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Recovery for Purely Mental Injuries Under the Warsaw Convention: Aviation--*Eastern Airlines, Inc. v. Floyd*

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RECOVERY FOR PURELY MENTAL INJURIES UNDER THE WARSAW CONVENTION: AVIATION— Passengers brought action against an airline to recover for intentional infliction of emotional distress as a result of an incident involving loss of power during flight. Article 17 of the Warsaw Convention does not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1555 (1991).

I. INTRODUCTION

In 1990, the United States Supreme Court granted certiorari in the case of *Eastern Airlines, Inc. v. Floyd*,[1] in order to consider the allowance of recovery for purely mental injuries under article 17 of the Warsaw Convention.[2] This issue has long been debated in American courts but raises an original question for the Supreme Court. The Court's decision will provide uniformity among the circuit courts in disallowing recovery for mental anguish, unaccompanied by physical injury, resulting from international air carrier accidents. Several issues concerning mental injuries under the Warsaw Convention were not addressed by the Court, and further refinement of these points will be necessary in the future.

The cause of action arose when, due to a loss of oil pressure, an Eastern Airlines jet began losing altitude rapidly, and the crew informed passengers that the plane would be ditched in the Atlantic Ocean. After a period of powerless descending flight, the crew managed to restart

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[1] 496 U.S. 904 (1990).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 49 U.S.C. § 1502 (1988) [hereinafter Warsaw Convention].

an engine and land the plane without further incident. Subsequently, several passengers brought separate complaints against Eastern solely for mental distress unaccompanied by physical injury.

The district court entertained the complaints in a consolidated proceeding, concluding that mental anguish alone is not compensable under article 17 of the Warsaw Convention.[3] Article 17 sets forth conditions under which an international air carrier can be held liable for injuries to passengers.[4] On appeal, the Eleventh Circuit reversed the judgment of the district court and permitted recovery for purely mental injuries.[5] The court examined the legal meaning of *lésion corporelle*,[6] a French phrase in the treaty, the concurrent and subsequent history of the Warsaw Convention, and cases interpreting article 17, and held that the phrase *lésion corporelle* in the authentic French text of article 17 encompasses purely mental injuries.[7] On that basis, the court granted recovery to the passengers.[8]

The United States Supreme Court granted certiorari to resolve the conflict among the courts concerning mental anguish awards under the Warsaw Convention.[9] The Supreme Court reversed the judgment of the court of appeals, holding that article 17 does not allow recovery for purely mental injuries.[10] In making its determination, the Court looked beyond the written words of the treaty to its history, negotiations, and practical construction adopted by the parties to thoroughly analyze the intent of the sig-

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[3] *In re* Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983, 629 F. Supp. 307, 309 (S.D. Fla. 1986).

[4] Warsaw Convention, *supra* note 2, art. 17.

[5] Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989).

[6] The term *lésion corporelle* has been translated to mean "bodily injury." *See infra* note 37 and accompanying text.

[7] *Eastern Airlines*, 872 F.2d at 1471.

[8] *Id.* at 1471-80.

[9] *Eastern Airlines*, 496 U.S. at 904. The court noted that, while the Eleventh Circuit held purely psychic trauma to be compensable under article 17 of the Warsaw Convention, the New York Court of Appeals held otherwise in Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385 (1974). Eastern Airlines Inc. v. Floyd, 111 S. Ct. 1489, 1493 (1991).

[10] *Eastern Airlines*, 111 S. Ct. at 1502-03.

natories.[11] The Court left for another day the issue of whether passengers could recover for mental injuries accompanied by physical injuries.[12] Further, the Court refused to decide whether the Warsaw Convention provides the exclusive cause of action for injuries incurred during international flights, foreclosing independent state tort claims for such injuries.[13]

II. LEGAL BACKGROUND

In many English-speaking countries and several other nations, liability in international air transportation is governed by rules promulgated in the Warsaw Convention.[14] The Warsaw Convention is an international treaty to which the United States, though not a signatory, has adhered since 1934 by Proclamation of the President.[15] The Warsaw Convention of 1929 was the result of efforts to achieve an international agreement to both regulate and also encourage the aviation industry in its formative years.[16] With these long-range goals in mind, the Convention's participants had two objectives.[17] First, they intended to establish uniform rules governing parties to international air carriage contracts.[18] Second, the partici-

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[11] *Id.* at 1493.

