

# The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?

McKay Cunningham\*

## ABSTRACT

*Since the 1920s, recovery for accidents suffered on international flights has been subject to the Warsaw Convention's limitation of "bodily injury." To address perceived inequities stemming from this limitation, some courts invoked a liberal interpretation of the phrase "bodily injury," and the resulting and fragmented judicial precedent threatened the treaty's goal of international uniformity. Although Warsaw's long-awaited replacement, the Montreal Convention, retains 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 nations intended to broaden the allowable recovery beyond strict bodily injury and that many had in fact 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.*

*As a result, courts faced with claims under the Montreal Convention must undertake a materially different analysis from those courts that addressed similar claims under the Warsaw Convention.*

---

\* Staff Attorney, Supreme Court of Texas; Former briefing attorney, U.S. Court of Appeals for the Eleventh Circuit; J.D. 2000, Baylor Law School. Contact the Author at [McKay.Cunningham@courts.state.tx.us](mailto:McKay.Cunningham@courts.state.tx.us).

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1044
II.	WARSAW'S HISTORY .....	1046
III.	FRAGMENTED CASE LAW .....	1053
	A. <i>Before Floyd</i> .....	1053
	B. <i>Floyd</i> .....	1055
	C. <i>After Floyd</i> .....	1057
	1. <i>Bending Over Backwards</i> .....	1058
	2. <i>Refusing to Bend at All</i> .....	1063
	3. <i>Bent out of Shape</i> .....	1066
IV.	THE MONTREAL CONVENTION .....	1069
	A. <i>Broader Recovery: The First Pass</i> .....	1070
	B. <i>Broader Recovery: The Second Pass</i> .....	1072
	C. <i>Broadsided and Passed Over</i> .....	1075
	D. <i>Broader Recovery: A Passing Hope</i> .....	1076
	E. <i>Broader Recovery Passed By</i> .....	1078
V.	CONCLUSION .....	1080

## I. INTRODUCTION

Since 1929, recovery for accidents suffered on international flights has been limited to bodily injury. 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. As a result, courts interpreting “bodily injury” under the new treaty should closely review the intent of the signatories before adopting the previous treaty’s precedent.

Eighty years ago, when dignitaries prescribed a uniform law to govern international commercial flights, prophylactic measures were necessary to encourage growth in a nascent and dangerous field. As a result, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the Warsaw Convention, adopted a protectionist policy designed to limit air carriers’ potential liability in the event of accidents.<sup>1</sup> Of course, this

---

1. Andreas F. Lowenfield & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498–99 (1967).

policy did not inure to the benefit of the passenger. Even when Warsaw allowed recovery, the damages were conservatively capped.<sup>2</sup> Several international conventions in the past half-century strove to dilute the seemingly draconian measures that truncated recovery when a passenger suffered grievous injury on an international flight.

One such limitation on passenger recovery stemmed from Article 17, which allowed recovery for death or bodily injury.<sup>3</sup> In light of Warsaw's pronounced protectionist policy,<sup>4</sup> courts have interpreted "bodily injury" to exclude mental, emotional, and psychological injury.<sup>5</sup> Under this framework, an airline employee could molest a minor, hold a gun to a passenger's head, racially discriminate, defame, or slander without fear of liability.<sup>6</sup> If a pilot deliberately flew through a hurricane resulting in an extended near-death experience, a passenger could recover for a bruised arm, but not for Post-Traumatic Stress Disorder.

Perhaps cognizant of this apparent inequity or uncomfortable with the task of categorizing a personal injury as either bodily or mental, U.S. courts began allowing recovery for mental injury in some circumstances. Outside the plain meaning of Warsaw's text, and thus, without guidance from the treaty itself, the decisions varied widely. Some courts only allowed mental injury recovery when it flowed from, or was caused by, bodily injury.<sup>7</sup> Others awarded mental injury recovery when it was associated with, or occurred in close proximity to, bodily injury.<sup>8</sup> Still others allowed it without *any* concomitant bodily injury.<sup>9</sup>

After the Supreme Court addressed the meaning of bodily injury in *Eastern Airlines, Inc. v. Floyd*,<sup>10</sup> a majority trend emerged: recovery was permitted only for mental injury that resulted from bodily injury. However, this trend also 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 her mental injuries derived from the scratch rather than the assault.

2. Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 22, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter Warsaw Convention].

3. *Id.*

4. Lowenfield & Mendelsohn, *supra* note 1, at 498–99.

5. *See infra* Part III.C.3.

6. *See infra* Part III.C.3.

7. *See infra* Part III.C.2.

8. *See infra* Part III.C.1.

9. *See, e.g.,* *Husserl v. Swiss Air Trans. Co.*, 388 F. Supp. 1238, 1252–53 (S.D.N.Y. 1975) (allowing recovery for mental injury when there was no physical injury). *But see* *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 854–57 (N.Y. 1974) (refusing recovery for mental injury when there was no manifest bodily injury).

10. 499 U.S. 530 (1991).

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, that is a result of the deal struck among the signatories to the Warsaw Convention.”<sup>11</sup>

In 1999, representatives from 121 states convened in Montreal, Canada, not to amend Warsaw, but to replace it with a new international treaty.<sup>12</sup> Recovery for “mental injury in the absence of accompanying physical injury” was a primary objective and was listed as a condition to the United States’ participation.<sup>13</sup> Although a clear majority of states voiced approval for mental injury recovery, the new treaty somehow retained the 1929 Warsaw limitation of “bodily injury.”<sup>14</sup>

Part II of this Article presents a history of the Warsaw Convention, including the international community’s repeated but largely ineffective efforts to modernize the treaty. Part III examines the divergent analysis and results reached by several courts interpreting the bodily injury requirement. Part IV studies the negotiations among the delegates at Montreal and suggests that the new treaty broadened the scope of passenger recovery even though the old text remained unchanged.

## II. WARSAW’S HISTORY

In 1925, two years before Charles Lindbergh’s transatlantic flight, a global system of liability governing international flights was conceived in Paris.<sup>15</sup> Non-military, commercial air travel was relatively rare, and the forethought implicit in aspiring to global uniformity distinguishes this early effort. In Warsaw, four years later, thirty-two nations agreed to the Warsaw Convention.<sup>16</sup> The United States was not a member of the League of Nations, which

---

11. *Carey v. United Airlines*, 255 F.3d 1044, 1053 (9th Cir. 2001).

12. See 1 CHARLES F. KRAUSE & KENT C. KRAUSE, *AVIATION TORT AND REGULATORY LAW* § 11:13 (2d ed. 2002).

13. 1 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air)*, Montreal (May 10–28, 1999), Minutes, Doc. 9775-DC/2, at 44 (2001) [hereinafter *Montreal Minutes*].

14. See Letter of Submittal of Strobe Talbott (June 23, 2000), *reprinted in* Unification of Certain Rules for International Carriage by Air, S. TREATY DOC. NO. 106-45, 1999 WL 33292734, at \*16–17 [hereinafter *Talbott Letter*].

15. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 246–47 (1984).

