term “lésion corporelle” as “bodily injury.”70 In the absence of disagreement as to its proper English translation, the Supreme Court next turned to the French legal interpretation of the text. The Court applied the same principles that would have been applied by contemporary French lawyers to interpret the text – “(1) legislation, (2) judicial decisions, and (3) scholarly writing.”71 The Court found that the term “lésion corporelle” was not in use in French legislative texts at the time of the Warsaw Convention.72 Second, the Court found no French court decisions explaining the meaning of the phrase. Third, the Court found no supplemental materials or scholarly writing prior to the Convention discussing the meaning of the term “lésion corporelle.”73 Since neither Article 17 nor the traditional methods of interpretation suggested that the term “lésion corporelle” should be translated as anything but “bodily injury,” the Court then examined the negotiating history of the Convention.

The protocol established by the Paris Convention in 1925 would have held air carriers liable for a broad range of injuries,

67 Floyd, 499 U.S. at 552.
68 Id. at 535-36.
69 Id.
70 Id. at 536-37.
71 Id. at 537.
72 More recent French cases have used the term “lésion corporelle,” generally, in the context of automobile accidents. Id. at 538. The Court found that the recent cases “tend to support the conclusion that, in French legal usage, the term “lésion corporelle” refers only to physical injuries.” Id. at 538.
73 Although some scholarly writings discussed “lésion corporelle” subsequent to the Convention, the Court found the analysis unpersuasive. Id.
including emotional distress.\textsuperscript{74} At the Warsaw Convention, CITEJA drafted the more narrow provision that was ultimately adopted, although the negotiating history does not provide an explanation as to why the language was revised or of the meaning of the term "\textit{lésion corporelle.}" The Floyd Court’s review of the documentary record “confirms – and courts and commentators appear universally to agree – that there is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of ‘\textit{lésion corporelle.’}”\textsuperscript{75} The Court was persuaded by the “unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Convention.”\textsuperscript{76} “On balance, the evidence of the post-1929 ‘conduct’ and interpretations of the signatories . . . supports the narrow translation of ‘\textit{lésion corporelle.’}”\textsuperscript{77} After examining subsequent amendments to the Convention as well as case law from other Signatory States, the Court concluded that there was no support for a broader reading of the term. The Court ultimately held 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,” but expressed “no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.”\textsuperscript{78}

In cases subsequent to \textit{Floyd}, courts have consistently found that pure emotional distress is not actionable. In \textit{Fishman v. Delta Air Lines, Inc.}, plaintiffs—an infant child and her mother—brought an action against an airline for damages sustained by the infant when a stewardess applied a cup containing a warm cloth over the child’s ear to alleviate the child’s pain from changes in air pressure.\textsuperscript{79} When the stewardess applied this to the child’s ear, scalding water dripped onto the child, causing burns.\textsuperscript{80} The crew declined to administer first aid upon arrival, and eventually, the child was rushed to the first aid station at the airport and was treated. The court’s primary focus was whether

\textsuperscript{75} \textit{Id.} at 544.
\textsuperscript{76} \textit{Id.} at 544-45.
\textsuperscript{77} \textit{Id.} at 546 (internal citations omitted).
\textsuperscript{78} \textit{Id.} at 552.
\textsuperscript{80} \textit{Id.}
the alleged torts arose from an "accident" under the Warsaw Convention and whether the statute of limitations was tolled during the child's infancy. Relying on the Supreme Court's Decision in *Air France v. Saks*, the court found that the claim fell within the scope of the meaning of accident as the injury was caused "by an unexpected or unusual event or happening that is external to the passenger." The court went on to find that injuries resulting from "routine procedures in the operation of an aircraft or airline can be an 'accident' if those procedures or operations are carried out in an unreasonable manner."83

In an attempt to bring her claim outside of the Warsaw Convention, the child's mother argued that her claims were solely for emotional harm and, therefore, outside the scope of Article 17. Because the claim arose out of an accident, it was within the ambit of Article 17. In fact, the court found that all claims for both infant and mother were accident claims under the Warsaw Convention. However, because the mother's claims were solely for emotional distress they were not compensable under the Warsaw Convention.

In *Lee v. American Airlines, Inc.*, an individual brought a putative class action under Article 19 of the Warsaw Convention on behalf of himself and other similarly situated passengers on a flight from New York to London. The flight was delayed and eventually cancelled, and the plaintiff alleged a variety of "inconveniences" under Article 19 of the Warsaw Convention arising from the delay. The inconveniences he suffered included: "(1) having to remain in the holding area without adequate food, water, restroom facilities and information; (2) having to stay in a substandard motel; (3) having to 'be subjected' to misinformation about the flight status; (4) having to obtain alternative means of transportation; and (5) losing out on a refreshing, memorable vacation." While acknowledging that economic damages arising from delay were compensable under Article 19

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82 *Fishman*, 132 F.3d at 141 (quoting *Saks*, 470 U.S. at 405).
83 *Id.* at 143 (emphasis in original).
84 *Id.* at 142.
85 *Id.*
87 See *id.* Article 19 provides that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage, or goods."
88 *Lee*, 2003 WL 1461920, at *1, 2.
89 *Id.* at *3 fn. 5.
of the Warsaw Convention, the court found that the plaintiff’s alleged damages were nothing more than pure mental injuries arising “from discomfort, annoyance, and irritation” suffered as a result of the delay. As such, the Lee court relied on Floyd and Daniel v. Virgin Atlantic Airways Ltd., and concluded that plaintiff could not recover for mental injuries under the Warsaw Convention.