[12] *Id.* at 1502.

[13] *Id.*

[14] More than 120 nations are parties to the Warsaw Convention. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 247 (1984); *see* LEE GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 285-93 (1988) (listing signatory parties to the Convention); 1 LEE S. KREINDLER, AVIATION ACCIDENT LAW § 11.01[3], at 11-7 to 11-8 (1990).

[15] 49 Stat. 3000, 3014 (1934). The Warsaw Convention was drafted at Warsaw, Poland, on October 12, 1929, and the United States later became a party to the treaty with reservation by Proclamation of the President, dated October 29, 1934, as recommended by the United States Senate. Executive G, 73rd Cong., 2d Sess., 78 CONG. REC. 11, 577-82 (1934).

[16] Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle*, 25 TEX. INT'L L.J. 127, 129 (1990).

[17] Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967); 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:4, at 635-36 (1978).

[18] 1 SPEISER & KRAUSE, *supra* note 17, at 635-36.

pants intended to limit the liability of air carriers in exchange for limiting the defenses available to such carriers.[19] Consequently, the two goals of uniformity and limited liability, which have facilitated recovery, have guided judicial action regarding Warsaw Convention claims.[20] The courts have balanced these factors in determining which claims are permitted under the Convention.[21]

The United States' accession to the Warsaw Convention in 1934 gave the Convention status as a treaty of the United States, which constitutes the supreme law of the United States.[22] Therefore, it must be applied notwithstanding state law.[23] Further, the Convention governs the rights of all parties in any action for damages involving international air transportation.[24] In 1966, the Warsaw Convention's application in the United States was modified by the Montreal Agreement, a private agreement between the United States and international air carriers, which raised the Convention's cap on liability in the United States from a mere $8,300, as provided in the Warsaw Convention of 1929, to $75,000 per passenger and also eliminated the air carriers' due care defense.[25] The Montreal Agreement resulted from the desire of air carriers to placate the United States, who, because of increasing dissatisfaction with the unrealistic liability limits

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[19] *Id.*

[20] James M. Grippando, *Warsaw Convention—Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 GEO. WASH. J. INT'L L. & ECON. 59, 68 (1985).

[21] *Id.*; *see* Reed v. Wiser, 555 F.2d 1079, 1085, 1090 (2d Cir. 1977); Block v. Compagnie Nationale Air, 386 F.2d 323, 337-38 (5th Cir. 1967).

[22] U.S. CONST. art. VI, § 2.

[23] *See* Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984) (holding that the Warsaw Convention preempted Texas law, therefore disallowing the award of attorney fees), *cert. denied*, 469 U.S. 1186 (1985).

[24] Warsaw Convention, *supra* note 2, art. 1(1).

[25] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, May 13, 1966, 31 Fed. Reg. 7302 (1966), *reprinted in* 19 STANLEY B. ROSENFIELD, THE REGULATION OF INTERNATIONAL COMMERCIAL AVIATION: THE INTERNATIONAL REGULATORY STRUCTURE 49-50 (1984) [hereinafter Montreal Agreement]. The Montreal Agreement was approved by Civil Aeronautics Board Order No. E-28680.

imposed by the treaty, threatened to pull out of the Warsaw Convention altogether.[26]

Currently in the United States, liability in international air transportation is governed by the Warsaw Convention, as modified by the Montreal Agreement.[27] This agreement provides that the carrier is absolutely liable for damages sustained in the event of the wounding or death of a passenger or any other bodily injury incurred by a passenger, unless the carrier can prove negligence on the part of such passenger.[28] This absolute liability applies if the accident causing the bodily damage took place on board the aircraft or in the course of any of the carrier's operations of embarking or disembarking.[29]

Immediately following accession by the United States to the treaty, the courts did not view the Convention as creating a cause of action.[30] The courts first interpreted the Convention as simply limiting monetary damages on otherwise applicable law.[31] The view that the treaty created only a presumption of liability, rather than an independent cause of action,[32] led to non-uniform treatment of recovery against air carriers, thereby defeating one of the primary objectives of the signatories, that of

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[26] *See generally* Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977) (discussing the background of the Warsaw Convention and its subsequent modification under the Montreal Agreement); Rosman v. Trans World Airlines, 34 N.Y.2d 385 (1974) (discussing further the modification under the Montreal Agreement).