16. See Warsaw Convention, *supra* note 2.

produced the treaty, and had neither voice nor vote, but agreed to its terms in 1934.<sup>17</sup>

The Warsaw Convention sought to unify the rules governing international air transportation and provide standard documentation for international transportation of freight.<sup>18</sup> Notably, a primary goal was to limit air carrier liability:<sup>19</sup> “[I]n 1929, the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers . . . .”<sup>20</sup> In the first half of the twentieth century, air travel was viewed as dangerous, and the developing commercial industry required legal protection to ensure growth.<sup>21</sup> Absent willful misconduct, if an international flight crashed, killing all on board, claims were limited under the Warsaw Convention to a maximum of \$8,300 per passenger.<sup>22</sup> Moreover, Warsaw prohibited punitive damages.<sup>23</sup>

The treaty cast a broad net. In general terms, it applied when (1) an accident (2) resulted in death or bodily injury (3) while en route, embarking, or disembarking on an international flight.<sup>24</sup>

17. See Talbott Letter, *supra* note 14, at \*3.

18. See Lowenfeld & Mendelsohn, *supra* note 1, at 498–99.

19. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991) (“[T]he primary purpose of the contracting parties to the Convention [is] limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry.” (citing *Trans World Airlines*, 466 U.S. at 256)); Minutes, Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw 34 (Robert C. Horner & Didier Legrez trans. 1975) [hereinafter Warsaw Minutes].

20. *Floyd*, 499 U.S. at 546; see also Lowenfeld & Mendelsohn, *supra* note 1, at 499–500 (“[S]uch limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expense for the carrier . . . .” (quoting Senate Committee on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, SEN. EXEC. DOC. NO. 73-G, 3–4 (1934))).

21. See *Trans World Airlines*, 466 U.S. at 264–65 (“The liability limitation was deemed necessary in order to enable air carriers ‘to attract capital that might otherwise be scared away by the fear of a single catastrophic accident.’” (quoting Lowenfeld & Mendelsohn, *supra* note 1, at 499)).

22. Warsaw Convention, *supra* note 2, art. 22; see also Lowenfeld & Mendelsohn, *supra* note 1, at 498–99; Talbott Letter, *supra* note 14, at \*3.

23. See, e.g., *In re Air Disaster at Lockerbie, Scot.* on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991), *cert. denied sub nom. Rein v. Pan Am. World Airways, Inc.*, 502 U.S. 920 (1991); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991); *Floyd v. E. Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), *rev’d* 499 U.S. 530 (1991); *In re Air Crash Disaster at Gander, Newfoundland*, on Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987); *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797 (N.D. Ill. 1986). *But see In re Hijacking of Pan Am. World Airways, Inc. Aircraft at Karachi Int’l Airport, Pak.* on Sept. 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990) (holding that a finding of willful misconduct permits recovery for punitive damages), *rev’d*, *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991); *Hill v. United Airlines*, 550 F. Supp. 1048 (D. Kan. 1982).

24. *Floyd*, 499 U.S. at 535–36; see also Shannon Clark Kief, Annotation, *Recovery for Emotional and Mental Injury under Warsaw Convention*, 196 A.L.R. FED. 221, 235 (2008).

While judicial interpretation has vacillated somewhat,<sup>25</sup> Warsaw's broad reach has traditionally been coupled with exclusivity; thus, the terms of the treaty prevented passengers from bringing claims under any other law.<sup>26</sup> For example, if a passenger's death on an international flight fell within Warsaw's ambit, recovery was limited to \$8,300 regardless of whether local law would allow further recovery or related claims.

Spurred by World War II developments of larger, more capable aircraft, global air transportation had grown considerably by 1950.<sup>27</sup> Several Warsaw signatories, including the United States, moved to increase the damages cap to approximately \$16,600 and to modernize the air freight documentation system.<sup>28</sup> But the United States never signed what became known as the 1955 Hague Protocol,<sup>29</sup> and it took eight years for the necessary thirty countries to sign—thereby ratifying—the Protocol.

Additional amendments to the Warsaw Convention—seven in total—reflected the international community's repeated attempts to modernize the original agreement. In 1965, dissatisfied with the liability limits, the United States threatened to denounce Warsaw but withdrew notice of denunciation when all major foreign and U.S. carriers privately agreed that accident victims on flights to or from the United States could receive compensation of up to \$75,000 per passenger.<sup>30</sup> Such inter-carrier agreements were facilitated through

25. Cf. *Brown v. Eurocopter S.A.*, 111 F. Supp. 2d 859 (S.D. Tex. 2000) (holding that applicability of federal Death on the High Seas Act to litigation arising from helicopter crash in the Gulf of Mexico precluded plaintiff's claim under state law). Compare *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) (holding that Warsaw Convention precluded passenger from maintaining an action for damages under local law when claim arose out of an international flight), with *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996) (holding that Warsaw Convention provides a pass-through, authorizing courts to apply the law that would govern in the absence of the Warsaw Convention).

26. See, e.g., *El Al Isr. Airlines*, 525 U.S. 155; *Croucher v. Worldwide Flight Services, Inc.*, 111 F. Supp. 2d 501, 504 (D.N.J. 2000); *Trans World Airlines, Inc. v. Christophel*, 500 S.W.2d 409, 411 (Ky. 1973).

27. The Second World War was a powerful catalyst for the technical development of the aeroplane. At that time, a vast network of passenger and freight carriage was set up, but in order for air transport to support and benefit a world at peace, there were many obstacles, both political and technical, to overcome.

Memorandum from the International Civil Aviation Organization on its Objective and Organization 2 (2008), available at <http://www.icao.int/icao/en/pub/memo.pdf>.

28. Lowenfield & Mendelsohn, *supra* note 1, at 506–07, 513–14.

29. The United States purportedly failed to ratify the Hague Protocol “due largely to the inadequacy of the proposed liability limits.” See Talbott Letter, *supra* note 14, at \*3.

30. See Lowenfield & Mendelsohn, *supra* note 1, at 546–52; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, Agreement CAB 18900 (May 13, 1966), reprinted following 49

the International Air Transport Association (IATA)<sup>31</sup> and proved to be a useful, although piecemeal and temporary, tool in updating Warsaw.

Another attempt to amend Warsaw, the 1971 Guatemala City Protocol, featured an amendment that would impose liability on the carrier for “an event which caused the death or injury” of a passenger. Importantly, “injury” was no longer modified by “bodily.”<sup>32</sup> But the amendment was not ratified by the United States, as another effort to amend Warsaw—the 1975 Montreal Protocols—absorbed the Guatemala City effort.<sup>33</sup> The 1975 Montreal Protocols incorporated an increased liability cap that was part of the Guatemala City Protocol, replaced the gold standard with an artificial currency conversion, and updated Warsaw’s cargo documentation provisions to facilitate electronic commerce.<sup>34</sup> Again, the United States did not ratify any of the Protocols,<sup>35</sup> even though its delegates signed two of the four measures.<sup>36</sup>

Such repeated attempts and failures to modernize the 1929 Warsaw Convention spurred the IATA and the Air Transport Association of America (ATA)<sup>37</sup> to cobble together private voluntary agreements among air carriers. In 1997, the Department of Transportation approved certain IATA and ATA inter-carrier agreements, effectively superseding the previous liability cap of \$75,000 per passenger set by the 1966 inter-carrier agreements.<sup>38</sup> In addition to eliminating the damages cap altogether, the new inter-carrier agreements held carriers strictly liable for up to approximately \$135,000 in proven damages.<sup>39</sup> As a result, any passenger who suffered an accident while en route, embarking, or disembarking from an international flight could recover up to

U.S.C. § 40105 (2000), available at [http://www4.law.cornell.edu/uscode/html/uscode49/usc\\_sec\\_49\\_00040105----000-notes.html](http://www4.law.cornell.edu/uscode/html/uscode49/usc_sec_49_00040105----000-notes.html).

