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Abdulla Hassan Mohamed

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Recovery for Emotional Distress Under International Air Transportation as Developed by the Common Law Courts

*Abdulla Hassan Mohamed**

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ABSTRACT

A passenger who seeks to recover for bodily injury incurred as a consequence of the inherent risks of international air transportation is limited to the uniform and exclusive cause of action provided under Article 17 of the Warsaw and Montreal conventions. However, courts have been inconsistent in their decisions as to whether the passenger

should be allowed to recover damages for purely emotional distress resulting from aircraft accidents. Three approaches have been developed to resolve this issue: (1) disallow recovery for pure emotional distress; (2) allow recovery only for emotional distress flowing from a bodily injury; and (3) allow recovery for all emotional distress so long as bodily injury occurs.

The purpose of this Article is to examine these three approaches in light of common law cases.

INTRODUCTION

In international air travel, the Warsaw Convention of 1929¹ and the Montreal Convention of 1999² are the main instruments applicable to cases of liability of a carrier to redress passenger injury.³ Article 17 in both conventions sets forth the conditions under which an international air

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* College of Law, UAE University.

1. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter Warsaw Convention]. The Convention had two objectives. First, it was intended to establish uniform rules governing parties to international air carriage contracts. Second, it was intended to limit the liability of air carriers in exchange for limiting the defenses available to such carriers. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 247, 256, 259 (1984).

2. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. NO. 106-45 (1999) [hereinafter Montreal Convention]. The Montreal Convention has the stated purpose of providing a modernized uniform liability regime for international air transportation.

3. Article 29 of Montreal Convention provides that:

In the carriage of passengers, . . . any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Montreal Convention, *supra* note 2, at art. 29. *See El Al Israel Airline v. Tseng*, 525 U.S. 155, 155 (1999) (where the U.S. Supreme Court concluded that a passenger is precluded from maintaining an action for personal injury damage under local law when the claim does not satisfy the conditions for liability under Article 17 of Warsaw Convention).

carrier can be held liable for passenger death or bodily injury.⁴ Article 17 of the Warsaw Convention reads:⁵

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁶

This article has remained more or less unmodified over the years, and the Montreal Convention made only inconsequential changes to the language of Article 17.⁷ Article 17 of the Montreal Convention reads:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁸

An air carrier will be liable for the passengers' injuries, irrespective of whether the Warsaw Convention or Montreal Convention applies, only when the following three conditions are satisfied:⁹ (1) there has been an accident that has been defined as "an unusual or unexpected event or happening external to the passenger," (2) the passenger suffered bodily injury as a result of the accident, and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking.¹⁰

4. *Air France v. Saks*, 470 U.S. 392, 397 (1985).

5. The authentic French text of Article 17 of The Warsaw Convention reads as follows:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit a bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

Warsaw Convention, *supra* note 1, at art. 17.

6. *Id.* at art. 17; *see also* Paul Stephen Dempsey, *Accidents & Injuries in International Air Law: The Clash of the Titans*, 24 KOREAN J. AIR & SPACE L. & POL'Y 236, 237 (2009); GEORGE TOMPKINS, *LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999*, at 124 (2010).

7. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

8. Montreal Convention, *supra* note 2, at art. 17.

9. *E. Airlines*, 499 U.S. 530.

10. *Air France v. Saks*, 470 U.S. 392, 392 (1985)

A compensable bodily injury requires some proof of physical damage to the body of the passenger,¹¹ such as a broken arm, a broken leg, or a burn.¹² The major question that has troubled common law courts for years is whether Article 17 encompasses a claim for emotional distress, such as fear, fright, anxiety, or nervousness,¹³ because this question was never discussed during the drafting of the Warsaw Convention or in the Convention's early years.¹⁴

It was the mid-1970s before claims were brought for emotional distress; these claims arose out of a number of terrorist hijackings.¹⁵

11. *E. Airlines*, 499 U.S. at 530.

12. TOMPKINS, *supra* note 6, at 135.

13. A number of the delegates to the Montreal Conference suggested that stand alone "mental injury"—such as fear, fright, nervousness, anguish, anxiety, stress—should be included as a "compensable" injury in Article 17 of the Montreal Convention. The Delegate Observers of the International Air Transport Association (IATA) were strongly opposed to this suggestion, due to problems of proof or disproof of such subjective claims, and eventually, after lengthy and intense debate, "stand alone mental injury" was not included expressly as a compensable injury in Article 17 of the Montreal Convention. See Excerpt from Warsaw Convention Conference Minutes, October 4–12, 1929, reprinted at app. 161–64.

14. Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle*, 25 TEX. INT'L L.J. 127, 132 (1990). The early drafts of the Montreal Convention's Article 17 would have expressly included liability for mental injury. See Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 66 J. AIR L. & COM. 21, 27 (2000). Later drafts even introduced the element of personal injury designed to encompass both physical and mental injuries. See Ruwantissa I.R. Abeyratne, *Mental Distress in Aviation Claims – Emergent Trends*, 65 J. AIR L. & COM. 225, 227 (2000). For example, the provision (then Article 16) of the first draft of the Montreal Convention corresponding to Article 17 of the Warsaw Convention 29 read:

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

Id. at 226–27 (emphasis added). Other drafts of the convention even included the term "personal injury"; however, after further deliberations, the ICAO removed both "mental injury" and "personal" injury from the provision, choosing instead to leave the language virtually unchanged.

15. The first case decided by a supreme court of a Warsaw Convention signatory state on the question of whether mental anguish alone can be recovered

Passengers who had not suffered any identifiable physical injuries nevertheless claimed compensation for the terror and mental anguish they had experienced.¹⁶ The litigation that followed raised the question of whether Article 17 encompasses a claim for emotional distress.

This Article aims to review several common law cases that have addressed the issue of recovery for emotional distress damages under Article 17 in order to find out the current position of an air carrier's liability for such damages.

It is worth noting that most cases that have dealt with claims for emotional distress under Article 17 were decided before the Montreal Convention was adopted. However, as Article 17 of the Montreal Convention repeats verbatim the substance of the original Article 17 of the Warsaw Convention, the precedent developed under the Warsaw Convention is still relevant, if not determinative, in cases to which the Montreal Convention applies.¹⁷

I. EMOTIONAL DISTRESS CLAIMS BEFORE *FLOYD*

In the United States, prior to the Supreme Court's decision in the landmark case of *Eastern Airlines, Inc. v. Floyd*,¹⁸ the courts were split as to whether a plaintiff could recover under Article 17 of the Warsaw Convention for emotional distress that does not result from a "bodily

under Article 17 is the Israeli case *Air France v. Teichner*, 38(3) PD 785 (1984) (Isr.). The case stems from the hijacking of an Air France aircraft on June 27, 1976. The hijackers forced the pilot to land at the Entebbe Airport in Uganda, where the passengers were held for several days before they were rescued by Israeli forces. The Supreme Court of Israel held that Article 17 of the Warsaw Convention permitted recovery for emotional distress damages. See Dafna Yoran, *Recovery for Emotional Distress Damages Under Article 17 of the Warsaw Convention: The American Versus the Israeli Approach*, 18 BROOKLYN J. INT'L L. 811, 819–20 (1992).

16. Robert J. Rivers Jr., *Torts – International Infliction of Emotional Distress*, 14 SUFFOLK TRANSNAT'L L.J. 353, 357 (1990).

17. See *Sompo Japan Ins. v. Nippon Cargo Airlines Co.*, 522 F.3d 776 (7th Cir. 2008); *Byrd v. Comair*, 501 F. Supp. 2d 902 (E.D. Ky. 2007); *Baah v. Virgin Atlantic Airways*, 473 F. Supp. 2d 591 (S.D.N.Y. 2007); *Cont'l Ins. Co. v. Fed. Express Corp.*, 454 F.3d 951 (9th Cir. 2006); see also Dempsey, *supra*, note 6, at 237; TOMPKINS, *supra*, note 6 at 124.

18. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

injury” or “*lésion corporelle*.”¹⁹ In *Burnett v. Trans World Airlines, Inc.*²⁰ and *Rosman v. Trans World Airlines, Inc.*,²¹ both courts held that damages for stand-alone mental injuries were not compensable under Article 17,²² whereas in *Husserl v. Swiss Air Transport Co.*,²³ the court allowed recovery for purely psychic injuries under Article 17.

In *Burnett v. Trans World Airlines, Inc.*, the plaintiffs boarded a Trans World Airlines flight from Athens to New York. After additional passengers boarded in Frankfurt, members of the Popular Front for the Liberation of Palestine hijacked the plane, diverted the aircraft to Jordan, and forced it to land on a dry lakebed in the desert outskirts of Amman.²⁴ The plaintiffs claimed that they feared for their lives during their period of captivity and thus experienced severe emotional trauma.²⁵ The plaintiffs sued TWA for their purely emotional distress.²⁶

The United States District Court for the District of New Mexico held that damages for mental anguish alone could not be recovered under Article 17 of the Warsaw Convention.²⁷ In addition, the court examined the legislative history of the Convention and found a strong inference that the drafters intended to exclude recovery for purely emotional distress by using a narrow definition of *lésion corporelle*.²⁸

The court looked to the French legal meaning of the term for guidance.²⁹ The court noted that French law distinguishes sharply between

19. See generally Karen M. Campbell, *The Emotional Trauma of Hijacking: Who Pays?*, 74 KY. L.J. 599, 611–20 (1985) (surveying conflicting decisions as to whether Article 17 encompasses claims for emotional distress unaccompanied by physical injury).

20. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973).

21. *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (N.Y. 1974).

22. See *Finkelstein v. Trans World Airlines, Inc.*, 434 U.S. 858 (1977) (no recovery for purely mental injuries as a result of a hijacking and no physical injuries).

23. *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975), *abrogated by* *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). Other courts that have allowed recovery for purely psychic injuries under Article 17 include the Southern District of New York in *Borham v. Pan Am. World Airways*, No. 85-6922, 1986 WL 2974 (S.D.N.Y. Mar. 5, 1986) and the Central District of California in *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975).

24. *Burnett*, 368 F. Supp. at 1153.

25. *Id.*

26. *Id.*

27. *Id.* at 1157.

28. *Id.*

29. *Id.* at 1155.

“bodily injury” (*lésion corporelle*) and “mental injury” (*lésion mentale*) and consequently decided that the two phrases were mutually exclusive³⁰ and that a mental injury is only compensable if it flows from a physical injury:

Plaintiffs next contend that recovery may be obtained for mental anguish suffered as a result of physical injuries according to generally recognized principles of jurisprudence. Supporting this contention is the language of Article 17 itself which states that the carrier is liable “for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger” Certainly, mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury. The delegates apparently chose to follow this well recognized principle of law allowing recovery for mental anguish resulting from the occurrence of a bodily injury, the emotional distress being directly precipitated by the bodily injury being considered as a part of the bodily injury itself. Therefore, plaintiffs may recover . . . for any such emotional anxiety that they can demonstrate resulted from a bodily injury suffered as a consequence of the hijacking.³¹

In *Rosman v. Trans World Airlines, Inc.*, the New York Court of Appeals considered the claims of passengers involved in the hijacking of a flight from Tel Aviv to New York.³² The claims were brought under Article 17 for emotional injury accompanied by physical injury.³³ Guerillas armed with rifles and hand grenades hijacked the plane on September 6, 1970, and held the plaintiffs hostage for six days.³⁴ The plaintiffs claimed that they suffered “severe psychic trauma” and that they were damaged “by the physical circumstances of their imprisonment aboard the aircraft.”³⁵ Additionally, the plaintiffs alleged that they suffered physical injury as a result of the forced immobility, inadequate sanitary facilities, and scarcity of food and water.³⁶ The alleged physical injuries included backaches, swollen feet, boils, skin irritation, weight loss,

30. *Id.* at 1156.

31. *Id.* at 1158.

32. *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 850 (N.Y. 1974).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

dehydration, and sleep deprivation.³⁷ The defendant airline argued that the liability scheme of the Warsaw Convention did not allow recovery because psychic injury, “with or without palpable physical manifestation,” is not “bodily injury” within the meaning of Article 17 and “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.’”³⁸

The court began by examining the meaning of Article 17 in its original French and found that there was no dispute that the French words *lésion corporelle* were properly translated as “bodily injury” for purposes of the plaintiffs’ claims; thus, the meaning of “bodily injury” was at issue.³⁹ 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.⁴⁰ 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.’”⁴¹ The court found that the ordinary meaning of “bodily injury” connotes “palpable, conspicuous physical injury, and excludes mental injury with no observable ‘bodily,’ as distinguished from ‘behavioral,’ manifestations.”⁴²

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.’”⁴³ 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.⁴⁴ 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 flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.”⁴⁵

In *Husserl v. Swiss Air Transport Co.*, the plaintiff, Husserl, boarded a Swiss Air direct flight from Zurich to New York in September of 1970.⁴⁶

37. *Id.*

38. *Id.* at 852.

39. *Id.*

40. *Id.* at 853.

41. *Id.* at 855.

42. *Id.*

43. *Id.* at 857.

44. *Id.*

45. *Id.*

46. *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975), *abrogated by* *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

Shortly after takeoff, members of the Popular Front for the Liberation of Palestine hijacked the plane and directed the pilot to fly to a desert area near Amman.⁴⁷ Once there, the plaintiff was forced to stay on the plane for approximately 24 hours under circumstances “less than ideal for . . . mental health.”⁴⁸ Once the plaintiff returned to New York, she filed suit under the Warsaw Convention, alleging that from the time the terrorists took control of the aircraft until she returned to Zurich she suffered “severe mental pain and anguish resulting from her expectation of severe injury and/or death.”⁴⁹ Swiss Air contended that the plaintiff could not recover under the Warsaw Convention because her injuries were purely emotional.⁵⁰

In determining whether the phrase “*en cas de mort, de blessure ou de toute autre lésion corporelle*” (in the event of the death or wounding, or any other bodily injury) comprehended mental and psychosomatic injuries, the Southern District of New York attempted to ascertain the intention of the drafters and signatories of the Warsaw Convention.⁵¹ The court was, however, unable to ascertain the specific intent of the Convention’s framers and thus concluded “that the parties probably had no specific intention at all about mental and psychosomatic injuries because, if they had, they would have clearly expressed their intentions.”⁵² Consequently, the court held “that the phrase ‘death or wounding . . . or any other bodily injury,’ as used in Article 17, does comprehend mental injuries.”⁵³

II. *EASTERN AIRLINES V. FLOYD*

In 1990, the United States Supreme Court granted certiorari in *Eastern Airlines, Inc. v. Floyd* in order to resolve the question debated among lower courts of whether Article 17 of the Warsaw Convention allows recovery for pure mental injuries.⁵⁴ In a unanimous opinion, the Supreme Court concluded that recovery for pure emotional injuries is not permitted under Article 17.⁵⁵

47. *Id.* at 1241.

48. *Id.* at 1242.

49. *Id.*

50. *Id.* at 1241.

51. *Id.* at 1248–49.

52. *Id.* at 1249.

53. *Id.* at 1253.

54. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 533 (1991).

55. *Id.* at 534.

The relevant facts of *Floyd* were as follows. On May 5, 1983, an Eastern Airlines flight departed from Miami, bound for the Bahamas.⁵⁶ Shortly after takeoff, one of the plane's three jet engines lost oil pressure.⁵⁷ The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engines also failed due to loss of oil pressure.⁵⁸ The plane began losing altitude rapidly, and the crew informed the passengers that the plane would be ditched in the Atlantic Ocean.⁵⁹ Luckily, after a period of descending flight without power, the crew managed to restart one of the engines and landed the plane safely at Miami International Airport.⁶⁰

Floyd brought an action against Eastern Airlines, claiming damages solely for mental distress arising out of the incident. "Eastern conceded that the engine failure and subsequent preparations for ditching the plane amounted to an 'accident' under Article 17 of the [Warsaw] Convention but argued that Article 17 also [made] physical injury a condition of liability."⁶¹ The district court, relying on the *Burnett* court's analysis of the French authentic text and negotiating history of the Warsaw Convention,⁶² concluded that Floyd's "mental anguish alone [was] not compensable under Article 17."⁶³

On appeal, the Eleventh Circuit Court of Appeals reversed the judgment of the district court, holding that the phrase "'*lésion corporelle*' in the authentic French text of Article 17 encompass[e]d purely emotional distress"⁶⁴ and granted recovery to Floyd.⁶⁵ The court based its decision upon several factors. First, the court interpreted *lésion corporelle* based on its French legal meaning.⁶⁶ Second, the court looked to subsequent actions by the contracting parties to the Warsaw Convention that interpreted the treaty.⁶⁷ Third, the court analyzed the prior case law interpreting Article

56. *Id.* at 533.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973).

63. *E. Airlines*, 499 U.S. at 534.

64. *Id.* at 530 (citing *Floyd v. E. Airlines, Inc.*, 872 F.2d 1462, 1480 (11th Cir. 1989)).

65. *Floyd*, 872 F.2d at 1471-72.

66. *Id.* at 1471-73. The court concluded that a literal translation of "bodily injury" into its non-legal meaning would not capture its French legal meaning.

67. *Id.* at 1473. The court first noted that the drafters of the Convention did not discuss recovery for emotional injuries. In particular, the court found the textual changes made to the Convention's provisions by the Hague Protocol,

17.⁶⁸ Finally, the court noted that permitting recovery of damages for mental injuries would support the underlying policy of the Convention of establishing a uniform system of law and liability governing international air carriers.⁶⁹

The Supreme Court reversed the decision of the Court of Appeals and held that Article 17 of the Warsaw Convention does not allow recovery for purely mental injuries.⁷⁰ In order to come to its decision, the Supreme Court first examined the French legal meaning of the term *lésion corporelle*, as used in the Warsaw Convention, to determine the expectations of all parties to the Convention.⁷¹ Bilingual dictionaries indicated that the proper translation of the term is “bodily injury,” suggesting that Article 17 does not permit recovery for psychic injuries.⁷²

The Court then reviewed French legal materials and discovered that the term *lésion corporelle* was rarely used in French law in 1929.⁷³ The Court noted that no French case had construed Article 17 to cover psychic injury and that cases in which the phrase was used invariably involved physical injuries.⁷⁴ The term was most frequently utilized in causes of action based on injuries incurred in automobile accidents.