[27] *See* Montreal Agreement, *supra* note 25.

[28] *Id.* at 17.

[29] *Id.*

[30] *See, e.g.*, Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 n.2 (9th Cir. 1977) (stating that the Warsaw Convention does not create a cause of action, but merely establishes a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the alleged injury), *cert. denied*, 431 U.S. 974 (1977); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957) (stating that the Warsaw Convention does not create a cause of action), *cert. denied*, 355 U.S. 907 (1957); Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238 (S.D.N.Y. 1975) (reasoning that article 17 of the Warsaw Convention was not an all-inclusive catalog of permissible domestic claims and thus did not preclude claims for mental injury).

[31] *Husserl*, 388 F. Supp. at 1252.

[32] *Id.*

uniformity.[33]

In the late 1970s, the courts began to construe the Warsaw Convention as the "universal source of a right of action."[34] In *Benjamins v. British European Airways* the Court of Appeals for the Second Circuit held that courts must interpret the Convention in a manner that promotes uniformity in such cases to the fullest extent.[35] This decision overruled prior United States case law that found no cause of action to be created by the Convention.[36]

Since the courts have determined that the Convention does indeed create a cause of action, the difficulty lies in determining precisely which injuries are included within its reach. According to the original French text, article 17 of the Convention provides for recovery by passengers for any *lésion corporelle*, which has been translated to mean "bodily injury."[37] In the years immediately following the drafting of the Convention, there was little inquiry into the meaning of this phrase, because prior to the Montreal Agreement, the amount of damages was so limited by the Convention that the small amount available would be used to compensate unquestioned damages, rather than

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[33] Sisk, *supra* note 16, at 149.

[34] Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *see generally* Note, *The Warsaw Convention Creates a Cause of Action for Wrongful Death —Benjamins v. British European Airways*, 38 MD. L. REV. 120 (1978) (detailing the court's holding in *Benjamins* and interpreting the result to signal a desire to return to uniformity in international air law). *But see* Abramson v. Japan Airlines Co., 739 F.2d 130, 134-35 (3d Cir. 1984) (holding that the Warsaw Convention does not preclude common law remedies for "accidents" outside the meaning of article 17), *cert. denied*, 470 U.S. 1059 (1985).

[35] *Benjamins*, 572 F.2d at 917-18. "[T]he overriding policy goal embodied in the [Warsaw] Convention is the desire to formulate a uniform and universal set of legal rules to govern international air transportation." *In re* Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 411 (9th Cir. 1983) (citing *Benjamins*, 572 F.2d at 917).

[36] Russell J. Davis, Annotation, *Warsaw Convention (49 Stat 3000 et seq.) as Creating a Cause of Action*, 51 A.L.R. Fed. 949, 951 (1981); *see* Mahaney v. Air France, 474 F. Supp. 532, 534 (S.D.N.Y. 1979) (citing *Benjamins* as authority for the proposition that the Warsaw Convention may establish a cause of action).

[37] Warsaw Convention, *supra* note 2, art. 17. The Supreme Court has characterized the English translation that was before the Senate upon the Convention's ratification in 1934 as the "official American translation." Air France v. Saks, 470 U.S. 392, 397 (1985).

those damages for which recoverability was not yet certain.[38] Compensability of emotional distress, however, became an issue in the 1970's as a result of a series of terrorist hijackings leading to suits for mental anguish unaccompanied by physical injury.[39] More recently, passengers have sought to recover for emotional distress resulting from merely a "close call" during flight, from which no bodily harm resulted.[40]

The question debated before the Supreme Court in *Eastern Airlines* was whether article 17 encompasses a claim for emotional distress that does not result from a "bodily injury."[41] Several courts have held article 17 to be applicable only to actual physical injury.[42] In support of this view, commentators have urged that, "[r]ather than striving to impart a technical connotation to the term [*lésion corporelle*], the ordinary meaning of the words should prevail."[43]

For example, in *Rosman v. Trans World Airlines*,[44] a case arising from mental anguish caused by terrorists' hijacking of an international flight, the New York Court of Appeals, relying on the English translation of article 17, held that the carrier was liable only for a passenger's "palpable, objective bodily injuries, including those caused by

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[38] Sisk, *supra* note 16, at 132.