31. Talbott Letter, *supra* note 14, at \*3.

32. See *Air France v. Saks*, 470 U.S. 392, 403 (1985).

33. Several key provisions of the Guatemala City Protocol were incorporated into Montreal Protocol No. 3. See Talbott Letter, *supra* note 14, at \*4.

34. See *id.*

35. The United States eventually ratified Montreal Protocol No. 4, relating to the air cargo industry, in 1998. Provisions governing that industry had not been updated in almost 70 years. See *id.* at \*4–6.

36. See *id.* at \*4.

37. The International Air Transport Association is an international trade body created in the 1940s by a group of airlines. Today, the IATA represents approximately 230 airlines responsible for ninety-three percent of scheduled international air traffic. See IATA Fact Sheet, [http://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/iata.htm](http://www.iata.org/pressroom/facts_figures/fact_sheets/iata.htm) (last visited Sept. 27, 2008). The Air Transport Association of America is a trade organization of the principal U.S. airlines. ATA airline members and their affiliates transport more than ninety percent of all U.S. airline passenger and cargo traffic. See About ATA, <http://www.airlines.org/aboutata> (last visited Sept. 27, 2008).

38. Talbott Letter, *supra* note 14, at \*5.

39. *Id.*

\$135,000, provided the carrier was a signatory to the new inter-carrier agreements. By May 1999, more than 120 international carriers—comprising over ninety percent of international civil air transportation—had signed the inter-carrier agreements waiving Warsaw’s arbitrary damages cap.<sup>40</sup>

While a decided step forward in modernizing Warsaw,<sup>41</sup> the inter-carrier agreements were not universal,<sup>42</sup> constituted mere contractual agreements without the force and effect of an international treaty,<sup>43</sup> and resulted largely in “a patchwork of liability regimes.”<sup>44</sup> As a result, the International Civil Aviation Organization (ICAO)<sup>45</sup> analyzed and re-drafted several contentious

40. Montreal Minutes, *supra* note 13, at 43.

41. See David E. Rapoport & Hans Ephraimson-Abt, *A 73-Year Odyssey: The Time Has Come for a New International Air Liability System*, in ISSUES IN AVIATION LAW AND POLICY 22,151, at 22,161 (2002) (stating that before the new inter-carrier agreements, “injustice in international air disaster litigation was too frequent, unreasonable delay too common, and unfair expenses too prevalent.”).

42. See, e.g., Talbott Letter, *supra* note 14, at \*10 (“[W]hile airlines that have signed those agreements uniformly waive the Warsaw liability limits, they do not all accept strict liability up to 100,000 SDR.”).

43. See Rapoport & Ephraimson-Abt, *supra* note 41, at 22,167.

Another problem is that nothing would stop some of the member airlines from withdrawing from the [agreement] on relatively short notice, returning to the pre-[agreement] justice travesty. What was needed when [the agreement] was signed is still needed today, a new binding treaty for all of the 189 countries that are members of ICAO, so that the benefits of the [agreement] can grow beyond a private agreement into a lasting international treaty and so that the flaws of the [agreement] can be rectified.

*Id.*

44. Montreal Minutes, *supra* note 13, at 37.

[T]he ‘Warsaw System,’ a system of amending Protocols and supplementary instruments, whose complexity and degree of fragmentation has become well-known to all of us . . . has been further extended by additional rules, regulations and industry-based solutions, some of which are regional in nature or scope. The result of these uncoordinated efforts is an increasingly opaque legal framework whose usefulness for the traveling public has become a matter of growing concern . . . .

*Id.*; Talbott Letter, *supra* note 14, at \*6; see also Montreal Minutes, *supra* note 13, at 38, 43, 200, 205–06.

45. The consequence of the studies initiated by the U.S. and subsequent consultations between the Major Allies was that the U.S. government extended an invitation to 55 States or authorities to attend, in November 1944, an International Civil Aviation Conference in Chicago. Fifty-four States attended this Conference and [sic] of which a Convention on International Civil Aviation was signed by 52 States set up the permanent International Civil Aviation Organization (ICAO) as a means to secure international co-operation an highest possible degree of uniformity in regulations and standards, procedures and organisation regarding civil aviation matters.



Warsaw provisions. Prominent among them was Article 17 of the Warsaw Convention:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>46</sup>

ICAO's initial redraft added "mental injury" as a recoverable grievance and added a sentence excluding recovery based on pre-existing health conditions:

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.<sup>47</sup>

Subsequent drafts replaced "bodily injury or mental injury" with "personal injury," but ultimately the ICAO submitted a proposal similar to the original and retained "bodily injury" without further modification.<sup>48</sup>

In May 1999, the ICAO initiated another conference hoping to wholly replace Warsaw with a modernized uniform treaty.<sup>49</sup> More than 500 delegates representing 121 nations gathered in Montreal to negotiate.<sup>50</sup> Throughout eighteen days of debate, most delegates supported expanding a passenger's recovery beyond "bodily injury," since that phrase from Article 17 of the Warsaw Convention implied the preclusion of mental or emotional injury.<sup>51</sup> Part IV of this paper

Foundation of the International Civil Aviation Organization, [http://www.icao.int/cgi/goto\\_m.pl?icao/en/hist/history02.htm](http://www.icao.int/cgi/goto_m.pl?icao/en/hist/history02.htm) (last visited Sept. 27, 2008).

46. Warsaw Convention, *supra* note 2, art. 17.

47. Ruwantissa I.R. Abeyratne, *Mental Distress in Aviation Claims—Emergent Trends*, 65 J. AIR L. & COM. 225, 226–27 (2000) (quoting Report of the Rapporteur on the Modernization and Consolidation of the Warsaw System AVIATION Q., July 1997, at 286, 313) (emphasis added).

48. See J. Brent Alldredge, Comment, *Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention Be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?*, 67 J. AIR L. & COM. 1345, 1369–70 (2002).

49. See *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 371 n.4 (2d Cir. 2004) ("The Montreal Convention is the product of an effort by the International Civil Aviation Organization, a specialized agency of the United Nations, to reform the Warsaw Convention so as to 'harmonize the hodgepodge of supplementary amendments and intercarrier agreements' of which the Warsaw Convention system of liability consists." (quoting Carl E. Fumarola, Note, *Stratospheric Recovery: Recent and Forthcoming Changes in International Air Disaster Law and Its Effect on Air Terrorism Recovery*, 36 SUFFOLK U. L. REV. 821, 835 (2003))).

50. See KRAUSE & KRAUSE, *supra* note 12, §§ 11:13, 11:14.

51. See generally Montreal Minutes, *supra* note 13.

explores exactly what the delegates proposed and how—despite a consensus for change—the 1929 language remained unaltered.