The Court turned to the negotiating history of the Warsaw Convention and found that the translation of *lésion corporelle* as “bodily injury” is consistent with that history.⁷⁵ From its review of the Convention’s documentary record, the Court found no evidence that the signatories specifically considered liability for psychic injury.⁷⁶ The Court averred that, because a remedy for mental anguish was unknown to most jurisdictions in 1929, the drafters would most likely have felt obliged to make explicit reference to purely mental injury if they had specifically intended to provide for such recovery.⁷⁷ The 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

Montreal Agreement, and Guatemala Protocol, which were later ratified by many countries, to be convincing evidence that the term *lésion corporelle* should include purely mental suffering.

68. *Id.* at 1475–80.

69. *Id.* at 1479.

70. *E. Airlines*, 499 U.S. at 534.

71. *Id.* at 536–42.

72. *Id.* at 536–37.

73. *Id.*

74. *Id.*

75. *Id.* at 542.

76. *Id.* at 544.

77. *Id.* at 544–45.

of liability of air carriers in an effort to encourage the growth of the then-nascent commercial aviation industry.⁷⁸ The Court emphasized that, regardless of what the current view of the Convention signatories may be, in 1929, the negotiating parties were more concerned with fostering a new industry than with fully compensating injured passengers.⁷⁹ This legislative choice directed the Court to interpret *lésion corporelle* narrowly, thus excluding recovery for purely mental injury:

Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.⁸⁰

The Supreme Court then examined the post-1929 conduct and interpretations of the signatories and found that relevant evidence supports the narrow translation of *lésion corporelle*.⁸¹ First, in 1951, a committee composed of 20 Convention signatories convened in Madrid and adopted a proposal to substitute the phrase "*affection corporelle*" for "*lésion corporelle*" in Article 17.⁸² 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."⁸³ 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 proposal.⁸⁴ Although the amendment was never implemented, the Court found that the discussion and subsequent vote showed the view of the signatories that *lésion corporelle* has a "distinctly physical scope."⁸⁵

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,

78. *Id.* at 546.

79. *Id.* at 546.

80. *Id.*

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

82. *Id.* at 547.

83. *Id.*

84. *Id.*

85. *Id.*

physical manifestation of injury, or death, the Court avoided expressing a view as to whether the Warsaw Convention allows recovery for mental injuries accompanied by physical injuries, as the passengers in this case did not present this issue:

[A]n 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 Although Article 17 renders air carriers liable for “damage sustained in the event of” (“dommage survenu en cas de”) such injuries, . . . *we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.* That issue is not presented here because respondents do not allege physical injury or physical manifestation of injury.⁸⁶

III. EMOTIONAL DISTRESS CLAIMS SINCE *FLOYD*

The *Floyd* case has become the dominant precedent for purely mental injury under the Warsaw Convention in U.S. jurisdictions since it was decided, and it has exerted a strong persuasive influence in other common law jurisdictions. This may not be surprising as it was perhaps the first, albeit most conservative, attempt by a supreme court to define and discuss the interpretive issues regarding *lésion corporelle*. However, the explicit imprecision and ambivalence of the Supreme Court’s dictum in *Floyd*—“*we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries*”⁸⁷—left the door open for all sorts of litigation.⁸⁸ For example, to recover under Article 17, need the emotional injury result from the physical harm, or may the physical harm result from the emotional injury? In other words, may the physical injury simply be the physical manifestation of emotional harm (e.g., if the plaintiff was not physically touched but suffered hives, diarrhea, or hair loss because of her fright), or must there instead be some direct physical contact that produces a bruise, lesion, or broken bone causing emotional harm? Also, if the accident causes emotional harm that, in turn, causes bodily injury, may the passenger recover for the emotional harm that precedes its physical manifestation or only the pain and suffering flowing

86. *Id.* at 552 (emphasis added).

87. *Id.* (emphasis added).

88. Jean-Paul Boulee, *Recovery for Mental Injuries That Are Accompanied by Physical Injuries Under Article 17 of the Warsaw Convention: The Progeny of Eastern Airlines, Inc. v. Floyd*, 24 GA. J. INT’L & COMP. L. 501 (1995).

subsequently from the bodily injury? If death or direct bodily injury occurs, may the passenger recover for pre-impact injuries?⁸⁹

The courts, in answering the above questions, have adopted three approaches:

- (1) disallow recovery for pure emotional distress;
- (2) allow recovery only for emotional distress flowing from a bodily injury; and
- (3) allow recovery for all emotional distress, so long as bodily injury occurs.⁹⁰

A. Disallow Recovery for Pure Emotional Distress

The first approach is to disallow recovery for pure emotional distress. Following the Supreme Court's holding in *Floyd*, several courts have adopted this approach and consistently found that pure emotional distress is not actionable under Article 17. The following are cases where the courts adopted this first approach.

1. El Al Israel Airlines v. Tseng

In *Tseng*, the plaintiff, Tsui Yuan Tseng, arrived at JFK Airport to board an El Al Israel Airlines flight to Tel Aviv.⁹¹ During the pre-boarding procedures, an El Al security guard questioned Tseng about her destinations and travel plans.⁹² The guard considered Tseng's responses to be "illogical" and ranked her as a "high risk" passenger. Tseng was taken to a private security room and was told to remove her shoes, jacket, and sweater and to lower her blue jeans to mid-hip.⁹³ A female security guard then searched Tseng's body outside her clothes by hand and with an electronic security wand. After the search, El Al personnel decided that Tseng did not pose a security threat and allowed her to board the flight.⁹⁴ Tseng later testified that she was really sick and very upset during the flight, that she was emotionally traumatized and disturbed during her trip, and that she underwent medical and psychiatric treatment for the lingering

89. Dempsey, *supra* note 6, at 235.

90. See *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D. Cal. 1994).

91. *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 163 (1999).

92. *Id.*

93. *Id.*

94. *Id.* at 164.

effects of the body search.⁹⁵ Tseng filed suit against El Al, alleging assault and false imprisonment but no bodily injury.⁹⁶

The district court dismissed Tseng's personal injury claim because Tseng sustained no bodily injury as a result of the search and the Warsaw Convention does not permit recovery for psychic or psychosomatic injury unaccompanied by bodily injury.⁹⁷ The Second Circuit Court of Appeals affirmed, holding that Tseng was not entitled to compensation under Article 17 because she sustained no bodily injury and could not recover for her solely psychic or psychosomatic injuries:

In sum, from the . . . authorities, we derive the following: a carrier is liable in damages for an accident on board the aircraft or in the course of embarking or disembarking that causes the death or wounding or any other bodily injury of a passenger . . . [W]e hold that even though the event of which plaintiff complains occurred during the course of her embarkation on defendant's airplane, there was no accident and she suffered no bodily injury.⁹⁸

The Supreme Court affirmed, holding that “[t]he Convention provides for compensation under Article 17 only when the passenger suffers ‘death, physical injury, or physical manifestation of injury.’”⁹⁹ Both the district court and the court of appeals determined that Tseng did not meet the “bodily injury” requirement and could not recover under Article 17 for her solely psychic or psychosomatic injuries.¹⁰⁰

2. *Croucher v. Worldwide Flight Services*

In *Croucher*, the plaintiff, Mrs. Croucher, was a passenger onboard a Korean Air Lines (KAL) flight from New Jersey to Seoul. After the plane departed from New Jersey, the plaintiff's child became ill.¹⁰¹ The plaintiff removed the airsickness bag from the seatback pocket and as she opened the bag, came into contact with fluid in the bag, which the plaintiff claimed was left from a previous KAL flight.¹⁰² The fluid in the airsickness bag was tested in Korea for the presence of human immunovirus and was

95. *Id.*

96. *Id.* at 155.

97. *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996).

98. *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997).

99. *El Al Israel Airlines*, 525 U.S. at 165 n.9.

100. *Id.* at 155.

101. *Croucher v. Worldwide Flight Serv.*, 111 F. Supp. 2d 501, 502 (D.N.J. 2000).