In another Article 17 case, Croucher v. Worldwide Flight Services, Inc., the court reviewed a claim for emotional distress resulting from a passenger coming into contact with biomedical waste in an air sickness bag that was allegedly left from a prior flight. The plaintiff also alleged emotional distress from the fear of contracting a disease from the waste. Plaintiff alleged no bodily injury, and the court rejected the plaintiff’s arguments as having no basis in law.

90 Id. at *4. “Because the Warsaw Convention is premised upon a ‘contract’ between the passenger and the airline, courts permit recovery of economic damages arising out of the delay itself (i.e., rental, hotel accommodation, taxis, etc.) under Article 19.” See Pakistan Arts & Entm’t Corp. v. Pakistan Int’l Airlines Corp., 660 N.Y.S.2d 741, 743 (N.Y. App. Div. 1997).


92 Daniel v. Virgin Atlantic Airways Ltd., 59 F. Supp. 2d 986, 992-93 (N.D. Cal. 1998) (dismissing claims of emotional distress including anxiety, exhaustion, frustration, humiliation, mental anguish and physical discomfort arising out of a flight delay).

93 Lee, 2002 WL 146920, at *5. Under Article 19 of the Warsaw Convention, courts have allowed recovery for inconvenience as a result of delay. See Daniel, 59 F. Supp. 2d at 994 (“[D]amages for inconvenience do not fall within the rubric of ‘emotional distress.’ Time is money, after all, and the Court finds that the inconvenience of being trapped for hours in an unfamiliar airport is a compensable element of damages for delay in air travel under the Warsaw Convention and domestic law, even in the absence of economic loss or physical injury.”); see also Pakistan Arts & Entm’t Corp., 232 A.D.2d at 32 (holding that “[d]amages resulting from the delay in transporting a passenger are the type permitted to be recovered under the Convention”); Harpalani v. Air India, Inc., 622 F. Supp. 69 (N.D. Ill. 1985) (holding that Article 19 of the Warsaw Convention provided a cause of action for delay where plaintiffs were “bumped” from their scheduled flight and the airline did not provide transportation for six days).

Notably, the cases that have rejected recovery under Article 19 of the Warsaw Convention for pure emotional injury arising from delay have relied on Floyd, which denied recovery under Article 17 of the Convention based on the meaning of “lésion corporelle,” a term that is not used in Article 19.


95 Id. at 507.
2. Emotional Injury Manifested in Physical Injury

Although the Supreme Court has never decided whether emotional injury that manifests itself in physical injury is compensable under Article 17, lower federal courts have generally agreed that, like pure emotional injury, emotional injury that manifests itself in physical injury is not compensable under Article 17. For instance, in *Hermano v. United Airlines*, the plaintiff brought an action for unlawful arrest, defamation, and negligent infliction of severe emotional distress. The plaintiff checked several bags—some of which contained motorcycle parts—on a flight from Los Angeles to Miami with a connecting flight to Brazil. While on board the aircraft, the plaintiff was approached by a uniformed airline employee and questioned about whether he had any firearms in his checked bags. After denying the claim, the plaintiff was asked to deplane the aircraft, which he did. After the bags were re-examined and no firearms were found, the airline employee located another flight for the plaintiff and the rest of his trip proceeded without further incident. Plaintiff sought damages for "severe and enduring mental distress and anguish, emotional shock to his nervous system, and monetary expenditures for medical treatment." Relying on *Floyd* and *Tseng*, the court found that plaintiff's "physical manifestations of alleged emotional distress" were insufficient to constitute bodily injury under the Convention.

Similarly, in *Terrafranca v. Virgin Atlantic Airways, Ltd.*, a passenger sought damages for extreme emotional distress, post traumatic stress disorder, and anorexia. During her flight to London, the captain became aware of a bomb threat against the plane; it was classified as a "nonspecific warning which could be related to one or more targets but where there could be doubt as to its credibility or the effectiveness of existing security measures." In accordance with the airline's protocol, the captain informed the passengers of the threat, and the plane landed safely as scheduled in London.

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97 Id. at *4.
98 Id.
100 Id. at 108.
101 Id. at 109.
There was no dispute that the event constituted an “accident” under Article 17, and the only question was whether plaintiff’s injuries were compensable under the Convention. The plaintiff relied on a sentence at the very end of the *Floyd* opinion, which states: “We conclude 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.”

In light of the last phrase, “physical manifestation of injury,” the plaintiff asserted that her injuries were compensable under the Convention. Rather than claim that PTSD was the physical manifestation of injury, the plaintiff relied on her weight loss as the actual physical manifestation of the injury. The *Terrafranca* court rejected the plaintiff’s argument, relying on the central holding of *Floyd* – that a passenger cannot recover absent bodily injury. The court concluded that the text of Article 17 requires “bodily injury” as “a precondition to recovery” and that the plaintiff “must demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety.” Since the plaintiff’s claims of post traumatic stress disorder complicated by anorexia and weight loss were found to be purely psychic, they did not qualify as “bodily injuries” under Article 17.

In *Turturro v. Continental Airlines*, a plaintiff’s pocketbook was stolen prior to boarding a flight to Costa Rica. The pocketbook contained plaintiff’s medication, Xanax, which plaintiff regularly took to treat panic attacks, anxiety, and nervousness. Plaintiff boarded the aircraft, but became concerned that the medication would wear off during the flight, and asked the flight attendant if she could disembark. The flight attendant denied her request, despite the fact that they had not yet pushed back from the gate. After her third request was denied, plaintiff began to feel terrified. She started to sweat and as alleged, began to “feel dizzy, nauseated, and short of breath.” She had a rapid heartbeat and pain in her stomach. The plaintiff dialed

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102 *Id.* at 110.