[39] *See* Herman v. Trans World Airlines, Inc., 337 N.Y.S.2d 827 (1972); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702 (S.D.N.Y. 1972); *see generally* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 111-12 (1977) (analyzing and criticizing American court decisions dealing with damages due to hijacking); Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. 345 (1973) (discussing recovery for psychic injuries under the Warsaw Convention).

[40] *See Eastern Airlines*, 872 F.2d at 1462 (seeking recovery for mental anguish resulting from warnings that the plane would be ditched in the ocean, although the plane eventually landed safely, and no physical harm resulted).

[41] *Eastern Airlines*, 111 S. Ct. at 1493; *see generally* Comment, *The Emotional Trauma of Hijacking: Who Pays?*, 74 KY. L.J. 599, 611-20 (1985-86) (surveying conflicting decisions as to whether article 17 encompasses claims for emotional distress unaccompanied by physical injury).

[42] *See* Rosman v. Trans World Airlines, 34 N.Y.2d 385 (1974); Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.M. 1973).

[43] Sisk, *supra* note 16, at 129.

[44] 34 N.Y.2d 385 (1974).

the psychic trauma [of an accident], and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma."[45] Likewise, in *Burnett v. Trans World Airlines, Inc.*,[46] passengers brought suit for recovery of both bodily injuries and mental anguish suffered as a result of a hijacking of their airplane. The district court in New Mexico held that recovery is permitted for mental trauma actually derived from physical injuries.[47] Since the emotional distress occurs in conjunction with the physical injury, the court considered such distress to be part of, and not severable from, the bodily injury itself.[48] Nevertheless, the court maintained that no recovery would be permitted for mental injury alone.[49]

In contrast, other courts and commentators have held the language of article 17 broadly covers any personal injury, including emotional distress without accompanying physical harm.[50] For example, in *Husserl v. Swiss Air Transport Co.*,[51] the district court for the Southern District of New York held that both mental and psychosomatic injuries are "colorably within the ambit" of article 17.[52] The court stated that the drafters of the Convention indicated no specific intent to include mental injuries.[53] At the same time, both the general intent to make the treaty comprehensive in its application and the desire to achieve

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[45] *Id.* at 857.

[46] 368 F. Supp. 1152 (D.N.M. 1973).

[47] *Id.* at 1158.

[48] *Id.*

[49] *Id.* at 1156-58.

[50] *See, e.g.*, Floyd v. Eastern Airlines, 872 F.2d 1462, 1471, (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991); Tarar v. Pakistan Int'l Airlines, 554 F. Supp. 471, 480 (S.D. Tex. 1982); Palagonia v. Trans World Airlines, Inc., 442 N.Y.S.2d 670, 673 (N.Y. Sup. Ct. 1978); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1323-24 (C.D. Cal. 1975); Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1251 (S.D.N.Y. 1975); *see generally* RENE H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 146 (1981) (arguing that in French law, the phrase *lesion corporelle* encompasses any "personal" injury whatsoever).

[51] 388 F. Supp. 1238 (S.D.N.Y. 1975).

[52] *Id.* at 1248-50.

[53] *Id.* at 1250.

the goal of uniformity sufficed to encourage the court to construe the Convention expansively in order to encompass as many types of injuries, physical and mental, as are reasonably within its reach.[54] Further, in *Floyd v. Eastern Airlines, Inc.*,[55] the Court of Appeals for the Eleventh Circuit held that the terms of the Warsaw Convention must be construed broadly in order to advance its goal of uniformity.[56] Therefore, the court held that passengers could recover damages for mental injury, whether or not accompanied by physical injury.[57]

III. CRITICAL CASE ANALYSIS

In a unanimous opinion written by Justice Marshall, the Supreme Court reversed the Court of Appeals for the Eleventh Circuit's decision in *Eastern Airlines* and held that article 17 of the Warsaw Convention does not allow recovery for purely mental injuries.[58] In its analysis, the Court looked beyond the written words of the treaty itself to its history, negotiations, and the practical construction adopted by the parties.[59] The Court examined each of these factors in detail.