102. *Id.*

found to be hepatitis C positive.¹⁰³ Mrs. Croucher was tested for hepatitis C on a series of occasions thereafter with negative results.¹⁰⁴ Nevertheless, Mrs. Croucher sued KAL, alleging that as a result of KAL's negligence, she came in contact with bio-medical waste, causing her severe emotional distress and mental anxiety, even though there was no physical injury.¹⁰⁵ The district court, relying on *Floyd*, determined that the plaintiff's emotional distress and anxiety failed to constitute a "bodily injury" within the meaning of Article 17.¹⁰⁶ Therefore, the court granted summary judgment in favor of KAL:

[KAL] correctly claims that purely mental anguish does not constitute a "bodily injury" for which damages are recoverable under the Convention. *See [Floyd]* (concluding that Article 17 requirement that accident results in "bodily injury" does not encompass claims for damages solely for mental distress). Plaintiffs do not dispute that they have not suffered any "bodily injury" and that they seek only to recover damages for emotional distress arising out of the concern and fear over being exposed to the potential for developing the Hepatitis C Virus or some other infectious disease.¹⁰⁷

3. *Lee v. American Airlines, Inc.*

In *Lee*,¹⁰⁸ following the delay and ultimate cancellation of Lee's flight from New York to London, Lee brought a claim under Article 19 of the Warsaw Convention seeking compensation for damages arising out of a flight delay and in particular, for inconvenience and loss of a "refreshing, memorable vacation."¹⁰⁹ The airline argued that the plaintiff's inconvenience damages were not damages for delay under Article 19 at all but disguised claims for emotional distress that were not permitted under Article 17.¹¹⁰

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 506.

107. *Id.* at 507 (citations omitted).

108. *Lee v. Am. Airlines, Inc.*, 355 F.3d 386 (5th Cir. 2004).

109. *Lee v. Am. Airlines, Inc.*, No. 301-1179P, 2002 WL 1461920 (N.D. Tex. July 2, 2002).

110. *Id.* at *3.

The district court analyzed the plaintiff's inconvenience damages and determined that they fell under the rubric of mental injuries.¹¹¹ After re-characterizing the plaintiff's damages as mental anguish rather than economic in nature, the court granted the motion for summary judgment in favor of the airline, relying on the *Floyd* decision.¹¹²

On appeal, Lee contended that his claim for inconvenience and loss of a refreshing, memorable vacation was a claim for economic damages and not a claim for mental anguish damages.¹¹³ Specifically, Lee alleged that American Airlines inconvenienced him by forcing him to spend time in a terminal without adequate food, water, restroom facilities, and information regarding the status of his flight; forcing him to spend the night in a dirty, substandard, and unsafe motel room; and causing him to lose a full day of vacation.

The Fifth Circuit Court of Appeals dismissed Lee's allegations, holding that Lee's alleged damages were nothing more than pure mental injuries arising "from discomfort, annoyance, and irritation" as a result of the delay and that no economic loss had occurred.¹¹⁴ As such, the court, relying on *Floyd*, concluded that Lee could not recover for mental injuries under the Warsaw Convention:

We agree with the district court that, as alleged, Lee's so-called inconvenience damages are not easily quantifiable and do not result in real economic loss. These alleged damages are merely an attempted re-characterization of mental anguish damages. Mental injury damages are not recoverable under the Warsaw Convention. *See [Floyd]*. Accordingly, we AFFIRM the ruling of the district court.¹¹⁵

4. *Morris v. KLM*

The House of Lords in the United Kingdom in *Morris v. KLM* determined, following the *Floyd* decision, that "bodily injury" means a change in some part or parts of the body of a passenger that is sufficiently serious to be described as an injury.¹¹⁶ A psychiatric illness—emotional

111. *Id.* at *4.

112. *Id.* at *5.

113. *Id.* at *3.

114. *Id.* at *4.

115. *Lee v. Am. Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004).

116. *Morris v. KLM Royal Dutch Airlines King v. Bristow Helicopters Ltd.* [2002] 2 AC (HL) 628.

upset such as fear, distress, grief, or mental anguish—may be evidence of bodily injury but does not in itself constitute bodily injury.

The alleged facts of the case were as follows. The plaintiff, Ms. Morris, a young girl of 15 years, travelled with KLM from Kuala Lumpur to Amsterdam. She was seated beside two men. After a meal, she fell asleep and was awakened by the groping hand of the man next to her, touching her left thigh. He was caressing her between her hip and knee and his fingers dug into her thigh.¹¹⁷ Ms. Morris got up, walked away, and reported the incident to the cabin staff. She became very distressed as a result of the incident on her return to England. A doctor examined her and found that she was suffering from clinical depression amounting to a single episode of a major depressive illness.¹¹⁸

At the court of first instance, Ms. Morris based her claim for compensation under Article 17 of the Warsaw Convention. Judge Carter held in favor of Ms. Morris based on his interpretation of Article 17—that bodily injury included mental injury—and its applicability to the case at hand. KLM appealed, arguing that bodily injury in Article 17 was injury that results in some form of physical damage but does not extend to illness of the mind.

The Court of Appeal, rejecting Judge Carter's judgment, held that the depressive illness suffered by Ms. Morris was not bodily injury within the meaning of the Warsaw Convention on the following grounds:

- (1) There is a distinct difference between physical and mental injury. Physical injury involves damage to the structure of the body, whereas mental injury affects the well-being of the mind.
- (2) The court was bound to interpret Article 17 along the lines of shared intentions of signatories in 1929.¹¹⁹

The House of Lords upheld the findings of the Court of Appeal. Their Lordships examined the *travaux préparatoires* of the Warsaw Convention and found no discussion of the issue of mental injury or illness. They concluded that Article 17 does not allow one to recover for emotional damages where he has suffered no physical injury:

Thus, *bodily injury* simply and unambiguously means a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury. It does not include mere emotional upset such as fear, distress, grief or

117. *Id.* at para. 2.

118. *Id.* at para. 3.

119. *Id.* at para. 2.

mental anguish A psychiatric illness may often be evidence of a *bodily injury* or the description of a condition which includes *bodily injury*. But the passenger must be prepared to prove this, not just prove a psychiatric illness without evidence of its significance for the existence of a *bodily injury*.¹²⁰

5. *Stott v. Thomas Cook Tour Operators Ltd.*

The United Kingdom Supreme Court considered a passenger's right to recover for pure mental injury in *Stott v. Thomas Cook Tour Operators Ltd.*¹²¹ Mr. Stott was paralyzed from the shoulders down and a permanent wheelchair user.¹²² When traveling by air, he depended on his wife to manage his incontinence, help him to eat, and change his sitting position.¹²³ Mr. Stott booked flights with Thomas Cook, a tour operator and air carrier, for he and his wife's trip to Greece.¹²⁴ He telephoned Thomas Cook's helpline twice, informing them that he had paid to be seated with his wife, and he was assured that this would happen.¹²⁵ However, on arrival at check-in for the return journey, Mr. and Mrs. Stott were told that they would not be seated together.¹²⁶ They protested but were eventually told that the seat allocations could not be changed.¹²⁷ Mr. Stott had difficulties boarding the aircraft and was not sufficiently assisted by Thomas Cook staff.¹²⁸ He felt extremely embarrassed, humiliated, and angry.¹²⁹ He was eventually helped into his seat, with his wife sitting behind him.¹³⁰ This arrangement was problematic because Mrs. Stott could not properly assist her husband during the three-hour-and-twenty-minute flight.¹³¹ She had to kneel or crouch in the aisle to attend to his personal needs, obstructing the cabin crew and other passengers. The cabin crew made no attempt to ease their difficulties.¹³²

120. *Id.* at para. 101–02.

121. *Stott v. Thomas Cook Tour Operators LTD*, [2014] UKSC 15 (Eng.).

122. *Id.* at para. 5.

123. *Id.*

124. *Id.* at para. 7 (quoting *Stott v. Thomas Cook Tour Operators LTD*, [2012] EWCA (Civ) 66 (Eng.))

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

Mr. Stott brought a claim against Thomas Cook seeking damages for injury to his feelings.¹³³ Thomas Cook argued that it had made reasonable efforts and that the Montreal Convention precludes an award of damages for injury to feelings because under Articles 17 and 29 of the Convention, damages for harm to passengers can only be awarded in cases of death or bodily injury.¹³⁴ At first instance, the judge decided that the EC Disability Regulation had in fact been violated and that he would have awarded £ 2,500 if the Montreal Convention had not prevented him from doing so.¹³⁵ The court therefore rejected Stott's claim for aggravated damages due to injury to his feelings.¹³⁶ The Court of Appeal agreed.¹³⁷

Mr. Stott appealed to the UK Supreme Court, arguing that his claim was (1) outside the substantive scope of the Montreal Convention since the Montreal Convention did not touch the issue of equal access to air travel, which is governed by the EC Regulations, and (2) outside the temporal scope of the Montreal Convention because Thomas Cook's failure to make all reasonable efforts occurred before Mr. and Mrs. Stott boarded the aircraft.¹³⁸

The Supreme Court unanimously dismissed the appeal.¹³⁹ The Court found that Mr. Stott was treated in a humiliating and disgraceful manner by Thomas Cook; however, his claim fell within the substantive and temporal scope of the Montreal Convention and as a result, damages could not be awarded for injury to feelings:

Substantively, the Convention deals comprehensively with the carrier's liability for physical incidents involving passengers between embarkation and disembarkation. The fact that Mr. Stott's claim involves an EU law right makes no difference. Temporally, Mr. Stott's claim is for damages and distress suffered in the course of embarkation and flight, and these fall squarely within the temporal scope of the Convention.¹⁴⁰

133. *Id.* at para. 8.

134. *Id.* at para. 52–53.

135. *Id.* at para. 8.

136. *Id.*

137. *Id.* at para. 9.

138. *Id.* at para. 45–48.