103 *Floyd*, 499 U.S. at 552 (emphasis added).

104 *Id.*

105 *Terrafranca*, 151 F.3d at 111.

106 *Id.* Plaintiff’s psychiatrist classified plaintiff’s injuries—fear, anxiety and isolation—as emotional. *Id.* at 112.

107 *Id.*


109 *Id.* at 173.
“911” from her cell phone and eventually the police contacted the pilot and the aircraft returned to the gate. An airline employee “announced over the loudspeaker that an ‘unruly’ passenger wished to leave; some fellow passengers then greeted plaintiff with hisses and jeers.” The plane returned to the gate, and the plaintiff disembarked, where she was treated by EMS technicians and transported to a nearby psychiatric emergency room.

Plaintiff claimed she suffered “embarrassment, humiliation, loss of liberty, psychological injury, pain, suffering emotional distress and mental anguish.” She also claimed that she suffered post traumatic stress, psychological injury and pain, and that she continued to suffer physical manifestations after her release from the hospital, including “insomnia, restlessness, inability to concentrate, and unexplained aching in her arms and legs.”

The court reasoned that, in Floyd, although not expressly alleged, many of the plaintiffs suffered what “we may call ‘psychosomatic’ sequelae (such as insomnia or weight loss) as a result of their acute fear while airborne.” The court reasoned that Floyd bars recovery for “physical manifestations” of emotional distress where the accident causes “no direct physical injury but rather merely terrifies the passengers (even when the terror later leads to physical symptoms, such as weight loss).” The court determined that this reading is bolstered by the Supreme Court’s narrow reading of lésion corporelle, which respected the Convention’s primary purpose of limiting the liability of air carriers and maintaining uniformity. The court held that to “the extent that plaintiff throughout her ordeal did not receive 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

10 Id.
11 Id.
12 Id. at 174.
13 Evidence of plaintiff’s diagnosis by her psychiatrist was confusing, as she made two different diagnoses – acute stress disorder and generalized anxiety disorder, each with different manifestations. Id.
14 Id.
15 Id. at 175.
16 Id. at 177.
17 Id. (citing Floyd, 499 U.S. at 547).
safely be characterized as psychosomatic and is not compensable.”

The Turturro court also considered sua sponte whether the accident caused the plaintiff to develop PTSD. In its review, the court acknowledged new medical advances that make it possible to document the physical effects of PTSD, including changes to brain cell structure, and “that under some circumstances a diagnosis of chronic PTSD may fall within the Convention’s definition of ‘bodily injury.’” While ultimately concluding that the plaintiff did not adequately plead PTSD, as she did not proffer “reliable evidence beyond her purely subjective experience of panic, . . . somatic complaints, . . . and conflicting diagnoses,” the court’s conclusion may represent a significant development in the ability of plaintiffs to recover for PTSD under Article 17. The court recognized that its finding might open the “floodgates of litigation” unless claims of PTSD are carefully scrutinized.

In more recent cases, plaintiffs have begun bringing claims that PTSD is tantamount to physical injury, based on new medical technologies that suggest that injuries traditionally considered “purely psychic” or “purely emotional” parallel physiological manifestations. In Bobian v. CSA Czech Airlines, plaintiffs alleged that they suffered emotional injuries and physical manifestations of emotional trauma during a flight through severe turbulence related to a hurricane. Plaintiffs generally alleged that PTSD, like other stress-related disorders, “causes ‘biochemical and structural changes’ in the brain.” The court divided the alleged injuries into several categories, none of which were compensable under Article 17. First, several injuries were “patently and purely emotional” and, as such, they were non-compensable under Floyd’s construction of Article 17. The second category of injury included “manifestations of emotional injury—either physical (nausea, cold sweats) or mental (nightmares, lack of concentration).” The court found that these claims were expressly precluded by Terrafranca, which re-

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118 Id. at 178.
119 Id. at 179.
120 Id.
121 Id.
123 Id. at 322.
124 Id. at 325.
125 Id.
quired direct, concrete, bodily injury. While evidence was offered to suggest that severe turbulence could directly cause physical symptoms such as nausea and cold sweats, plaintiffs did not allege that such symptoms were a direct result of the severe turbulence encountered by the aircraft. Plaintiffs also alleged that the mere experience of G-forces amounted to bodily injury under the Convention. The court rejected this argument, noting that “while such forces may of course cause injury, experiencing them does not in itself constitute bodily injury.”

The Bobian court also declined to apply the reasoning in Turturro, instead relying on Terrafranca and concluding that PTSD is purely an emotional injury, despite plaintiffs' attempt to re-characterize PTSD in terms of its effect on the brain. However, unlike Terrafranca where the plaintiff did not allege physical injury from her PTSD, in Bobian, the plaintiffs presented evidence that PTSD and other stress-related disorders are associated with biochemical and structural changes in the brain. The plaintiffs in Bobian presented general evidence that PTSD and other emotional disorders are tantamount to physical injuries, but they did not present specific evidence such as MRIs or other medical evidence of their particular injuries. Other lower courts presented with such evidence have allowed the actions to proceed.