Although fifty-two countries, including the United States, signed the treaty in Montreal,<sup>52</sup> and although President Clinton submitted it to the Senate for ratification on September 6, 2000, it was not ratified until July 31, 2003.<sup>53</sup> Based on the United States' ratification, the treaty entered into force for all signatories on November 4, 2003.<sup>54</sup> The new treaty instituted several broad changes to its 1929 predecessor, four of which are often cited: (1) the removal of all liability caps for bodily injury or death;<sup>55</sup> (2) the imposition of strict liability on carriers for the first \$135,000 of proven damages for bodily injury or death;<sup>56</sup> (3) the expansion of jurisdiction, permitting suit in the passenger's homeland more readily;<sup>57</sup> and (4) the implementation of code-sharing responsibilities among carriers.<sup>58</sup>

The new treaty, long overdue, is a step forward in modernizing international air travel.<sup>59</sup> But, by adhering to the 1929 rubric and allowing passenger recovery for "bodily injury" alone, the Montreal Convention left one foot in pre-Lindbergh days. The original goal of protecting the fledgling airline industry is no longer germane,<sup>60</sup> because air travel is now demonstrably safer.<sup>61</sup>

52. See Talbott Letter, *supra* note 14, at \*6.

53. 149 CONG. REC. S10, 870 (daily ed. July 31, 2003).

54. See Ehrlich, 360 F.3d at 372; see also International Civil Aviation Organization Memo on the Signature and Effective Dates for All Parties to the Montreal Treaty, <http://www.icao.int/icao/en/leb/mtl99.pdf> (last visited Sept. 27, 2008).

55. Convention for the Unification of Certain Rules for International Carriage by Air art. 21, May 28, 1999, S. TREATY DOC. NO. 106-45 (1999).

56. *Id.*; see also Talbott Letter, *supra* note 14, at \*19.

57. Talbott Letter, *supra* note 14, at \*2.

58. *Id.*

59. *Id.* at \*10.

[T]he new Convention would represent the culmination of a four-decades long effort by the United States and other countries to persuade the international aviation community to provide increased economic protection for the international air traveler and shipper with a regime of liability and modernized procedures that match the developments in today's aviation industry.

*Id.*

60. The Supreme Court has signaled that the policy concern for vulnerable, fledgling airlines may no longer be relevant. See *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 170 (1999) ("This exposure inhibited the growth of the *then*-fledgling international airline industry.") (emphasis added); see also *Tseng v. El Al Isr. Airlines, Ltd.*, 122 F.3d 99, 107 (2d Cir. 1997) (concluding that, with the "increasing strength of the airline industry, the balance has properly shifted away from protecting the carrier and toward protecting the passenger"), *rev'd* 525 U.S. 155.

61. The fatality rate, one measure of airline safety, has improved dramatically since the time of the Warsaw Convention, to a rate of 0.02 fatalities per 100 million passenger kilometers in 2001 from 45 fatalities per 100 million passenger miles in 1925. See *In re Aircrash in Bali*, 684 F.2d 1301, 1310 (9th Cir. 1982); Press Release, International Civil Aviation Organization Preliminary Safety Statistics for Air Carrier

## III. FRAGMENTED CASE LAW

## A. Before Floyd

It was not until 1991 that the United States Supreme Court addressed the meaning of bodily injury, or *lésion corporelle*,<sup>62</sup> under the Warsaw Convention, and what recovery, if any, Warsaw allowed for mental or emotional injury. Before the Court's decision in *Eastern Airlines, Inc. v. Floyd*, lower courts were split. Most held that bodily injury included mental injury, but some required overt physical impact before considering mental injury.<sup>63</sup> For example, in *Husserl v. Swiss Air Transport Co.*,<sup>64</sup> terrorists hijacked an airliner bound for New York and directed the pilot to land in the desert near Amman, Jordan.<sup>65</sup> Forced to remain in the plane for twenty-four hours, the passengers were then shuttled over the next seven days from Jordan to Cyprus before finally arriving in New York.<sup>66</sup> The claimant did not allege that she was injured by any physical impact to her body; she asserted only that the "mental trauma of the hijacking experience, apparently including to some extent the detention in Amman . . . caused various mental and psychosomatic injuries . . ." <sup>67</sup>

The court closely inspected the language, history, case law, drafters' intent, and policy informing Article 17 before concluding that "bodily injury" comprehends mental and psychosomatic injuries:

Operations in 2001 (Apr. 9, 2002), available at [http://www.icao.int/icao/en/nr/2002/pio200205\\_e.pdf](http://www.icao.int/icao/en/nr/2002/pio200205_e.pdf).

62. The governing text of the Warsaw Convention is in French. See *Air France v. Saks*, 470 U.S. 392, 397–99 (1985). Article 17 provides: "Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." *Id.* at 397 (citing Warsaw Convention, *supra* note 2).

63. See John F. Easton et al., *Post Traumatic "Lésion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention*, 68 J. AIR L. & COM. 665, 675 (2003) (noting "a host of trial courts [that] permit damages for purely emotional injury"). Compare *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1158 (D.N.M. 1973) (holding that purely psychic trauma is not compensable under Article 17), and *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 859 (N.Y. 1974) (same), with *Floyd v. E. Airlines, Inc.*, 872 F.2d 1462, 1490 (11th Cir. 1989) (allowing recovery for mental injury), *rev'd*, 499 U.S. 530 (1991), *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 976–77 (S.D.N.Y. 1977) (same), *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1324 (C.D. Cal. 1975) (same), *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1253 (S.D.N.Y. 1975) (same), *Borham v. Pan Am World Airways*, No. 85 Civ. 6822, 1986 WL 2974, at \*3 (S.D.N.Y. Mar. 5, 1986) (same), *Gilbert v. Pan American World Airways*, No. 85 Civ. 4157, 1989 WL 59623, at \*1 (S.D.N.Y. June 2, 1989) (same), and *Palagonia v. Trans World Airlines*, 442 N.Y.S.2d 670, 671 (N.Y. Sup. Ct. 1978) (same).

64. 388 F. Supp. 1238 (S.D.N.Y. 1975).

65. *Id.* at 1242.

66. *Id.*

67. *Id.*

“[T]here is absolutely no indication in either the language of the Convention or its legislative history that the drafters intended to preclude all liability for some types of injury.”<sup>68</sup> The court made several observations: (1) in many instances—including the Guatemala City Protocol and the margin of the text ratified by the U.S. Senate—“personal injury” was substituted for bodily injury;<sup>69</sup> (2) “[d]eath’, ‘wounding’, and ‘bodily injury’ in English or in French can . . . easily . . . all be construed to relate to emotional and mental injury”;<sup>70</sup> (3) medical science increasingly recognizes that injuries are not prone to categorization as either mental or physical;<sup>71</sup> and (4) while the Warsaw drafters’ intent as to mental injury under Article 17 was unclear, arbitrarily parsing physical from mental injury would undermine their efforts to ensure the uniformity and comprehensive reach of the Convention.<sup>72</sup> Only the final observation persuaded the court to allow the plaintiff’s claim.<sup>73</sup>

This analysis conflicts sharply with a New York Court of Appeals decision that evaluated nearly identical facts but arrived at the opposite result. In *Rosman v. Trans World Airlines*, a decision issued less than one year before *Husserl*, the court read “bodily injury” to require “palpable, objective bodily injuries.”<sup>74</sup> The claimants, a Jewish mother and her two young children, were on the same hijacked flight as the *Husserl* claimant. Confined to their seats, subjected to extreme temperatures and inadequate food and water, and fearful for their lives, the claimants alleged “severe psychic trauma . . . [w]hile none of them allege[d] to have been shot, struck, or personally assaulted . . . .”<sup>75</sup>

The airline argued that injury resulting from psychic trauma alone is not bodily injury and that the claimants’ physical injuries did not result from any physical impact or, if they did, the injuries were so slight as not to amount to compensable bodily injury. The highest court in New York agreed, for the most part: “The inclusion of the term ‘bodily’ to modify ‘injury’ cannot be ignored, and in its ordinary usage, the term ‘bodily’ suggests opposition to ‘mental.’”<sup>76</sup> The ordinary meaning of bodily injury “connotes [a] palpable, conspicuous

68. *Id.* at 1248.