139. *Id.* at para. 65.

140. Press Summary, *Stott v. Thomas Cook Tour Operators LTD*, [2014] UKSC 15 (Eng.).

6. Kotsambasis v. Singapore Airlines

In Australia, the Australian New South Wales Court of Appeal in *Kotsambasis v. Singapore Airlines* held, following the *Floyd* decision, that the term “bodily injury” in Article 17 of the Warsaw Convention does not include purely psychological injury.¹⁴¹ On May 28, 1992, the plaintiff, Kotsambasis, boarded a Singapore Airlines flight in Athens, which was scheduled to fly to Sydney via Singapore. Shortly after takeoff, Kotsambasis saw smoke coming out of the starboard engine. The crew announced that there was an engine problem and that the aircraft would be returning to Athens but that fuel had to be jettisoned first. The aircraft landed over an hour after takeoff, and because of the lack of facilities provided by Athens airport, the passengers were prevented from disembarking the aircraft for another 2.5 hours. Kotsambasis brought a suit against Singapore Airlines to recover for damages on the basis of psychological injuries as well as back injuries.¹⁴²

The New South Wales Court of Appeal stated that the two phrases “bodily injury” and “*lésion corporelle*” can be regarded as essentially equivalents and that both are ambiguous as to whether they refer to psychological injuries:

Both [*bodily injury* and *lésion corporelle*] have the same ambiguity, namely whether the phrase can be taken to refer to a psychological injury. This ambiguity can only be resolved by looking at the intention of the contracting parties and adopting a purposive approach to the interpretation of the Convention. It is immediately apparent that the adjective “bodily” is a word of qualification or limitation . . . that courts are not at liberty to consider any words as superfluous or insignificant It is clear that the draftsmen of the Convention did not intend to impose absolute liability in respect of all forms of injury.¹⁴³

The court also reviewed the *Floyd* decision and entirely agreed with it. In particular, the court quoted what the *Floyd* court’s Judge Marshall wrote regarding the history of negotiations of the Warsaw Convention and the state of the law in many of the other contracting states at the time:¹⁴⁴

No evidence that the drafters or signatories of the Warsaw

141. *Kotsambasis v. Singapore Airlines* [1997] 42 NSWLR 110 (Austl.).

142. *Id.* at 111 E–F.

143. *Id.* at 114 E.

144. *Id.* at 114 A.

Convention specifically considered liability for psychic or the meaning of *lésion corporelle* Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the convention.

The court concluded that the term “bodily injury” was not intended to and, on a proper interpretation of the Warsaw Convention, does not include purely psychological injury.¹⁴⁵

B. Recovery Allowed Only for Emotional Distress Flowing from Bodily Injury

Under the second approach, emotional distress flowing from a bodily injury is a recoverable element of damages allowed for the bodily injury. Thus, damages are allowed for emotional distress only to the extent that the emotional distress is caused by a bodily injury.¹⁴⁶ An injured passenger may, therefore, recover for physical injuries, e.g., a twisted ankle, as well as for his emotional distress related to the twisted ankle, but not for emotional distress generally related to the accident.

1. Jack v. Trans World Airlines, Inc.

In *Jack*, a TWA flight departing JFK Airport for San Francisco experienced an aborted takeoff.¹⁴⁷ During the aborted takeoff and evacuation, some passengers suffered minor physical injuries, and many alleged emotional distress caused by the incident.¹⁴⁸ The passengers filed several lawsuits seeking damages for physical injury and emotional distress.¹⁴⁹ TWA moved for partial summary judgment under the Warsaw Convention.¹⁵⁰ TWA argued that the passengers suffering impact injuries were barred from any emotional distress recovery unless the emotional

145. *Id.* at 115 F.

146. *Alvarez v. Am. Airlines, Inc.*, No. 98-1027, 1999 WL 691922 (S.D.N.Y. Sept. 7, 1999); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D. Cal. 1994); *Longo v. Air France*, No. 95-0292, 1996 WL 866124 (S.D.N.Y. 1996) (no recovery for fear of death in runway overrun case even though passenger suffered minor injury in evacuating aircraft—stepped on a sea urchin).

147. *Jack*, 854 F. Supp. at 654.

148. *Id.* at 663.

149. *Id.* at 657.

150. *Id.*

distress itself had resulted in physical manifestations.¹⁵¹ The district court agreed with TWA's contention and held that a carrier is not liable under Article 17 for pure mental injuries.¹⁵² The district court examined, in considerable detail, the application of the *Floyd* case to the facts and analyzed four possible different approaches to determining the recoverability of emotional distress damages.¹⁵³ The court ultimately adopted the fourth approach, which: (1) limited recovery of emotional distress damages to distress flowing from the plaintiff's impact injuries; (2) denied emotional distress recoveries to plaintiffs who had neither suffered impact injuries nor physical manifestations of their emotional distress from the accident; and (3) limited plaintiffs who had suffered physical manifestations of their emotional distress to damages flowing from those physical manifestations, and not from the accident in general.¹⁵⁴ The court stated that

damages for emotional distress are allowed only for distress that flows from a bodily injury, reasoning that it would prevent inequities among the passengers, in that the happenstance of getting scratched on the way down the evacuation slide [did] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash Under this approach, a plaintiff can recover for emotional distress caused by and flowing from a physical injury, but not for the emotional distress caused by and flowing from the accident itself.¹⁵⁵

151. *Id.*

152. *Id.* at 668.

153. *Id.* at 665.

154. *Id.* at 668.

155. *Id.* In *Longo v. Air France*, No. 95-0292, 1996 WL 866124, at *1 (S.D.N.Y. July 25, 1996), a honeymooning couple sustained minor injuries while using emergency slides after their aircraft slid off the runway into the ocean. The wife bruised her thigh and stepped on a sea urchin; the husband bruised his knee. They claimed they could recover for all their mental distress as long as some physical injury had also occurred. Rejecting that claim, the district court reasoned that the only compensable mental injury was that springing from physical injury:

Although *Floyd* left open the question of whether emotional distress is compensable under Article 17 if accompanied by bodily injury, *Floyd* prescribes the decision here to the extent the Longos have alleged mental injury that although accompanied by physical injury is unrelated to that physical injury. Allegations of mental distress that is unrelated to physical injury—i.e., mental distress that does not flow from physical

2. Alvarez v. American Airlines, Inc.

In *Alvarez*, the plaintiff traveled from New York to Santo Domingo on American Airlines Flight 587.¹⁵⁶ Shortly after the plane left the gate, it stopped.¹⁵⁷ Approximately two minutes later, “a strong gas smell” suffused the passenger cabin, and the plane filled rapidly with smoke.¹⁵⁸ A member of the flight crew yelled “get out,” and the passengers, including Alvarez, scrambled for the exits.¹⁵⁹ When Alvarez reached the exit door, the plane’s emergency slide had already inflated.¹⁶⁰ Alvarez jumped onto the slide and descended in a sitting position.¹⁶¹ Before reaching the ground, a second evacuating passenger bumped Alvarez from behind.¹⁶² As a result of this collision, Alvarez picked up speed and, near the bottom of the slide, bumped into a third passenger.¹⁶³ Alvarez’s heels struck the ground, and he fell forward onto his knees, then backward onto his buttocks.¹⁶⁴ Alvarez came to rest on the runway, three feet from the end of the slide.¹⁶⁵ As a result of Alvarez’s impact with the runway, he felt a burning sensation on his knees and buttocks and was bruised in both places.¹⁶⁶ One month after the accident, Alvarez began to experience nightmares and anxiety attacks.¹⁶⁷ Alvarez sued American Airlines for injuries suffered, claiming both physical and psychic injuries.¹⁶⁸ The airline moved for summary judgment dismissing all psychologically based injuries.¹⁶⁹

The district court first addressed the issue of Alvarez’s physical injuries and concluded that they were recoverable under Article 17 because the requirement of proximate causation was satisfied:

injury or that does not flow from the physical manifestations of mental distress—are no different from the pure mental injury claims proscribed by Floyd, and therefore must be dismissed.

156. *Alvarez v. Am. Airlines, Inc.*, No. 98-1027, 1999 WL 691922, at *1 (S.D.N.Y. Sept. 7, 1999).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

With respect to plaintiff's claims of physical injury, all three conditions [of the air carrier's liability under Article 17] have been met. First, the parties have stipulated that there was an "accident." Second, the bruises, scrapes, and other physical injuries allegedly suffered by Alvarez during the evacuation constitute "bodily injury." Third, Alvarez was injured while evacuating—"in the course of . . . disembarking." Therefore, Alvarez may recover under Article 17 for physical injuries proximately caused by the evacuation of Flight 587.¹⁷⁰

The district court then turned to Alvarez's claim for psychological injuries. The court held that Alvarez could not recover damages for psychological injuries because his psychological injuries resulted from his reaction to the terror of the accident and not from his knee injury.¹⁷¹ The court rejected Alvarez's argument that Article 17 only requires a physical injury or death as a condition to liability and that once that condition is met, Article 17 allows recovery for all damage sustained in the accident, whether physical or psychological, for three reasons:¹⁷² (1) the preservation of the substantive decision in *Floyd*,¹⁷³ (2) consistency of the Second Circuit Article 17 jurisprudence,¹⁷⁴ and (3) protection against "illogical results."¹⁷⁵ Regarding the first reason, the court said:

[The majority rule adopted by] most courts . . . permitted plaintiffs to recover for psychological injuries only if there is a causal link between the alleged physical injury and the alleged psychological injury. I find the majority rule more compelling. First, adoption of the contrary, minority rule [which permits recovery for psychological injuries provided only that there are some, even unrelated, physical injuries as well] would tend to undermine the Supreme Court's recent decision in *Floyd* [T]he Supreme Court held in *Floyd* that Article 17 does not permit recovery for strictly psychological injuries. If the minority rule were adopted, plaintiffs would be able to skirt *Floyd*'s bar on recovery, for purely psychological injuries simply by alleging that they have suffered

170. *Id.* at *3.