For example, in Weaver v. Delta Airlines, the District Court for the District of Montana awarded damages to a plaintiff whose emotional injury resulted in a simultaneous brain injury. In Weaver, the defendant airline made an emergency landing during a flight from London. The plaintiff alleged that she was terrified during the emergency landing and had to subsequently seek treatment for emotional and physical injuries attributable to the accident. She was subsequently diagnosed with PTSD. The plaintiff argued that recent developments in medicine have determined that “extreme stress causes actual physical brain damage, i.e., physical destruction or atrophy of portions of the hippocampus of the brain.” Plaintiff also presented evidence sufficient to meet her burden of showing “an absence of any factual issue that the emergency landing

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126 Id. at 326.
127 Id.
129 Id.
130 Id. at 1190-91.
131 Id.
132 Id. at 1191.
physically impacted” her brain, while the defendant did not raise a genuine issue that the plaintiff’s injury was non-physical. As such, no material issue of fact existed and the court focused on whether the plaintiff was entitled to a judgment as a matter of law. The Weaver court concluded that, because plaintiff’s PTSD manifested as a brain injury, she sustained a bodily injury within the meaning of Article 17. Cognizant, as was the Turturro court, that its decision could open the “floodgates of litigation,” the court reasoned that because claims must be based on a “definite diagnosis of a disorder that arises from a physical injury that is medically verifiable,” there would be no flood of litigation arising out of its holding.

In Carey v. United Airlines, the Ninth Circuit distinguished Weaver. In Carey, a passenger brought a claim against an airline arising out of a confrontation with a flight attendant. The passenger was seated in first class, while his three daughters were seated in coach. During the flight, two of his daughters experienced ear aches and attempted to seek their father’s assistance in first class. A flight attendant prevented them from reaching their father. The father alleged that the flight attendant refused to assist him and humiliated him in front of the other first-class passengers. The passenger alleged emotional and mental distress and claimed that he suffered “physical manifestation including nausea, cramps, perspiration, nervousness, tension and sleeplessness.” The lower court concluded that the passenger’s sole remedy was under the Warsaw Convention and that the alleged injuries were not compensable. This is consistent with the holding in Weaver and Chendrimada v. Air India, although the lower court in Carey did not require medical evidence of “physical injury” of the emotional injury in order to sustain the action.

On appeal, the Carey court affirmed the Third Circuit’s reasoning in Terrafranca that the physical manifestations of the passenger’s emotional distress and mental distress – nausea,
perspiration, cramps, nervousness, tension and sleeplessness—did not satisfy the Article 17 "bodily injury" requirement. As in Terrafranca, the passenger did not demonstrate "direct, concrete bodily injury as opposed to mere manifestation of fear or anxiety." The Carey court relied on the reasoning in Floyd with respect to the purpose of the Convention, i.e., to limit the liability of air carriers to foster industry growth. The court also referenced dicta in El Al Israel Airlines, Ltd. v. Tseng to support its conclusion that the "Supreme Court would hold that physical manifestations purely descended from emotional and mental distress do not satisfy the 'bodily injury' requirement of Article 17." Although other cases, including Terrafranca, cite to this same statement in Tseng, the issue of recovery for emotional distress was not before the Tseng Court. Again, as the plaintiffs did not provide concrete physiological medical evidence of their emotional injuries, the court was hard pressed to find that the emotional injuries constituted "bodily injury" under Article 17.

In Bloom v. Alaska Airlines, the Ninth Circuit reviewed a passenger's claim with facts very similar to those in Carey. The passenger brought a claim for emotional distress under Article 17 based on his confrontation with a flight attendant. The plaintiff did not allege bodily harm, but alleged that intentional infliction of emotional distress "is not preempted because the Convention does not govern the commission of intentional and malicious torts that cause non-bodily harm." The court analogized this case to Carey and held that the "Warsaw Convention creates 'no exception for an injury suffered as a result of intentional conduct.'" As the injuries were purely emotional, the passenger's claim was barred.

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141 Id.
142 Carey, 255 F.3d at 1052 (citing Terrafranca, 151 F.3d at 110).
143 Id. at 1052-53.
145 Carey, 255 F.3d at 1053.
146 Tseng, 525 U.S. at 172.
148 Id. at *2.
149 Id. (citing Carey, 255 F.3d at 1051).
3. Emotional Injury Unrelated to Physical Harm

The majority of courts have not allowed plaintiffs to recover for emotional injury that is unrelated to physical harm. In *Alvarez v. American Airlines, Inc.*,\(^{150}\) plaintiff sought compensation for physical and mental injuries related to an emergency evacuation. Plaintiff suffered physical injuries during the evacuation, including bruises and pain. In addition, plaintiff began having anxiety attacks in situations that were similar to those occurring just before the evacuation.\(^{151}\) The plaintiff did not allege a causal connection between the physical injuries and the mental injuries. The court concluded that only plaintiff's physical injuries were compensable.

The *Alvarez* court adopted the majority view that in order to recover for psychological injuries, there must be a “causal link between the alleged physical injury and the alleged psychological injury.”\(^{152}\) The court looked to the Second Circuit's decision in *Shah v. Pan American World Services, Inc.*\(^{153}\) and compared the language in Article 25, which required causation, with the liability provisions in Article 17, which did not. The court found that “under Article 17, a relatively intimate link is required between the liability-triggering event (the accident) and plaintiffs’ damages because the liability-triggering event is not necessarily culpable.”\(^{154}\) In other words, whereas a liability event is necessary to trigger liability under Article 25 (which is necessarily culpable), Article 17 imposes strict liability for “bodily injury,” and the standard for imposing strict liability should be more stringent.