69. *Id.* at 1249–50 (“The original English translation which the Senate ratified uses ‘personal injuries’ as a descriptive marginal note for Article 17.” (citing Warsaw Convention, *supra* note 2)).

70. *Id.* at 1250.

71. *Id.* (“[M]ental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma.”).

72. *Id.*

73. *Id.*

74. 314 N.E.2d 848, 850 (N.Y. 1974).

75. *Id.*

76. *Id.* at 855.

physical injury[,] and excludes mental injury with no observable 'bodily', as distinguished from 'behavioral', manifestations."<sup>77</sup> Even so, the court left open recovery for mental injury that manifested itself in physical injury. Severe fright from an in-flight accident that in turn caused or aggravated a skin rash, for example, would fall within the bounds of Article 17.<sup>78</sup>

That question—whether recovery is allowed under Warsaw for mental injury manifesting itself in bodily injury—was precisely the issue in *Salerno v. Pan American World Airways*, in which the claimant alleged that a bomb threat caused her miscarriage.<sup>79</sup> No physical or bodily injury precipitated the miscarriage, only the passenger's fear of the threatened bomb.<sup>80</sup> *Pan American* apparently did not raise as a defense that Salerno suffered no physical injury or that the miscarriage was merely a physical manifestation of a purely mental injury. This omission illustrates how litigants and courts, prior to *Floyd* and in the wake of cases like *Husserl* and *Rosman*, approached recovery under Article 17.<sup>81</sup>

#### B. Floyd

The Supreme Court finally weighed in on the meaning and reach of "bodily injury" in the landmark case *Eastern Airlines, Inc. v. Floyd*.<sup>82</sup> En route from Miami to the Bahamas, one of the airplane's three engines lost oil pressure.<sup>83</sup> The crew had shut down the engine and headed back to Miami when the second and third engines failed.<sup>84</sup> Without power, the plane's altitude plummeted and the crew announced they would have to make an emergency landing in the Atlantic Ocean.<sup>85</sup> Eventually the crew managed to restart the engine

77. *Id.*

78. *Id.* at 856 ("If the accident—the hijacking—caused severe fright, which in turn manifested itself in some objective 'bodily injury', then we would conclude that the Convention's requirement of the causal connection is satisfied.")

79. 606 F. Supp. 656, 657 (S.D.N.Y. 1985).

80. *Id.* The first of two jury questions asked: "Do you find that the plaintiff Onna Lil Salerno has proven by a preponderance of the evidence that the events aboard Pan Am Flight # 441 on August 24, 1981 and at the Miami Airport on August 25 proximately caused her miscarriage and/or emotional injury and distress?" *Id.*

81. *See, e.g.,* *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1322–23 (C.D. Cal. 1975) (dealing with passenger in hijacked flight who alleged mental distress unaccompanied by physical injury). The court, noting the United States' threatened denunciation of the Warsaw Convention and dissatisfaction with the limits on recovery under Warsaw, held that "the effect of the [1966] Montreal Agreement is to permit recovery for mental distress[.]" and even though some courts "have reached contrary conclusions[,] . . . such interpretations of Art. 17 are untenable." *Id.*

82. 499 U.S. 530 (1991).

83. *Id.* at 533.

84. *Id.*

85. *Id.*

that had initially failed and return safely to Miami.<sup>86</sup> The passengers sought damages solely for mental distress.<sup>87</sup>

The Court began its analysis with the tenets of treaty interpretation, emphasizing the liberal construction afforded treaties as opposed to private agreements.<sup>88</sup> To effectuate the policies behind the treaty, a court may look beyond the written words to the treaty's history, negotiations among the signatories, and interpretations by signatories and courts.<sup>89</sup> Because the treaty was written in French, the Court looked first to French law, noting that in 1929, the year Warsaw was drafted, little legislation, judicial precedent, or scholarly writing demonstrated that bodily injury had a meaning in French law that encompassed mental injuries.<sup>90</sup> Even though some French law allowed recovery for mental injury in limited instances, the Court emphasized that a cause of action arising from pure mental injury would not have been recognized in many other countries represented at Warsaw in 1929.<sup>91</sup>

The Court then delved into Warsaw's negotiation history, noting that the documentary records confirmed that neither the drafters nor the signatories had specifically considered liability for mental injury.<sup>92</sup> From this, the Court inferred that "the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury" had they intended to allow it.<sup>93</sup> Finally, the Court emphasized the 1929 policy behind Warsaw—to favor and protect the fledgling airline industry: "Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers . . . ."<sup>94</sup>

The Court did take notice of contrary evidence, including: (1) the 1951 proposal to substitute "affection corporelle" for "lésion corporelle"; and (2) references in the Hague Protocol of 1955, the Montreal Agreement of 1966, and the Guatemala City Protocol of

---

86. *Id.*

87. *Id.*

88. *Id.* at 534–35.

89. *Id.* at 535 (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)).

90. *Id.* at 536–38.

91. *Id.* at 540, 544–45 ("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."). "Although the official German translation of 'lésion corporelle' adopted by Austria, Germany, and Switzerland used German terms whose closest English translation is apparently 'infringement on the health,'" the Court was understandably "reluctant to place much weight on an English translation of a German translation of a French text." *Id.* at 531.

92. *Id.* at 544.

93. *Id.* at 545.

94. *Id.* at 546.

1971 to “personal injury” rather than “bodily injury.”<sup>95</sup> But the Court noted that the Hague Protocol referred to “personal injury” only in the context of giving passengers notice of Warsaw’s liability limits.<sup>96</sup> Further, the Montreal Agreement of 1966 did not and could not purport to speak for the Warsaw signatories because it was not a treaty but merely an agreement among the major international air carriers.<sup>97</sup> Finally, the Guatemala City Protocol “was not in effect in the international arena” because only a few countries had ratified it, and it could not be considered dispositive in the United States as it had not been ratified by the Senate.<sup>98</sup> As a result, the Court credited no evidence that any of the agreements subsequent to Warsaw were intended to effect a substantive change in, or clarification of, Article 17 of the Warsaw Convention.<sup>99</sup>

Importantly, the Court limited its review to purely mental injury, leaving unanswered questions regarding recovery for mental injury *accompanied* by physical injury, as well as questions regarding mental injury that later manifests itself as physical injury: “[W]e express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.”<sup>100</sup>

### C. After Floyd

*Floyd* established a precedent for purely mental injury under Warsaw.<sup>101</sup> In a case out of Australia, the Court of Appeal of New South Wales followed *Floyd* and refused recovery for a claimant who alleged purely mental injury after an in-flight engine fire caused the aircraft to turn back.<sup>102</sup> Like *Floyd*, the Australian court “left open the possibility that recovery might be available where psychological injury was accompanied by physical injury.”<sup>103</sup>

However, a spate of divergent lower court opinions in the United States quickly emerged regarding whether recovery for mental injury

95. *Id.* at 546–47.