First, the Court examined the French legal meaning of the phrase *lésion corporelle*, as used in the Warsaw Convention, to determine the expectations of all parties to the Convention.[60] Bilingual dictionaries indicated that the proper translation of the phrase is "bodily injury," suggesting that article 17 does not permit recovery for purely

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[54] *Id.*

[55] 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

[56] *Id.* at 1480.

[57] *Id.*

[58] *Eastern Airlines*, 111 S. Ct. at 1493.

[59] *Id.*; *see also* Air France v. Saks, 470 U.S. 392, 396 (1985) (holding that treaties are construed more liberally than private agreements and, therefore, parties must look beyond the written words to ascertain their meaning); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) (stating that "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages").

[60] *Eastern Airlines*, 111 S. Ct. at 1494-1500.

psychic injuries.[61] The Court's review of French legal materials discovered that the phrase was rarely used in French law.[62] Justice Marshall noted that no French case has construed article 17 to cover psychic injury and that cases in which the phrase is used invariably involve physical injuries.[63] The term *lésion corporelle* most frequently was utilized in causes of action based on injuries incurred in automobile accidents.[64]

The Court then rejected the passengers' argument that by 1929, France, unlike many other countries, permitted tort recovery for mental distress.[65] The Court reasoned that such a general proposition of French tort law was not indicative of the drafters' intent in this specific agreement.[66] The Supreme Court reiterated that its task was to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[67]

Next, the Court turned to the negotiating history of the Convention and found that the translation of *lesion corporelle* as "bodily injury" is consistent with such history.[68] From its review of the Convention's documentary record, the Court found no evidence that the signatories specifically considered liability for psychic injury.[69] Justice Marshall avers that, because a remedy for mental anguish was unknown to most jurisdictions in 1929, the drafters would most likely have felt obliged to make ex-

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[61] *Id.* at 1494; *see* J. JERAUTE, VOCABULAIRE FRANCAIS-ANGLAIS ET ANGLAIS-FRANCAIS DE TERMES ET LOCUTIONS JURIDIQUES 205 (1953) (translating "bodily harm" or "bodily injury" as *lésion ou blessure corporelle*); *see also id.* at 95 (translating the term *lésion* as "injury, damage, prejudice or wrong"); *id.* at 41 (giving as one sense of *corporel* the English word "bodily").

[62] *Eastern Airlines, Inc.*, 111 S. Ct. at 1495.

[63] *Id.*

[64] *Id.* The Court noted that in one case, the highest French court of ordinary jurisdiction specifically distinguished intentional blows and injuries, characterized as *lésions*, from neurotic disorders. *Id.*

[65] *Id.* at 1495-96; *see also* Sisk, *supra* note 16, at 128 (arguing that a liberal interpretation of article 17 would be consistent with the spirit of the Convention).

[66] *Eastern Airlines*, 111 S. Ct. at 1496.

[67] *Id.* (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).

[68] *Id.* at 1497.

[69] *Id.* at 1498.

plicit reference to purely mental injury if they had specifically intended to provide for such recovery.[70] The Supreme Court further deemed the narrower reading of *lésion corporelle* to be consistent with the primary purpose of the parties negotiating at the Convention, namely the limiting of liability of air carriers in an effort to encourage growth of the then-nascent commercial aviation industry.[71] The Court emphasized that, regardless of what the current view of the Warsaw Convention signatories may be, in 1929 the negotiating parties were more concerned with fostering a new industry than with fully compensating injured passengers.[72] This legislative choice directed the Court to interpret the phrase *lesion corporelle* narrowly, thus excluding recovery for purely mental injury.[73]

The Supreme Court then examined the post-1929 "conduct" and "interpretations of the signatories," and found that relevant evidence supports narrow translation of *lesion corporelle*.[74] First, in 1951, a committee composed of twenty Warsaw Convention signatories convened in Madrid and adopted a proposal to substitute the phrase *affection corporelle* for *lésion corporelle* in article 17.[75] The intent of the French delegate who proposed the change of language was to expand the coverage of the phrase to include injuries such as mental illness, due to fear that the word *lésion* was too narrow and "presupposed a rupture in the tissue."[76] The United States delegate opposed the change, desiring to exclude recovery for disturbances neither connected with, nor occurring as the result of bodily injury, but the committee nonetheless adopted the

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[70] *Id.* at 1498-99.