171. *Id.* at *5.

172. *Id.* at *4.

173. *Id.*

174. *Id.*

175. *Id.* at *5. The court, quoting from the *Jack* opinion, expressed its fear that "passengers [may be] treated differently from one another on the basis of an arbitrary and insignificant difference in their [physical] experience." *Id.* (citing *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 664, 668 (N.D. Cal. 1994)).

some physical injury, no matter how slight or remote. As a practical matter, the substantive rule law announced in *Floyd* would thus be converted into an easily satisfied pleading formality, and a back door would be impermissibly opened to recovery for purely psychological injuries.¹⁷⁶

3. Ehrlich v. American Airlines, Inc.

In *Ehrlich*, the plaintiffs, Gary and Maryanne Ehrlich, boarded an American Eagle flight in Baltimore, Maryland.¹⁷⁷ They intended to travel to JFK, where they were scheduled to connect to an American Airlines flight to London.¹⁷⁸ When their flight reached JFK, the plane approached the airport at a high rate of speed, overshot its designated runway, and was abruptly stopped from potentially plunging into Thurston Bay by an arrestor bed.¹⁷⁹ The passengers subsequently evacuated that aircraft by jumping approximately six to eight feet to the ground.¹⁸⁰ As a result of the landing and evacuation, both plaintiffs claimed to have suffered physical injuries.¹⁸¹ Specifically, Gary Ehrlich claimed to have sustained soft tissue injuries to both of his knees and Maryanne Ehrlich claimed to have sustained soft tissue injuries to her upper extremities, right knee, back, shoulder, and hips, as well as hypertension and cardiac changes.¹⁸² In addition to their physical injuries, the plaintiffs claimed that they had suffered mental injuries consisting of nightmares and a fear of flying as a result of the accident.¹⁸³

The plaintiffs, however, admitted that the mental injuries they claimed were not related to or caused by the physical injuries they sustained in the accident.¹⁸⁴ The plaintiffs' mental injuries were a result of the fear that they experienced during the accident. American Airlines moved for partial summary judgment on the mental injury claims, arguing that they did not flow from bodily injuries and that carriers were liable under the Warsaw Convention only for psychological injuries that were caused by bodily injuries.¹⁸⁵ In other words, the back and knee injuries did not cause the

176. *Id.* at *3–4 (internal citations omitted).

177. *Erlich v. Am. Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004).

178. *Id.* at 367.

179. *Id.*

180. *Id.*

181. *Id.* at 368.

182. *Id.*

183. *Id.*

184. *Id.* at 369.

185. *Id.*

plaintiffs' nightmares, hypertension, and fear of flying. Instead, because these mental injuries resulted from the near-death crash, they were not cognizable. The Ehrlichs contended that carriers could be liable under Warsaw if a mental injury accompanied a physical injury, irrespective of whether it was the bruised back or the crash-landing that gave rise to the imminent fear of death.¹⁸⁶

On reviewing the applicable case law, the district court determined that "[u]nder the Warsaw Convention, a plaintiff may only recover for emotional damages caused by physical injuries."¹⁸⁷ Because the Ehrlichs had not raised a genuine issue regarding a causal connection between their alleged bodily injuries and their mental suffering, the court dismissed their claim for psychological injuries, holding that plaintiffs may "not recover for their emotional trauma resulting solely from the aberrant landing and evacuation."¹⁸⁸ The Ehrlichs appealed.

The Second Circuit Court of Appeals affirmed the judgment of the district court and held that the airline was not liable under Article 17 of the Warsaw Convention, for mental injuries not caused by bodily injury.¹⁸⁹ In reaching its decision, the court extensively reviewed the French text of the Warsaw Convention, the negotiations that led to the adoption of the Convention, the purpose of the Convention, French law, the opinions (judicial and otherwise) of the United States' sister convention signatories at the recent Montreal Convention, and the meaning attributed to Article 17 of the Warsaw Convention by the executive branch of the United States:

To address the issue presented by this appeal, we must reach the question left unresolved by the Supreme Court in *Floyd*. We need to construe the Warsaw Convention and determine whether carriers may be held liable under Article 17 for mental injuries that accompany, but are not caused by, bodily injuries. In the proceedings below . . . the district court [has not] addressed the meaning of the language of Article 17 with sufficient specificity. However, after reviewing that provision in accordance with the proper canons of treaty interpretation, we conclude . . . that Article 17 allows passengers to bring a Warsaw Convention action against air carriers to recover for their mental injuries but only to the

186. *Id.* at 374.

187. *Id.* at 369.

188. *Id.*

189. *Id.*

extent that they flow from bodily injuries.¹⁹⁰

The court specifically rejected the notion that emotional distress injuries that flow from an accident or that manifest in physical injuries constitute a bodily injury under Article 17 of the Warsaw Convention:

The happenstance of getting scratched on the way down the evacuation slide [should] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash. . . . If we determined that a “physical injury, no matter how minor or unrelated,” could “trigger recovery of any and all post-crash mental injuries,” that conclusion would violate the “spirit of *Floyd*.”¹⁹¹

It is worth pointing out that although the accident in *Ehrlich* occurred before the United States ratified the Montreal Convention, leaving the Warsaw Convention as the governing authority, the court took great pains to address whether and how the Montreal Convention might apply.¹⁹² The court, having discussed at length the Montreal Conference Minutes and the statements expressed by the Conference delegates, concluded that the Montreal Convention did not change the existing jurisprudence on what was or was not included in the term “bodily injury”:

In essence, despite the Ehrlichs' suggestions to the contrary, the history of the negotiations that produced the Montreal Convention demonstrate that the Montreal Conference delegates did not share a common understanding when it came to the subject of liability for mental injuries.

[T]hese delegates appear to suggest that their nations might construe Article 17 as if it allowed a passenger to hold a carrier liable for a mental injury, irrespective of whether it accompanied a physical injury, because they interpret the words “*lésion corporelle*” . . . to refer both to physical and mental injuries. However, whatever deference we may sometimes owe to the opinions of sister signatories, we may not defer to such an understanding of Article 17. The Supreme Court of the United States has held that “*lésion corporelle*” refers to bodily injuries

190. *Id.* at 375–76.

191. *Id.* at 386 (quoting *Erlich v. Am. Airlines*, No. 99-6013, 2002 U.S. Dist. LEXIS 21419 (E.D.N.Y. June 19, 2002)).

192. *Id.* at 372–73.

alone and that an air carrier cannot be held liable under Article 17 for purely mental injuries. We are bound to follow such precedent unless and until the Supreme Court itself overrules *Floyd*. In the absence of a statement from these delegates that could be construed to define the scope of the Warsaw Convention through something more than a contradictory interpretation of the words “*lésion corporelle*,” the opinions of such delegates at the Montreal Conference are of little relevance to the issue before us.¹⁹³

The court described the U.S. delegate’s statement of the law under the jurisprudence of the United States—that the term “bodily injury” had been interpreted as including “mental injury that accompanied or was associated with bodily injury”—as incorrect and rejected it as an unreasonable view:

The Ehrlichs contend that the American delegate’s statements support their construction of Article 17 and argue that we must defer to the delegate’s so-called “interpretation” of that provision.

At the Conference, the American delegate opined that references to mental injuries “resulting from” bodily injuries “might” represent a “step backwards” because “[t]he general prevailing attitude in [c]ourts interpreting the Warsaw Convention in the United States was that mental injury associated with bodily injury had generally been recoverable.” . . . By making these statements, the American delegate appeared to suggest that, as of May 1999, the majority of courts in the United States construed Article 17 in a fashion that allowed passengers to recover for a mental injury whenever they sustained a physical injury, regardless of whether the mental injury resulted from a bodily injury. That understanding of applicable case law is incorrect.¹⁹⁴

193. *Id.* at 395 (emphasis added) (internal citations omitted).