96. *Id.* at 548–49.

97. *Id.* at 549.

98. *Id.* at 550.

99. *Id.* at 547–50.

100. *Id.* at 552–53; *see also* McCaskey v. Cont'l Airlines, Inc., 159 F. Supp. 2d 562, 575 (S.D. Tex. 2001) (“Thus, while the decision clearly bars recovery for purely mental injuries, it did not address (1) whether mental injuries could be recovered by a person who had also been physically injured, and also arguably left open (2) whether a person could recover for mental injuries having physical manifestations.”).

101. *See, e.g.*, Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108 (3d Cir. 1998); Grimes v. Nw. Airlines, Inc., No. 98-CV-4794, 1999 WL 562244, at \*2 (E.D. Pa. July 30, 1999), *aff'd without opinion*, 216 F.3d 1076 (3d Cir. 2000), *cert. denied*, 531 U.S. 879 (2000).

102. Kotsambasis v. Sing. Airlines, Ltd. (1997) 140 F.L.R. 318, 323 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/1997/303.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1997/303.html).

103. *Id.*

accompanied by physical injury is available under Warsaw. Attempting to alleviate the apparent inequity implicit in a bodily injury prerequisite, some courts stretched their analysis to find an adequate accompanying physical injury. Others drew a more narrow line, requiring that the mental injury flow directly from the bodily injury in order to recover. The bodily injury requirement and the Supreme Court's limited interpretation of it spawned a disjointed and fragmented progeny.

### 1. Bending Over Backwards

After the Supreme Court's directive excluding recovery for pure mental injury under Warsaw, several courts scrambled to find a physical injury sufficient to justify mental injury recovery.

In *Weaver v. Delta Airlines*, the claimant alleged that she was terrified during an emergency landing and consequently had to seek treatment for emotional and physical injuries attributable to the accident.<sup>104</sup> She was diagnosed with Post-Traumatic Stress Disorder (PTSD), and she argued at trial that recent medical developments had shown that "extreme stress causes actual physical brain damage, i.e., physical destruction or atrophy of portions of the hippocampus of the brain."<sup>105</sup> While it is questionable whether such an analysis would survive a *Daubert* gatekeeping challenge,<sup>106</sup> the court concluded that the expert affidavits created an issue of fact sufficient to survive summary judgment.<sup>107</sup>

In *Chendrimada v. Air India*, the claimants' rescheduled flight was delayed in Delhi for almost twelve hours due to weather conditions.<sup>108</sup> Claimants alleged they suffered injuries including

104. 56 F. Supp. 2d 1190, 1190–91 (D. Mont. 1999).

105. *Id.*

106. A *Daubert* gatekeeping challenge is a test federal courts use to determine whether expert testimony is admissible. It generally requires that expert testimony will assist the fact-finder in understanding the evidence or determining a factual issue based on scientific, technical, or other specialized knowledge. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588–91, 597 (1993).

107. *Weaver*, 56 F. Supp. 2d at 1191–92; see also *Carey v. United Airlines*, 255 F.3d 1044, 1053 n.47 (9th Cir. 2001) (noting another case that held that PTSD is a bodily injury for purposes of Warsaw and left open "the possibility that there could be recovery for egregious incidents of intentional misconduct where there is no concrete or visible bodily injury"); *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170, 178–79 (S.D.N.Y. 2001) (noting that in a different context PTSD may fall within Warsaw's definition of bodily injury). But see *Bobian v. Czech Airlines*, 93 F. App'x 406, 407 (3d Cir. 2004), *aff'g* 232 F. Supp. 2d 319 (D.N.J. 2002). The *Bobian* court declined to apply the reasoning in *Turturro*, and concluded instead that PTSD is purely an emotional injury, despite plaintiffs' attempt to characterize PTSD in terms of its effect on the brain. *Id.* at 326. "PTSD is not compensable under the Warsaw Convention, and no expert re-characterization of emotional injury—or correlation of it with physical manifestations—will permit recovery for such injury. . . ." *Id.* at 323–24.

108. 802 F. Supp. 1089, 1090 (S.D.N.Y. 1992).



nausea, severe cramps, pain and anguish, malnutrition, and mental injury due to confinement in the plane without food.<sup>109</sup> The court found that these bodily injuries satisfied the requirements of *Floyd*—namely that they alleged a “physical injury or a manifestation of physical injury.”<sup>110</sup> The court concluded that the manifestation of physical injury “need not result from a suddenly inflicted trauma, but may, as is alleged here, result from other causes for which the carrier is responsible.”<sup>111</sup> Similarly, *Ratnaswamy v. Air Afrique*<sup>112</sup> echoes the premise that 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.<sup>113</sup>

In the United Kingdom, the House of Lords allowed recovery for physical manifestations of a mental injury so long as the mental injury causing the physical symptoms was itself caused by the accident. In *King v. Bristow Helicopters Ltd.*, the claimant alleged mental injuries as well as a peptic ulcer after a crash landing in a helicopter.<sup>114</sup> Permitting recovery for the ulcer but not the mental injuries which prompted it, the House of Lords held that no recovery is available for mental injury absent physical symptoms.<sup>115</sup>

Courts also appear to stretch to satisfy the bodily injury requirement when faced with allegations of mental injury before or concurrent with physical impact. While several courts have held that claimants can only recover for mental injury that directly flows from bodily injury under *Floyd*,<sup>116</sup> others have allowed recovery for mental injuries that arose prior to or simultaneously with bodily injury.

109. *Id.* at 1092.

110. *Id.*

111. *Id.* But see *Carey*, 255 F.3d at 1051–52 (holding passenger’s claims of “nausea, cramps, perspiration, nervousness, tension, and sleeplessness” did not meet “bodily injury” under Warsaw).

112. No. 95C7670, 1998 WL 111652, at \*6 (N.D. Ill. Mar. 3, 1998).

113. *Id.*; see also *Lobb v. United Airlines, Inc.*, No. 92-15846, 1993 U.S. App. LEXIS 17495, at \*9–10 (9th Cir. July 8, 1993) (showing that a court affirmed an award of \$10,000 (Aus.) for emotional distress even though the claimant sustained only minor scratches). The emotional damages included fear of flying. *Lobb*, 1993 U.S. App. LEXIS 17495, at \* 9-10. Importantly, the court was reviewing the adequacy of the amount, not whether Warsaw permitted the recovery. *Id.*

114. (2002) 1 Lloyd’s Rep. 745, 745 (H.L.) (U.K.).

115. *Id.* at 746; see also *Sidhu v. British Airways*, (1997) 2 Lloyd’s Rep. 76 (H.L.) (U.K.). In *Sidhu*, claimants alleged mental and bodily injury including weight loss, eczema, and excessive menstrual bleeding after being taken hostage in Kuwait by Iraqis during the first Gulf War. *Id.* at 77. Although claimants argued that their mental injuries were sufficient to permit recovery, the House of Lords did not decide that issue. *Id.* at 77, 87–88.