[71] *Eastern Airlines*, 111 S. Ct. at 1499; *see* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 256 (1984); Lowenfeld & Mendelsohn, *supra* note 17, at 497-99.

[72] *Eastern Airlines*, 111 S. Ct. at 1499.

[73] *Id.*

[74] *Id.* (quoting Air France v. Saks, 470 U.S. 392, 403 (1985)).

[75] *Id.*; *Minutes and Documents of the Eighth Session, Madrid*, ICAO Legal Committee, at xiii, 137, ICAO Doc. 7229-LC/133 (1951) [hereinafter ICAO].

[76] *Eastern Airlines*, 111 S. Ct. at 1499; *see* ICAO, *supra* note 75, at 136.

proposal.[77] Although the amendment was never implemented, the Court found that the discussion and subsequent vote showed the view of the signatories that the phrase *lésion corporelle* has a "distinctly physical scope."[78]

The court of appeals relied on three international agreements,[79] each negotiated after the Warsaw Convention, in finding that the signatories' post-1929 conduct supports a broad interpretation of *lésion corporelle*.[80] The Supreme Court disagreed with the court of appeals' reading of these agreements in each instance.[81] First, the Hague Protocol of 1955 amended the Convention's requirement of particular information to be included on passengers' tickets, using the phrase "personal injury" in the English version, while the original French text continued to use the phrase *lésion corporelle*.[82] Rather than finding this to be a "subsequent interpretation of the signatories" that "helps clarify the meaning" of *lésion corporelle*, as did the court of appeals,[83] the Supreme Court concluded that without evidence of an intent to effect a substantive change in, or clarification of that term, the Court does not have discretion to infer such intent.[84]

Second, the court of appeals noted that under the Montreal Agreement of 1966, which raised the limit of accident liability and eliminated due-care defenses, the notice required on the back of passenger tickets included the term "personal injury," rather than "bodily injury."[85] The Supreme Court first asserted that the Montreal Agreement is not a treaty, but rather is more contractual in nature.[86] It imposes merely a "quasi-legal and largely

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[77] *Eastern Airlines*, 111 S. Ct., at 1499-1500; *see* ICAO, *supra* note 75, at 137.

[78] *Eastern Airlines*, 111 S. Ct. at 1500.

[79] *Eastern Airlines*, 872 F.2d at 1474-75.

[80] *Id.*

[81] *Eastern Airlines*, 111 S. Ct. at 1500.

[82] *Id.*; *International Conference on Private Air Law*, The Hague, ICAO Doc. 7686-LC/140, (Sept. 1955).

[83] *Eastern Airlines*, 872 F.2d at 1474-75.

[84] *Eastern Airlines*, 111 S. Ct. at 1500.

[85] *Id.* at 1501; *see* Montreal Agreement, *supra* note 25, at 49-50.

[86] *Eastern Airlines*, 111 S. Ct. at 1501.

experimental system of liability," and therefore does not speak for the Warsaw Convention signatories.[87] In addition, the Court noted that the Agreement does not claim to change or clarify article 17, and so again, the Court did not presume authority to make such an inference independently.[88]

Third, the court of appeals found that the Guatemala City Protocol of 1971,[89] which substituted the words "personal injury" for "wounding or other bodily injury" in article 17, supported a broader interpretation of *lésion corporelle*.[90] The Supreme Court countered that the parties to the Protocol did not manifest such intent to expand the phrase's meaning.[91] Since the United States Senate and most other signatories to the Convention have not ratified the Protocol, the Court did not consider it dispositive.[92]

In its final analysis, the Supreme Court examined the approaches of other signatory nations regarding the interpretation of *lésion corporelle*. The only judicial decision to consider the matter was issued by the supreme court of Israel, which held that article 17 does allow recovery for purely psychic injuries.[93] The United States Supreme Court explained that it was not persuaded by the reasoning of that decision.[94] The Israeli court emphasized such recovery as being a desirable policy goal, tracking the evolution of Anglo-American and Israeli law to their present allowance of recovery for mental injury in some circumstances.[95] Justice Marshall declared that, whether or not these policy goals are desirable, the Court "cannot

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[87] *Id.*

[88] *Id.*

[89] *International Conference on Air Law, Guatemala City*, p. 183 ICAO Doc. 9040-LC/167-2 (1972).