Contrasting a similar case, *Longo v. Air France, Inc.*,\(^{155}\) where the plaintiffs alleged bodily injuries (bruises during evacuation) and related emotional injuries (fear of death), but failed to allege that their fear of death flowed from their bruises, the *Alvarez* court concluded that:

The Convention's goal of 'reasonable and predicable' recoveries, would be undermined if similarly situated passengers were treated differently from one another on the basis of an arbitrary and insignificant difference in their experience. The happenstance of getting scratched on the way down the evacuation slide . . . [should] not enable one passenger to obtain a substan-

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\(^{151}\) *Id.* at *1.

\(^{152}\) *Id.* at *4.

\(^{153}\) *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84 (2d Cir. 1998).


tially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash. In sum, in a case governed by Article 17, 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. Psychological and emotional injuries that are merely accompanied by physical injuries are not compensable.156

The court found no such link in Alvarez.

Not all courts have so hastily granted summary judgment in cases where psychic injury accompanies physical injury. In In re Aircrash Disaster Near Roselawn, Indiana,157 actions were brought against airlines for pre-impact fear damages arising out of an air crash in which all passengers perished. In allowing damages for pre-impact fear, the court emphasized what Floyd did not address—the question of whether passengers could recover for mental injuries that were accompanied by physical injuries and the decision that “there could never be any recovery for purely psychic injuries.”158 The court pointed out that nothing in Floyd “states that once [the bodily injury] precondition is met, and physical injury or death is present, damages for mental distress are not available.”159 The court distinguished other lower court decisions that have extended Floyd to “create a partial bar to recovering for emotional distress under the Warsaw Convention.”160 In these cases, courts found that the “emotional distress claims flowing from the accident (as opposed to some physical injury sustained in the accident) are unrecoverable.”161 The Alvarez court declined to adopt the reasoning in these cases, where “Article 17 itself expressly requires a causal link only between ‘damage sustained’ and the accident.”162 In holding that plaintiffs could recover for their pre-impact pain and suffering, the court in In re Roselawn noted that its decision, “which permits those passengers who sustained physical injury in the accident to recover for any pre-impact terror they may have experienced, is no more unfair than the rule recognized in

156 Alvarez, 1999 WL 691922, at *5 (citations omitted).
157 In re Aircrash Disaster Near Roselawn, Indiana, 954 F. Supp. 175 (N.D. Ill. 1997).
158 Id. at 178.
159 Id.
160 Id.
161 Id.
162 Id. at 179.
Floyd, which permits only passengers with physical injuries to recover at all."^{163}

Similarly, in *In re Korean Air Lines Disaster of September 1, 1983*,^{164} the court granted damages for emotional injury that was accompanied but not caused by simultaneous physical injury. Survivors sought damages for pre-death pain and suffering by passengers on a Korean Air Lines flight that crashed after being shot down by a Soviet missile.^{165} The court found that passengers were alive and conscious for about eleven minutes after the initial missile strike.^{166} Acknowledging that, under *Floyd*,^{167} damages for mental anguish were not recoverable “absent physical injury,”^{168} the court awarded damages for the decedents’ mental anguish because the evidence showed that they did sustain physical injury due to rapid air decompression.^{169} According to the court, the facts that the emotional injury was “accompanied by physical injury” and that the decedents’ suffering was “likely considerable” made the case “vastly different” from *Floyd*.^{170}

In *Chendrimada v. Air India*,^{171} plaintiffs brought an action for injuries that occurred on a trip to Bombay, India. Plaintiffs’ first flight from New York was canceled due to a bomb scare, and plaintiffs were rescheduled on a flight the following day.^{172} The flight made a scheduled stop in Delhi, but due to weather conditions, the flight remained at Delhi for eleven and a half hours, during which plaintiffs were not allowed to deplane nor were they provided with any food. Plaintiffs alleged that they suffered “bodily injuries” by being confined without food for that period – including nausea, severe cramps, pain and anguish, malnutrition and mental injury.^{173} The court found that the plaintiffs’ allegations of bodily injury satisfied the requirements of *Floyd* to survive summary judgment—namely that they alleged a “physi-

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^{163} *Id.*


^{165} *Id.* at 594.

^{166} *Id.* at 598.

^{167} *Floyd*, 499 U.S. at 530.

^{168} *In re Korean Air Lines Disaster*, 814 F. Supp. at 598.

^{169} *Id.*

^{170} *Id.*


^{172} *Id.* at 1090.

^{173} *Id.* at 1092.
The court concluded that the manifestation of physical injury “need not result from a suddenly inflicted trauma, but may, as is alleged here, result from other causes for which the carrier is responsible.” The court’s conclusion, while consistent with the decision in Weaver, relaxes the requirement that the emotional injury be related to physical injury.

4. Emotional Injury “Flowing From” Physical Harm

In cases following the Floyd decision, most courts have found that recovery for emotional injuries is permitted so long as the emotional injury “flows from” the bodily injury. In In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986, (“TWA”), survivors brought an action against an airline for physical and psychic injury arising out of a bomb explosion in which four people were killed and others were injured. One of the passengers alleged physical and psychic injuries. Mr. Ospina, a passenger, seated directly over the bomb, was blown out of the plane. Expert testimony established that Mr. Ospina’s body had been nearly severed by the blast and that he probably lived for five to ten seconds after the blast and was aware of what was happening to him.