116. See, e.g., *Ehrlich v. Am. Airlines*, 360 F.3d 366, 400 (2d Cir. 2004); *In re Air Crash at Little Rock, Ark.*, on June 1, 1999, 291 F.3d 503, 509–10 (8th Cir. 2002), *cert. denied sub nom.*, *Lloyd v. American Airlines, Inc.*, 537 U.S. 974 (2002); *Ligeti v. British Airways PLC*, No. 00 CIV. 2936 (FM), 2001 WL 1356238, at \*4 (S.D.N.Y. Nov. 5, 2001); *Alvarez v. Am. Airlines*, No. 98 Civ. 1027 (MBM), 1999 WL 691922, at \*3–5 (S.D.N.Y. Sept. 7, 1999); *Longo v. Air France*, No. 95 CV 0292 BDD, 1996 WL 866124, at \*2

In *In re Aircrash Disaster near Roselawn, Ind.*, all sixty-eight persons on board died when an American Eagle flight crashed.<sup>117</sup> The airline argued that Warsaw 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 *Eastern Airlines, Inc. v. Floyd*.”<sup>118</sup> But the court held otherwise, explaining that *Floyd* did not entirely preclude recovery for purely psychic injuries under Article 17; instead, the court asserted, *Floyd* artfully held that bodily injury was a precondition to liability: “Nothing in *Floyd* states that once that precondition is met, and physical injury or death is present, damages for mental distress are not available.”<sup>119</sup> The *Roselawn* court acknowledged a slew of rulings to the contrary,<sup>120</sup> but it rejected the narrow construction adopted in those cases, stating that:

Article 17 itself expressly requires a causal link only between ‘damage sustained’ and the accident . . . , not . . . 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.<sup>121</sup>

In *In re 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.<sup>122</sup> When a Soviet missile shot down an international flight, claimants sought damages for pre-death pain and suffering.<sup>123</sup> The court found that passengers were alive and conscious for about eleven minutes after the initial missile strike.<sup>124</sup> 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

---

(S.D.N.Y. July 25, 1996); *Wencelius v. Air France*, No. SACV95-389 AHS (EEX), 1996 WL 866122, at \*1 (C.D. Cal. Feb. 29, 1996); *Jack v. Trans World Airlines*, 854 F. Supp. 654, 663–68 (N.D. Cal. 1994).

117. 954 F. Supp. 175, 176 (N.D. Ill. 1997).

118. *Id.* at 176.

119. *Id.* at 178.

120. *Id.* at 178–79 (citing, *inter alia*, *Jack*, 854 F. Supp. 654 (“Warsaw Convention plaintiffs could recover only for physical injuries and the emotional distress flowing from those injuries”)); *accord Longo*, 1996 WL 866124, at \*2–3; *Wencelius*, 1996 WL 866122, at \*1; *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F. Supp. 625, 640–41 (E.D.N.Y. 1991), *rev’d on other grounds sub nom. Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992); *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1158–59 (D.N.M. 1973).

121. *In re Aircrash Disaster near Roselawn, Ind.*, 954 F. Supp. 175, 179 (N.D. Ill. 1997).

122. 814 F. Supp. 592 (E.D. Mich. 1993).

123. *Id.* at 594–95.

124. *Id.* at 598.

decompression.<sup>125</sup> 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*.<sup>126</sup> Several other decisions arising out of the same flight reached similar results.<sup>127</sup>

Notably, recovery for mental injury sustained prior to or simultaneously with bodily injury is not restricted to wrongful death. In *Gilbert v. Pan American World Airways*, a pre-*Floyd* case, the court upheld a \$25,000 award for “emotional distress and mental anguish prior to the impact upon her of the runaway bar cart.”<sup>128</sup> The claimant was not killed by the runaway bar cart, but the court noted that recovery for fear of death does not require actualization of that fear.<sup>129</sup>

Not only have courts allowed mental injury recovery without overt bodily impact, several have also permitted recovery for non-passengers suffering mental injury due to a relative’s physical injury. In one instance, an emergency landing allegedly caused traumatic brain injury that exacerbated a previous condition and eventually led to the passenger’s death.<sup>130</sup> Without discussion, the court allowed the passenger’s wife—who was not on the flight—to pursue damages for her own mental anguish.<sup>131</sup> In another case, the court refused to dismiss a non-passenger’s claim for loss of consortium after his wife allegedly sustained physical injury from an in-flight coffee spill.<sup>132</sup>

125. *Id.*

126. *Id.*

127. *See, e.g.,* *Oldham v. Korean Air Lines Co.*, 127 F.3d 43 (D.C. Cir. 1997) (affirming jury award for pre-death pain and suffering for passengers who were killed as expert testimony showed they could have survived initial explosion and experienced both physical and mental pain with the rapid decrease in cabin air pressure); *Bickel v. Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996) (permitting recovery for pre-death pain and suffering because airline waived its challenge); *Jones v. Korean Air Lines Co.*, 836 F. Supp. 1340 (E.D. Mich. 1993) (awarding loss of society damages but denying mental anguish damages to passenger’s son). *But see* *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998) (holding that Warsaw is a pass-through treaty and that the relevant “domestic” law, the Death on the High Seas Act, bars recovery for decedent’s pre-death pain and suffering); *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547 (9th Cir. 1996).

128. No. 85 Civ. 4157 (CSA), 1989 WL 59623, at \*1 (S.D.N.Y. June 2, 1989).

129. *Id.* Conversely, the court in *In re Air Crash off Point Mugu, Cal. on Jan. 30, 2000*, held that, despite a disaster that killed all on board, any recovery for mental injury must flow directly from a physical injury. 145 F. Supp. 2d 1156, 1162 (N.D. Cal. 2000); *see also* *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 639 (E.D.N.Y. 1991) (stating that because claimant suffered bodily injury that then caused psychic harm, award of damages was appropriate), *rev’d on other grounds sub nom.* *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992).

130. *Hunt v. Taca Int’l. Airlines, Inc.*, No. Civ. A. 96-3064, 1997 WL 738594, at \*1 (E.D. La. Nov. 17, 1997).

131. *Id.* at \*3.

132. *Diaz Lugo v. Am. Airlines Inc.*, 686 F. Supp. 373, 376 (D.P.R. 1988).

The airline argued that it was only liable for damages sustained by the passenger, but the court read Article 17 more broadly and refused to dismiss the husband's claim.<sup>133</sup> In yet another case, a passenger died of a stroke allegedly caused by an in-flight accident; in the subsequent legal action, the court denied the airline's bid for summary judgment as to his wife's mental injury claim, holding that the husband's physical injury satisfied the bodily injury requirement.<sup>134</sup> In further illustration of the incongruent case law, however, many courts have held that recovery is not available in such situations.<sup>135</sup>

Finally, the Supreme Court of Israel addressed this question and permitted recovery for purely mental injury under Article 17.<sup>136</sup> Claimants sued for mental injuries stemming from the hijacking and detention of their flight.<sup>137</sup> The Israeli Court pointed to the extensive development of the aviation industry coupled with the evolution of U.S. and Israeli law allowing recovery for mental injury in certain circumstances.<sup>138</sup> It further sought to avoid conflict with the 1971 Guatemala City Protocol, which substituted "personal injury" for "bodily injury."<sup>139</sup> As this case was decided before *Floyd*, the *Floyd* Court addressed but rejected these arguments as irrelevant to the signatories' intent.<sup>140</sup>

These cases reflect dissatisfaction with the threshold requirement of bodily injury. Unwilling to refuse recovery for

133. *Id.* at 376–77.