[90] *Eastern Airlines*, 872 F.2d at 1475.

[91] *Eastern Airlines*, 111 S. Ct. at 1501.

[92] *Id.*

[93] Cie Air France v. Teichner, 39 Revue Francaise de Droit Aerien at 243, 23 Eur. Tr. L. at 102 (arising from hijacking and detention, which allegedly caused psychic injury to passengers).

[94] *Eastern Airlines*, 111 S. Ct. at 1502.

[95] *Teichner*, 23 Eur. Tr. L. at 101-02.

give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery."[96]

In concluding that air carriers cannot be held liable under article 17 for an accident that has not caused a passenger to suffer physical injury, physical manifestation of injury, or death, the Court avoided two other issues.[97] First, the Supreme Court did not express a view as to whether the Convention allows recovery for mental injuries accompanied by physical injuries, as the passengers in this case did not present this issue below.[98] Second, this case did not present the question of whether the Warsaw Convention provides the exclusive cause of action for injuries incurred during international flight, and so the Court refused to address the allowance of an independent state tort action for mental injuries so incurred.[99]

IV. PRACTICAL IMPLICATIONS

The decision by the Supreme Court declares that the Warsaw Convention's provisions will not be circumvented by judicial decisions based on considerations of social policy.[100] This holding, as well as other Supreme Court cases in the past decade involving the Warsaw Convention, reflect the Court's long-standing determination that the duty of the Court is to interpret a treaty and administer it according to its terms.[101] The historical context and plain language of the Warsaw Convention reveal that its participants did not contemplate recovery for mental distress

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[96] *Eastern Airlines*, 111 S. Ct. at 1502.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Stephen C. Johnson & Lawrence N. Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System*, 52 J. AIR L. & COM. 93, 93-94 (1986).

[101] Doe v. Braden, 57 U.S. 635, 657 (1853); *see* Eastern Airlines, Inc. v. Mahfoud, 474 U.S. 213 (1985) (equally divided court), *aff'g per curiam*, Mahfoud v. Eastern Airlines, 729 F.2d 777 (5th Cir. 1984), *aff'g per curiam*, 17 Avi. Cas. (CCH) 17,714 (W.D. La. 1983); Air France v. Saks, 470 U.S. 392 (1985).

unaccompanied by physical injury.[102] As a result, the Court will uphold exclusion of such recovery until the Convention's signatories make clear their intent to alter this recovery scheme.

Although the Supreme Court's mandate clearly reflects that recovery for purely mental injury is not permitted under the Warsaw Convention, the Court does not resolve whether such injury can form the basis of an independent state law claim. Under article VI of the United States Constitution, the Warsaw Convention as a treaty is part of the supreme law of the land, and as federal law, may preempt state law by express or implicit terms.[103] Further, even if the treaty does not specifically displace state regulation, preemption occurs where state law actually conflicts with federal law[104] or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[105]

Regarding preemption, article 24 of the Convention includes an express provision that, in cases "covered by" the Convention's liability provisions, "*any action for damages, however founded*, can only be brought subject to the conditions and limits set out in this convention."[106] Courts must now address whether the case of recovery for purely mental injury is "covered by" the Convention's provisions for liability.[107] Then, if covered, courts must determine whether the "conditions and limits" to which the case is subject are incompatible with an action under state law.[108]

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[102] Sisk, *supra* note 16, at 161.

[103] Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 203 (1983); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[104] Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); Bacardi Corp. v. Domenech, 311 U.S. 150, 162 (1940); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); Nielsen v. Johnson, 279 U.S. 47, 52 (1929); Asakura v. Seattle, 265 U.S. 332, 341 (1924).

[105] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[106] Warsaw Convention, *supra* note 2, art. 24 (emphasis added); Johnson & Minch, *supra* note 100, at 110.