The court focused on the term “dommage survenue” and began by acknowledging that while the term encompasses many forms of harm, it cannot include “purely mental injury unconnected to physical harm.” The TWA court found that the Floyd decision implied that “psychic damage accompanying physical injury is recoverable.” The court distinguished Floyd based on the type of mental suffering experienced. In Floyd, the passengers were terrified, but no one was physically harmed from the event, while the airline’s misconduct in TWA caused plaintiffs to suffer “while in pain from his wounds, falling to certain death after the bomb tore through his body as he was

174 Id. (emphasis added).
175 Id.
177 Translated in English as “damage sustained.” Id. at 640.
178 Id. at 637.
179 Id.
180 TWA’s failure to follow established security protocol was found to be willful misconduct by the jury. As such, the liability limits of Article 17 did not apply. See id. at 638.
ejected from the aircraft." Because Mr. Ospina suffered bodily injury that then caused him psychic harm, the court found the award of damages to be appropriate.

The court recognized that some courts have objected to permitting recovery for pain and suffering subsequent to physical injury because any de minimus physical injury, such as a scratch or bruise, could give rise to recovery for psychic trauma. The court reasoned that in this case, the psychic injuries arose directly from the bodily injury, and both types of injury were severe. As such, the court distinguished the case from ones where the passenger first experienced psychic injury followed by bodily injury or death, and ones where death occurred simultaneously with the psychic injury. In upholding the jury’s award of damages for the conscious pain and suffering between the time of the explosions and Mr. Ospina’s death, the court found:

[Survival damages for pain and suffering comports with the main policy goals of general tort law—full deterrence and compensation—without interfering with the goals of the Warsaw Convention. These goals are compatible—in fact, almost identical. Both are designed to provide full compensation for harm suffered and deterrence when the statutory limit of $75,000 does not apply[.]

In *Jack v. Trans World Airlines, Inc.*, plaintiffs aboard a flight from New York to San Francisco experienced an “aborted take-off, crash and fire.” All passengers survived, but many suffered minor physical injuries and were traumatized. Several passengers had international tickets, and their sole remedy was through the Warsaw Convention. Roughly half of the plaintiffs alleged only emotional injuries, while the other plaintiffs alleged emotional distress in addition to minor physical injuries. The court defined “physical manifestations” as “those bodily injuries or illnesses (such as skin rashes and heart attacks) that result from the distress one experiences during or after an accident,” and emotional distress as “psychic trauma that one experiences either during or after the accident . . . (e.g., fear of flying or claustrophobia . . . or embarrassment about disfigure-
ment or concern that an injury will develop complications)." 187 The court found that the failure of the Warsaw Convention to use the term "caused by" in Article 17 may indicate that the recoverable damages "need not be caused by the bodily injury, and may instead be those caused by the accident." 188 The court examined four possible approaches under Article 17 for recovery of emotional distress, ranging from no recovery to recovery for different types of emotional distress.

First, the court examined the approach that would allow no recovery for emotional distress, even if accompanied by bodily injury. The court found this approach consistent with the Supreme Court’s narrow reading of "bodily injury" in Floyd. 189 This approach, the court noted, would further the pro-industry objectives of the Convention. The court ultimately rejected this approach as too one-sided in favor of the airlines, and concluded that such an approach would not be true to the intent of the Convention, which sought to balance the interests of the passengers and the air carriers. 190

The second approach discussed by the court was to allow recovery for all distress, as long as bodily injury occurs, regardless of the causal connection. This approach, favored by plaintiffs, would be consistent with a broad reading of Article 17 and would highlight the absence of the phrase "caused by" in Article 17. 191 The court also rejected this approach, finding that it would create a separate cause of action for emotional distress, and would be inconsistent with the courts' rulings "that the Warsaw Convention creates a cause of action, not just a limit on remedies." 192

The third approach examined by the court was whether "emotional distress should be allowed as damages for bodily injuries, but distress may include distress about the accident." 193 Under this scenario, the emotional distress need not be related to the injury, except that it must "occur at the same time or later than the bodily injury." 194 This approach would preclude recovery

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187 Id. at 664.
188 Id. at 665.
189 Id.
190 Id.
191 Id.
192 Id.
193 Id.
194 Id.
for pre-impact or pre-injury fear. Although some courts have adopted this approach, the *Jack* court found this approach unpersuasive, but provided very little reasoning for its position, citing only the lack of usefulness in analogizing to other areas of federal common law for recovery of emotional distress.\textsuperscript{195}

The final approach, the one the *Jack* court adopted, is to allow recovery for emotional distress only to the extent that it flows from the bodily injury.\textsuperscript{196} This approach is consistent with the approach enumerated by the court in *Rosman*\textsuperscript{197} that once bodily injury is established, damages sustained by the bodily injury, including mental suffering, are compensable. The court found that this approach would prevent inequities between two similarly situated passengers where both had suffered emotional distress, but one received a minor physical injury and the other received none at all. Under the fourth approach, neither would be able to recover for emotional distress, assuming that the minor injury did not, in and of itself, result in emotional distress. The court acknowledged that its approach would prevent recovery for pre-crash or pre-injury terror, but adopted it as the most consistent with the intent of the Warsaw Convention.\textsuperscript{198}