194. *Id.* at 398–99 (internal citations omitted). The few courts that have addressed bodily injury under the Montreal Convention have forgone an independent study of the delegates’ negotiations, instead relying on *Ehrlich* as well as other Warsaw precedent as authority for the old rule—a claimant can recover for mental injury only if it results from bodily injury. *See, e.g., Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1008, 1009 (N.D. Cal. 2007) (citing *Ehrlich* as authority for the history and enactment of the Montreal Convention; in the case, claimant was struck in head by backpack swung by another passenger, and the court held that “plaintiffs may not recover for any emotional distress experienced during the flight, except as [claimant’s] distress arose out of her

C. Allow Recovery for All Emotional Distress, so Long as Bodily Injury Occurs

Under the third approach, recovery is allowed for all emotional distress as long as a bodily injury occurs, even if there is no connection between the distress and the bodily injury.¹⁹⁵ Thus, a passenger with a scratched arm could recover for the trauma and fear due to the plane crash; the bodily injury opens the door to liability for emotional distress.¹⁹⁶

I. Chendrimada v. Air-India

In *Chendrimada*, the plaintiffs brought an action for injuries that occurred on a trip to Bombay, India.¹⁹⁷ The plaintiffs' first flight from New York was canceled due to a bomb scare, and the plaintiffs were rescheduled on a flight the following day.¹⁹⁸ The flight made a scheduled stop in Delhi, but due to weather conditions, the flight remained in Delhi for eleven and a half hours, during which the plaintiffs were not allowed to deplane, nor were they provided with any food.¹⁹⁹ The plaintiffs claimed that as a result they suffered from weakness, nausea, cramps, pain, anguish, malnutrition, and mental injury.²⁰⁰ Air-India moved for summary judgment, arguing that the plaintiffs' claim amounted to nothing more than emotional distress injuries that were not compensable under Article 17 of the Warsaw Convention.²⁰¹

In denying the summary judgment motion, the district court found that the plaintiffs' allegations of bodily injury satisfied the requirements of *Floyd* to survive summary judgment—namely that they alleged a

injuries"); *Booker v. BWIA W. Indies Airways Ltd.*, No. 06-2146, 2007 WL 1351927, at *4 (E.D.N.Y. May 8, 2007) (citing *Ehrlich* for its conclusion that claimant's emotional injuries stemming from delayed baggage "are not recoverable under the Montreal Convention unless they were caused by physical injuries"); *Sobol v. Cont'l Airlines*, No. 05-8992, 2006 WL 2742051, at *1, *4 (S.D.N.Y. Sept. 26, 2006) (citing *Ehrlich* for its conclusion that in order to recover, a claimant's mental injuries arising from enforced separation from his children in the first-class cabin "must be caused by bodily injury, which is not the case here").

195. *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 665 (N.D. Cal. 1994).

196. *Id.*

197. *Chendrimada v. Air-India*, 802 F. Supp. 1089, 1090 (S.D.N.Y. 1992).

198. *Id.* at 1090.

199. *Id.*

200. *Id.*

201. *Id.*

“physical injury or manifestation of physical injury.”²⁰² The court concluded that, if believed, these injuries were sufficient to constitute an injury and that the delay and alleged refusal to allow the plaintiffs to leave the aircraft could constitute an accident, as it was unexpected and external to the passengers.²⁰³ 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:

As discussed above, the Supreme Court held in the *Floyd* case that a passenger cannot recover for purely emotional or mental injuries absent physical injury or manifestation of physical injury. Therefore, to survive *Floyd*, plaintiffs must allege a physical injury or a manifestation of physical injury. The Court finds that plaintiffs’ allegations satisfy this requirement. It should be understood that the Court is not ruling that as a matter of law being held on an airplane for over eleven hours without food is a physical injury in and of itself. If a passenger in the same position as plaintiffs had not exhibited any physical manifestation of injury as a result of being held without food, but only alleged emotional injury, no action would lie. Of course, plaintiffs must still prove their alleged physical injuries at trial to recover, but plaintiffs have demonstrated that there is a genuine issue of material fact in dispute which cannot be resolved on a motion for summary judgment. In reaching this conclusion we of course have determined that the “manifestation of physical injury” which is a prerequisite to an action under *Floyd* need not result from a suddenly inflicted trauma, but may, as is alleged here, result from other causes for which the carrier is responsible.²⁰⁴

2. In re Air Crash Disaster Near Roselawn, Indiana

In *In re Air Crash Disaster Near Roselawn, Indiana*, the District Court for the Northern District of Illinois allowed recovery for mental injuries that arose prior to or simultaneously with bodily injury.²⁰⁵ In that case, 68

202. *Id.* at 1092.

203. *Id.*

204. *Id.*; see *Ratnaswamy v. Air Afrique*, No. 95C7670, 1998 WL 111652, at *6 (N.D. Ill. Mar. 3, 1998) (compensable bodily injury need not be based on physical impact but may arise after a delay that leads to such physical manifestations of injury as nausea and diarrhea).

205. *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 954 F. Supp. 175, 176 (N.D. Ill. 1997).

persons on board died when an American Eagle flight crashed.²⁰⁶ The dispute focused on whether pre-impact fear and terror were properly characterized as purely mental injuries, thereby barring recovery under *Floyd*.²⁰⁷ The airline argued that the Warsaw Convention prohibits recovery for pre-impact fear, contending that pre-impact fear is a purely psychic injury and that the recovery of damages for such injuries is foreclosed by *Floyd*.²⁰⁸ The plaintiffs responded that the psychic injuries were accompanied by physical injuries, including the deaths of all passengers, and noted that the Court in *Floyd* specifically declined to consider the situation in which both types of injury were present.²⁰⁹ The plaintiffs contended that “neither *Floyd* nor any other binding authority requires the dismissal of their claims alleging preimpact fear.”²¹⁰ The district court agreed with the plaintiffs, stating that *Floyd*’s holding merely made physical injury a precondition to liability and that once that precondition was met, there was nothing in *Floyd* stating that damages were unavailable for mental injuries.²¹¹ The *Roselawn* court determined that a causal connection is only required between the damage sustained and the accident, thus dispensing with the necessity for a causal connection between the physical injury and the emotional injury:

Second, the Court in *Floyd* did not hold that there could never be any recovery for purely psychic injuries under Article 17.

Article 17 itself expressly requires a causal link only between “damage sustained” and the accident Article 17 does not say that a carrier will only be liable for damage caused by a bodily injury, or that passengers can only recover for mental injuries if they are caused by bodily injuries. No less an authority than our Supreme Court has indicated that the key causal link is between the accident and the damage sustained.²¹²

As a result, the court permitted recovery for pre-impact terror.²¹³

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 178.

212. *Id.* at 178–79.

213. *Id.* In *Korean Air Lines Disaster of Sept. 1, 1983*, the court awarded damages for emotional injury that was accompanied by, but not caused by, simultaneous physical injury. 814 F. Supp. 592 (E.D. Mich. 1993). When a Soviet missile shot down an international flight, claimants sought damages for pre-death

3. Doe v. Etihad Airways

In *Doe v. Etihad Airways*, the plaintiff, Doe, was returning from Abu Dhabi to Chicago aboard a flight operated by Etihad Airways.²¹⁴ After reaching inside the seatback pocket in front of her, she pricked her finger on a hypodermic needle that was hidden in the pocket, causing it to bleed.²¹⁵ Doe was given a Band-Aid for her finger and was tested multiple times for possible exposure to disease, each time testing negative.²¹⁶ Doe sued Etihad, claiming damages both for the physical injury—the needle prick—and for mental injury—the distress associated with the possible exposure to various diseases.²¹⁷ Her husband, John Doe, claimed loss of consortium.²¹⁸ The district court granted partial summary judgment in Etihad’s favor, holding that Doe’s emotional distress was not caused by the bodily injury sustained by the needle, and therefore, the injury was not compensable under Article 17 of the Montreal Convention.²¹⁹

On appeal, Etihad argued that the plaintiff could only recover for mental anguish under the Montreal Convention if the mental anguish was caused by the bodily injury, i.e., being stuck by the needle.²²⁰ The Sixth Circuit Court of Appeals reversed the district court’s order, holding that under Article 17 of the Montreal Convention, emotional or mental damages are recoverable “so long as they are traceable to the *accident*, regardless of whether they are caused directly by the bodily *injury*.”²²¹ The court held that because Doe’s alleged mental distress arose from the accident itself, i.e., pricking her finger on the needle, she could recover for emotional distress damages, even if the mental distress was unrelated to the nominal physical injury she received:

pain and suffering. The court found that passengers were alive and conscious for about 11 minutes after the initial missile strike. Acknowledging that under *Floyd*, damages for mental anguish were not recoverable “absent physical injury,” the court awarded damages for the decedents’ mental anguish because the evidence showed that they sustained physical injury due to rapid air decompression. According to the court, the fact that the emotional injury was accompanied by physical injury and that the decedents’ suffering was likely considerable made the case “vastly different” from *Floyd*.

214. *Doe v. Etihad Airways*, P.J.S.C., 870 F.3d 406, 409 (6th Cir. 2017).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Doe v. Etihad Airways*, P.J.S.C., No. 13-14358, 2015 WL 5936326, at *2 (E.D. Mich. Oct. 13, 2015).