[107] Johnson & Minch, *supra* note 100, at 110-11.

[108] *Id.* at 111.

In an effort to answer these questions, examination of the first sentence of article 1 of the Convention sheds light on the drafters' intent to create a broad provision to regulate international air transportation: "This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire."[109] The breadth of coverage indicated by this opening sentence is in accord with the objective of achieving a uniform system of liability. Any finding that the Convention does not preempt state law would defeat the purpose of the signatories to create this international uniformity in air transportation.[110] State laws are simply not in agreement regarding liability for the negligent infliction of emotional distress.[111] In fact, many jurisdictions of the United States do not recognize a cause of action at all for negligent infliction of emotional distress unaccompanied by physical harm.[112] Due to the importance that the Supreme Court placed on uniformity in *Eastern Airlines v. Floyd*,[113] it is likely that the Court would find that the treaty preempts state law if this issue were presented. An independent state tort action for solely mental injuries would most likely not be permitted, as the Convention would provide the exclusive cause of action for injuries sustained during international air transportation.[114] The disallowance of an independent action seems to be the logical and appropriate result of the United States' efforts toward uniformity in the field of air transportation.

Also unaddressed by the Supreme Court is the question of whether a passenger who suffers mental injuries accompanied by physical injuries can recover for the former, due to the presence of the latter.[115] As discussed above,

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[109] Warsaw Convention, *supra* note 2, art. 1.

[110] Johnson & Minch, *supra* note 100, at 116.

[111] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 54, at 359-60 (5th ed. 1984).

[112] *Id.* at 361.

[113] 111 S. Ct. 1489, 1502 (1991).

[114] *See* Warsaw Convention, *supra* note 2, art. 1, § 1.

[115] *Eastern Airlines*, 111 S. Ct. at 1502 (stating "we express no view as to whether

in *Burnett v. Trans World Airlines, Inc.*,[116] the district court allowed recovery for mental anguish that directly resulted from physical injuries sustained by the passenger, but not for mental anguish that occurred without accompanying physical harm.[117] If the mental injury is seen as directly caused by, and not severable from, the physical injury incurred, it is likely that the Court would follow the result in *Burnett*, allowing the passenger recovery for the mental injury. Since the Convention explicitly provides for recovery for the physical injury,[118] it seems logical that any further injury, even if mental, caused to the passenger by such physical damage should be included as recoverable. This result would probably expand only minimally the liability of the air carriers, and would not directly contravene the intent of the signatories to the Convention.[119] The Supreme Court, however, has not yet been presented with this issue, so the outcome is undetermined.

In short, in interpreting the Warsaw Convention the Supreme Court has disallowed recovery for purely emotional injuries suffered by airline passengers. At the same time, although the question has not yet been addressed by the Court, it appears likely that such injuries would be compensable if accompanied by physical injury. Further, it is likely that the Court would consider any independent action for purely emotional injury to be preempted by the Warsaw Convention.

V. CONCLUSION

In summary, the Supreme Court's holding in *Eastern Airlines, Inc. v. Floyd* indicates that, in interpreting the Warsaw Convention and its application to certain types of damage in international air transportation, the Court will

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passengers can recover for mental injuries that are accompanied by physical injuries").

[116] 368 F. Supp. 1152 (D.N.M. 1973).

[117] *Id.* at 1156-58.

[118] Warsaw Convention, *supra* note 2, art. 17.

[119] *See Burnett*, 368 F. Supp. at 1158 (finding the delegates intended this type of injury to be compensable).

not expand the effect of the treaty beyond that intended by its participants. Any such expansion is within the authority of the executive and legislative branches of the United States government. The role of the judicial branch is to simply interpret that which the other branches have created as law. Further, the Court's emphasis on preserving the goal of uniformity, an objective frequently mentioned by the signatories, indicates that the Court may tend toward interpreting the Convention as the exclusive cause of action for damages arising out of international flight, should the issue one day be granted review. Until that day, though, the Court confirms only that the award of damages for purely mental injuries is not permitted under the Warsaw Convention as written today.[120]

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[120] *Eastern Airlines*, 111 S. Ct. at 1502.

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