In a more recent case, *In re Air Crash at Little Rock, Arkansas*, the Eighth Circuit reviewed a jury verdict in favor of passenger damages in the amount of $6.5 million\textsuperscript{200} for a claim arising under the Warsaw Convention. The passenger suffered physical injury (punctured leg, traumatic quadriceps tendinitis) during an air crash in Little Rock, Arkansas.\textsuperscript{201} Nearly a year later, she sought treatment from a psychiatrist for her psychic harm. She was diagnosed with PTSD and depression, and her psychiatrist testified that her leg injuries were a factor in her PTSD and depression, although later admitted that the passenger would likely have suffered from PTSD regardless of the physical injury. While testimony was offered that PTSD causes physical injury to

\textsuperscript{195} *Id.* at 667.
\textsuperscript{196} *Id.*
\textsuperscript{197} *Rosman*, 314 N.E.2d 848 (N.Y. 1974).
\textsuperscript{198} *Jack*, 854 F. Supp. at 668.
\textsuperscript{199} *In re Air Crash at Little Rock, Arkansas*, 291 F.3d 503 (8th Cir. 2002).
\textsuperscript{200} International Air Transport Association ("IATA") inter-carrier agreements entered into by America made the action a contract, rather than tort action. The agreements serve to waive the Warsaw Convention's liability limits. So, while the action was brought under Article 17, the liability limits of Article 17 were not applicable, hence the large jury verdict. *Id.* at 506-07 fn. 2.
\textsuperscript{201} Although the passenger was on a domestic flight, she was returning home from a trip to Germany. *Id.* at 506.
the brain, no testimony was offered to show damage to the passenger's brain. Indeed, no diagnostic medical tests were performed. On appeal, the Eighth Circuit reversed the district court’s ruling that any physical injury is sufficient to trigger recovery of emotional damages, regardless of their cause, and followed what it termed the more “mainstream” view that “damages for mental injury must proximately flow from physical injuries caused by the accident.”

The Fifth Circuit found that the approach was “consistent with Floyd, yet provides full compensation for the victim within the bounds established by the Warsaw Convention.”

In its holding, the court drew a line between the emotional injuries that were directly caused by the passenger’s physical injuries to her legs and those that were directly caused by the accident—the damages were compensable in the first case, but not in the second. The Supreme Court denied certiorari in October of 2002.

B. INTERNATIONAL CASES

While the United States is the primary source of aviation law decisions under the Warsaw Convention, few other countries have addressed the issue of recovery for purely emotional damages under the Warsaw Convention. Those countries that have addressed the issue almost uniformly adopted the view that no such recovery is available.

In King v. Bristow Helicopters Ltd., the House of Lords dealt with two cases where passengers suffered psychiatric injury with no physical injury as a result of accidents on board aircraft. In the first case, plaintiff King was a passenger on a helicopter transporting workers off of a North Sea oil platform. Both of the helicopter’s engines failed suddenly, causing the aircraft to plunge thirty-five feet back onto the oilrig’s deck. King suffered post traumatic stress disorder with symptoms such as insomnia, nightmares, anxiety, and a fear of flying. He claimed the accident also caused or contributed to an existing peptic ul-

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202 Id. at 510.
203 Id.
204 Id. at 511-12.
207 Id. at 745.
208 Id. (citing King v. Bristow, 1 Lloyd’s Rep. 95 (2001)).
209 Id.
cer. In the second case,\textsuperscript{210} the plaintiff was an underage girl, Morris, traveling unaccompanied from Kuala Lumpur to Amsterdam, who was sexually assaulted by a male passenger sitting next to her. She presented evidence at trial that she suffered from clinical depression consisting of a single episode of a major depressive illness. She claimed only mental anguish damages.\textsuperscript{211} The House of Lords heard a consolidated appeal because the same legal issue was presented in both cases.\textsuperscript{212}

The House of Lords held that compensation could be awarded for physical manifestations of a mental injury so long as a casual link can be established by showing that the mental injury causing the physical symptoms itself was caused by the accident.\textsuperscript{213} However, no recovery is available for mental injury absent physical symptoms.\textsuperscript{214} In this consolidated appeal, the holding meant that plaintiff King could recover only for his ulcer, and plaintiff Morris was entirely denied recovery.\textsuperscript{215}

In their analysis, their Lordships turned to the leading authorities from the United States. In particular, they followed \textit{Eastern Airlines, Inc. v. Floyd}\textsuperscript{216} and \textit{El Al Israel Airlines, Ltd. v. Tseng},\textsuperscript{217} but paid close attention \textit{Weaver v. Delta Airlines, Inc.}\textsuperscript{218} Lord Steyn noted that, in addition to any legal rationale for not following \textit{Weaver}, the policy reason for not following \textit{Weaver} was that "the extension of the Warsaw system to include mental injury and illnesses is too controversial to command sufficient international support."\textsuperscript{219} This rationale for rejecting \textit{Weaver} is important in that their Lordships expressed a strong preference in establishing international uniformity in Warsaw Convention interpretation.\textsuperscript{220} Lord Hobhouse disagreed and thought \textit{Weaver} was correctly decided and naturally followed from \textit{Floyd}.\textsuperscript{221} Lord Hope took a third position. He suggested that bodily injury is that which is capable of being demonstrated by a physical examination using the most sophisticated means availa-

\begin{itemize}
\item \textsuperscript{210} \textit{Id.} (citing Morris \textit{v. KLM Royal Dutch Airlines}, Q.B. 100 (C.A. 2002)).
\item \textsuperscript{211} \textit{Id.} at 746.
\item \textsuperscript{212} \textit{Id.} at 747.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Floyd}, 499 U.S. at 530; see \textit{supra} note 62 and related analysis.
\item \textsuperscript{217} \textit{Tseng}, 525 U.S. at 155; see \textit{supra} note 137 and related analysis.
\item \textsuperscript{218} \textit{Weaver}, 56 F. Supp. 2d at 1190; see \textit{supra} note 122 and related analysis.
\item \textsuperscript{219} \textit{King}, 1 Lloyd’s Rep. at 755.
\item \textsuperscript{220} \textit{Id.} at 748.
\item \textsuperscript{221} \textit{Id.} at 783-84.
\end{itemize}
He then stated that he did not think such an examination happened in *Weaver* and, in fact, that no evidence of a physical injury had been presented at all in that case. Based on these differing viewpoints, the United Kingdom's position regarding *Weaver* is unclear.