220. *Doe*, 870 F.3d at 433

221. *Id.*

[B]ecause an accident onboard Etihad’s aircraft caused Doe to suffer a bodily injury . . . Doe may therefore recover damages for her mental anguish, regardless of whether that anguish was caused directly by her bodily injury or more generally by the accident that caused the bodily injury . . . [T]he plain text of Article 17(1) allows our conclusion that when a single “accident” causes both bodily injury and mental anguish, that mental anguish is sustained “in case of” the bodily injury. But the plain text on its own does not *necessarily* require that a single accident cause both the required bodily injury and the claimed mental anguish in order for that mental anguish to be “sustained in case of” the bodily injury, as our conclusion suggests.²²²

The Sixth Circuit’s decision in *Etihad* represents a radical expansion for an air carrier’s potential liability under the Montreal Convention.²²³ Under the Warsaw Convention, as indicated above, an air carrier’s liability for emotional damages was limited to damages resulting from a bodily injury, and a passenger could not recover for emotional damages unconnected with the actual injury. Under the Montreal Convention and according to the Sixth Circuit’s holding, the air carrier would be liable for emotional damages unconnected with the bodily injury. The Sixth Circuit declined to adopt the *Ehrlich* holding (i.e., a plaintiff can only recover for emotional damages if they were caused by a bodily injury)²²⁴ as a means to interpret the Montreal Convention. The court noted the differing purposes of the Warsaw and Montreal conventions.²²⁵ For instance, the Warsaw Convention was adopted in 1929 to limit the liability of airlines “in order to foster the growth of the fledgling commercial aviation industry,”²²⁶ while the Montreal Convention was adopted in 1999 to offer a “modernized uniform liability regime for international air transportation.”²²⁷ Given the dramatically different rationales for each

222. *Id.* at 417–18

223. David Krueger, *How Should Air Carriers Respond to Etihad?*, LAW360 (Oct. 9, 2017), http://www.beneschlaw.com/Files/Publication/2fc34939-80e9-49bd-a22c-bd0a4529bff2/Presentation/PublicationAttachment/c356a5d9-c6a7-4112-b225-c117cd858e83/Krueger_Law360.pdf [<https://perma.cc/R5P5-3DS8>].

224. *Doe*, 870 F.3d at 415 (citing *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 369 (2d Cir. 2004)).

225. *Id.* at 426.

226. *Id.* at 416, 420.

227. *Id.* at 423.

treaty, the court found *Ehrlich* of limited use in interpreting the actual text of the Montreal Convention.²²⁸

The court instead relied on its own textual interpretation of Article 17 to find that although a passenger may not recover mental anguish damages absent an accident that causes bodily injury, there is no requirement that the mental anguish be caused by the bodily injury itself.²²⁹ The court's interpretation hinged upon its understanding of the phrase "in case of" in Article 17 of the Montreal Convention. While Etihad likened the phrase to "caused by," the court determined that its meaning was conditional rather than causal.²³⁰ In other words, a passenger need not establish that her emotional damages were caused by "death or bodily injury." The passenger need only show that she suffered emotional damages as a result of an accident that also happened to cause a bodily injury.²³¹ Accordingly, the court held that as long as there is an accident that causes a bodily injury, mental anguish damages are recoverable even if the mental anguish does not flow from the bodily injury itself.²³²

CONCLUSION

Article 17 of the Warsaw Convention and Montreal Convention states that the carrier is liable for the passenger's damages sustained in a case of death or bodily injury. There is nothing given in the conventions to clarify whether the term "bodily injury" includes both physical and emotional injuries. Therefore, common law courts have attempted to find an answer to the question and adopted the following three approaches:

- (1) disallow recovery for pure emotional distress;
- (2) allow recovery only for emotional distress flowing from a bodily injury; and
- (3) allow recovery for all emotional distress, so long as bodily injury occurs.

Under the first approach, the common law courts agreed that a purely mental injury suffered in an accident where there is no physical injury is not a compensable injury. This was first concluded by the U.S. Supreme Court in the seminal case *Floyd*, which has been followed in the United Kingdom and Australia. The first approach is in accordance with the

228. *Id.*

229. *Id.* at 417–18.

230. *Id.* at 413–14.

231. *Id.* at 417–18.

232. *Id.*

primary purpose of the Warsaw Convention, which is the limitation of air carriers' liability in order to foster the growth of the infant aviation industry; allowing recovery for psychic injuries would upset this purpose.

This first approach is undesirable because it gives so little to the passengers. By disallowing compensation for emotional distress, passengers will only recover pecuniary losses, providing minimal compensation for passengers who have suffered mental injury.²³³ In a footnote, the Ninth Circuit proposed a troubling hypothetical: suppose "a flight attendant . . . puts an unloaded gun to a passenger's head and pulls the trigger."²³⁴ Or what if a flight attendant molests an unaccompanied minor without leaving any bruises or scrapes? Can the crew defame or slander a plaintiff without fear of liability? The Ninth Circuit conceded that "[t]o the extent such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention."²³⁵

Another argument against this position is that Article 17 only establishes the conditions for air carrier liability and does not impose any further restrictions on the types of damages that may be recovered.²³⁶ A close study of the 1999 Montreal Convention's history and more importantly, the negotiations among the signatories' delegates suggests that the great majority of signatories intended to broaden the allowable recovery beyond strictly bodily injury and that many signatories had already interpreted the phrase to include mental injury. As a result, courts interpreting "bodily injury" under the Montreal Convention should closely review the intent of the signatories before adopting the Warsaw Convention's precedent.

The second approach allows damages for emotional distress only to the extent the emotional distress is caused by bodily injury. An injured passenger may therefore recover for physical injuries, i.e., a twisted ankle, as well as for his emotional distress related to the twisted ankle, but not for emotional distress related to the accident as such. The second approach allows for greater recovery with more severe injuries, presuming that more distress flows from more serious injuries.

There seems to be some uniformity between common law courts in that they have unanimously approved recovery for the mental injury flowing from physical injury. If the mental injury is caused by a physical

233. Boulee, *supra* note 88, at 514.

234. Carey v. United Airlines, 255 F.3d 1044, 1053 n.47 (9th Cir. 2001).

235. *Id.*

236. Sisk, *supra* note 14, at 134.

injury, which in turn was caused by the accident, the damages stemming from the mental injury are recoverable.

The second approach, however, spawned aberrant results. For example, a passenger assaulted by an airline employee could recover for a scratch on the arm but not for psychological damages stemming from molestation, unless the passenger could prove that his mental injuries derived from the scratch rather than the assault. As the Ninth Circuit Court of Appeals stated, passengers who suffered psychological injuries that did not flow from physical injuries had no recourse: “To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline’s conduct.”²³⁷

The third approach allows recovery for all emotional distress, as long as bodily injury occurs, regardless of the connection between the distress and the bodily injury. Assume, for example, that a crash landing occurs. In the process, a passenger pinches his finger in the tray table of his seat but is otherwise unharmed. The passenger then sues the carrier both for his physical injury (the pinched finger) and emotional distress—claiming the crash landing has led to a fear of flying. Under the first and second approaches, the passenger could only recover damages, if any, for his pinched finger and any emotional damages resulting from his pinched finger. But the passenger could not recover emotional damages for the new supposed fear of flight, which was the result of the crash landing and unconnected to the bodily injury. However, under the third approach the passenger could recover damages even though the emotional damages were unconnected to the bodily injury.

The third approach is consistent with a broad reading of Article 17’s imposition of liability for “damage sustained in the event of . . . bodily injury.”²³⁸ Significantly, the drafters did not use the phrase “damage caused by . . . bodily injury,” which would have served as a signal that any mental distress must be connected to the bodily injury.²³⁹ The third approach also is supported by the *Floyd* Court’s careful avoidance of any mention of a need for a causal connection between the bodily injury and the damages recoverable under the Warsaw Convention. This approach is in line with the approach to mental distress taken in several cases where a physical impact or manifestation was a prerequisite to recovery.²⁴⁰

An analysis of the three approaches reveals that the third one—to allow recovery for emotional distress as long as bodily injury occurs—is

237. *Carey*, 255 F.3d at 1053.

238. *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 666 (N.D. Cal. 1994).

239. *Id.*

240. *Id.* at 665.

the most appropriate. Although the 1999 Montreal Convention retained the “bodily injury” language, a close study of the treaty’s history and more importantly, the negotiations among the signatories’ delegates suggests that the great majority of signatories intended to broaden the allowable recovery beyond strictly bodily injury and that many signatories had already interpreted the phrase to include mental injury. Furthermore, the policy informing the new treaty substantively changed from protecting the airline industry to protecting the passenger. The Preamble to the 1999 Montreal Convention clearly emphasizes the changed outlook from the 1929 Warsaw Convention where the purpose was the protection of infant air carriers in an experimental industry. Seventy years later the purpose has become the protection of the consuming public in a worldwide industry that has become essential to the welfare of the global community.²⁴¹

The preamble is a strong suggestion of the spirit in which national courts are to interpret the provisions of the carrier’s liability under the Montreal Convention. This should produce a more uniform interpretation of the treaty language than that which occurred in the last years of the Warsaw Convention.

241. The preamble notes, in part: “RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution,” see Montreal Convention, *supra* note 2.