The House of Lords had been previously confronted with the issue of damages for purely mental injuries in *Sidhu v. British Airways*. That case involved a consolidated appeal arising from passengers being taken hostage in Kuwait by invading Iraqis during the first Gulf War. The plaintiffs claimed to have suffered psychological and bodily injury including weight loss, eczema and excessive menstrual bleeding. In the trial, however, plaintiffs submitted that their claims likely did not fall into the category of "bodily injury" as their claims were for psychological injury. Before the House of Lords, plaintiffs suggested that psychological injury should provide for recovery. Their Lordships regarded the issue as not germane to their decision and avoided discussion of the issue. Interestingly, it appears that the type of physical injury claimed in *Sidhu* would have allowed for recovery under the standard set forth by the House of Lords in *King*.

Australia has also had the opportunity to decide whether recovery should be allowed for purely mental damages. In *Kotsambasis v. Singapore Airlines, Ltd.*, the Court of Appeal of New South Wales dealt with a plaintiff who claimed mental anguish arising from an in-flight turn-back after an engine fire. Following *Floyd*, the court held that the term "bodily injury" did not include purely psychological injury, but noted that the decision in *Floyd* "left open the possibility that recovery be available where psychological injury is accompanied by physical injury."

The only case supporting recovery for mental anguish without physical symptoms was handed down by the Israel Supreme

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222 Id. at 771.
223 Id.
225 Id. at 77. The other consolidated plaintiff alleged only psychological injury.
226 Id. at 80.
227 Id. The issue was whether damage suffered in the course of international carriage by air is governed exclusively by the Warsaw Convention. The House of Lords held that it was and dismissed the case on limitations grounds. See *Sidhu*, 2 Lloyd's Rep. at 87.
229 Id. at 319.
230 Id. at 323.
In Daddon, the Israel Supreme Court was confronted with claims by passengers alleging mental anguish damages suffered while being held captive by hijackers. The court reached the conclusion that mental anguish absent any physical injury should be considered "bodily injury" under the Warsaw Convention because at the time of drafting, unlike today, mental anguish either was not actionable or the possibility of mental anguish without physical harm had simply not been contemplated. This approach has been criticized as impermissibly seeking to develop the meaning of the phrase "bodily injury" by judicial policy in light of subsequent legal and medical advances instead of interpreting the Convention as written. To date, no other jurisdictions have followed Daddon.

V. CONCLUSION

While there is very little disagreement about the literal translation of "lésion corporelle," its meaning and application in the context of a variety of mental or psychic injuries is less clear. There is widespread disagreement about whether – and to what extent – the term encompasses emotional injury. Court decisions since Floyd allow recovery for a range of claims involving emotional injury under Article 17; in some cases there is no recovery, while in others there is full recovery, depending on the allegations and the nexus between the alleged injury and any related or accompanying physical injury. Courts are in agreement that pure emotional injury is not compensable under the Convention. Most courts agree that emotional injury is not compensable in those cases where it has resulted only in physical manifestations such as weight loss or sleeplessness. At the same time, most courts generally agree that emotional injury is compensable if it proximately flows from a physical injury.

The troubling cases are those involving emotional injury accompanied by unrelated physical injury, i.e., where the physical injury has not been shown to have caused the emotional injury. These cases are typically resolved on a case-by-case basis. There

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231 1 Lloyd's Rep. at 770 (citing Daddon v. Air France, 1 S.&B. Av. R. 141 (1984)).
232 Id. at 769.
233 Id.
234 Id. at 770.
235 Id.
236 See Floyd, 499 U.S. at 530; Rosman, 214 N.E.2d at 848; Fishman, 132 F.3d at 140; Croucher, 111 F. Supp. 2d at 501.
is no consistent rule to guide the parties, although the trend in the decisions seems to disfavor recovery for emotional injury with unrelated physical harm. Thus, the case law suggests that a plaintiff is more likely to prevail if he or she can allege and prove a link between the physical and mental injuries.

In the future, certain advances in medicine may blur, or perhaps even clarify, the distinction between purely "physic" and physical injury. Currently, the majority of courts have not accepted that PTSD alone can be characterized as a physical injury. Defendants should expect, however, even under the new Montreal Convention of 1999, that plaintiffs will continue to push the envelope with the backing of experts and application of advances in science and medicine for more rulings to the effect that PTSD is itself a physical injury or lésion corporelle. On the other hand, although science may change or advance, the analysis of facts in cases involving a claim of emotional injury is unlikely to change significantly with the introduction of the Montreal Convention. Accordingly, parties involved in future cases with claims of mental injuries must be well-versed in the body of case law cited in this paper. As discussed herein, the application of the "lésion corporelle" concept in context of allegations of emotional harm is not entirely resolved and is an important area for development of the law in international air carrier litigation.