134. *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 576 (S.D. Tex. 2001) ("Mr. McCaskey's physical injury, if caused by an accident satisfies the 'gateway' bodily injury requirement."); *see also* *Blansett v. Continental Airlines, Inc.*, 204 F. Supp. 2d 999, 1002 (S.D. Tex. 2002) ("[T]he Court interprets *Zicherman* [*Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996)] to permit non-passenger plaintiffs to bring any claims otherwise allowed under the applicable domestic law.")

135. *See Hollie v. Korean Air Lines Co.*, 60 F.3d 90, 95 (2d Cir. 1995), *cert. granted, vacated*, 516 U.S. 1088 (1996) (stating that loss of society damages is a form of positive damages, but mental anguish or grief damages are emotional responses to wrongful death); *Croucher v. Worldwide Flight Serv., Inc.*, 111 F. Supp. 2d 501, 506–07 (D.N.J. 2000) (dismissing husband's loss of consortium claims for wife's alleged injury since neither the husband nor wife proved the requisite bodily harm); *Aragon v. Am. Airlines*, No. 96-3307-CIV., 1997 WL 33125721, at \*1–3 (S.D. Fla. Dec. 8, 1997) (dismissing without discussion passenger's sister's claims for mental pain and suffering, loss of society, guidance, and services); *Jones v. Korean Air Lines Co.*, 836 F. Supp. 1340, 1351–52 (E.D. Mich. 1993) (denying relief to son for mental anguish over mother's death in airline accident but endorsing son's recovery for loss of society); *cf. In re Air Crash on Dec. 20, 1995 near Cali, California*, No. 96-MD-1125, 1998 WL 1770589, at \*3 n.5 (S.D. Fla. Oct. 8, 1998) (denying relief for plaintiff's mental pain and suffering due to plaintiff's concession of issue).

136. *King v. Bristow Helicopters Ltd.*, (2002) 1 Lloyd's Rep. 745, 769 (H.L.) (U.K.) (construing *Daddon v. Air France*, 1 S. & B. Av. R. 141 (1984) (Isr.)).

137. *Id.*

138. *Id.*

139. *Id.* at 780.

140. *See E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–51 (1991).

apparently genuine mental injury, courts have bent over backward to find a bodily injury sufficient to justify recovery. On the other end of the spectrum, some courts wield “bodily injury” as a sword, rejecting recovery for mental injury unless the claimant’s psychic pain stems solely from a physical impact. In these cases, mental injury accompanying physical injury is not recoverable if it derives, even in part, from the accident itself rather than from the physical injury.

## 2. Refusing to Bend at All

In an oft-cited case, *Jack v. Trans World Airlines*, the federal district court for the Northern District of California restricted recovery for mental injury to only those circumstances when mental injury flows directly from bodily injury.<sup>141</sup> After an evacuation of a TWA flight that crashed on take-off, approximately half the plaintiffs claimed only to have suffered emotional distress from the accident, while the other half claimed to have suffered emotional distress plus minor physical injuries.<sup>142</sup>

The court discerned four possible approaches to “emotional distress” under Warsaw: (1) allowing no recovery for emotional distress; (2) allowing recovery for all distress, as long as a bodily injury occurs; (3) allowing recovery for emotional distress as damages for bodily injury, but only if the emotional distress includes distress about the accident; and (4) allowing recovery only for emotional distress flowing from the bodily injury.<sup>143</sup> Adopting the fourth approach, the *Jack* court held that “the emotional distress recoverable is limited to the distress about the physical impact or manifestation, i.e., the bodily injury. Recovery is not allowed for the distress about the accident itself.”<sup>144</sup>

The United States Court of Appeals for the Eighth Circuit agreed with *Jack*. That court, in *In re Air Crash at Little Rock, Arkansas, on June 1, 1999*, overturned a \$6,500,000 jury verdict, holding that the passenger’s physical injuries, which included a knee injury, a calf injury, and smoke inhalation, did not cause PTSD.<sup>145</sup> Instead, the court held that the syndrome resulted from her near-death experience in the plane crash.<sup>146</sup> Since her stress disorder was caused not by her knee, lung, or calf injuries but by the traumatic event, there could be no recovery for it.<sup>147</sup> For support, the court pointed to the claimant’s

---

141. 854 F. Supp. 654, 668 (N.D. Cal. 1994).

142. *Id.* at 663.

143. *Id.* at 665.

144. *Id.* at 668.

145. 291 F.3d 503, 507–08, 511 (8th Cir. 2002).

146. *Id.* at 511.

147. *Id.*

own expert, who testified that she would have had PTSD absent her relatively minor physical injuries.<sup>148</sup>

In *Longo v. Air France*, a honeymooning couple sustained minor injuries while using emergency slides after their aircraft slid off the runway into the ocean.<sup>149</sup> The wife bruised her thigh and stepped on a sea urchin; the husband bruised his knee.<sup>150</sup> They claimed they could recover for all their mental distress as long as some physical injury had also occurred.<sup>151</sup> 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 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.<sup>152</sup>

*Alvarez v. American Airlines, Inc.* reiterated the *Longo* analysis and holding, again emphasizing that in order to be compensable, a psychological injury must be caused by a physical injury.<sup>153</sup> After the claimant sustained bruises and scrapes to his knees and buttocks due to an emergency evacuation, he saw a psychiatrist who opined that he was suffering from PTSD.<sup>154</sup> While the claimant asserted both physical and psychological injuries as a result of the evacuation, he did not claim that there was any connection between the two types of injury.<sup>155</sup> Since his PTSD and sexual dysfunction were caused by distress about the emergency evacuation of the aircraft and not by the bodily bruising, his claims for psychological and emotional injuries were dismissed.<sup>156</sup>

---

148. *Id.*

149. No. 95 CV 0292 BDD, 1996 WL 866124, at \*1 (S.D.N.Y. July 25, 1996).

150. *Id.*

151. *Id.*

152. *Id.* at \*2 (citation omitted); see also *Ligeti v. British Airways*, No. 00 CIV. 2936(FM), 2001 WL 1356238 (S.D.N.Y. Nov. 5, 2001) (holding that where the only physical injury to a passenger trapped in an aircraft's lavatory was a banged elbow and where her expert conceded that merely banging one's elbow would not be a sufficient stressor to cause PTSD, there is likely no recovery for alleged mental injury).

153. No. 98.Civ. 1027(MBM), 1999 WL 691922, at \*3 (S.D.N.Y. Sept. 7, 1999).

154. *Id.* at \*1–2.

155. *Id.* at \*5.

156. *Id.* (“[A] plaintiff may recover compensation for psychological and emotional injuries only to the extent that these injuries are proximately caused by his or her physical injuries.”). The court sought to avoid a perceived inequity, stating that:

The Convention's goal of “reasonable and predictable” recoveries would be undermined if similarly situated passengers were treated differently from one

Curiously, some courts have refused recovery even in rare cases where mental injury in fact flows from physical injury. In *Marks v. Virgin Atlantic Airways Ltd.*, a passenger who was four months pregnant tripped on luggage in an airplane aisle, landing on her stomach.<sup>157</sup> The court first stated the rule that “mental injuries sustained in the same situation or circumstance as a bodily injury where the former have not been caused by the latter are not recoverable.”<sup>158</sup> It then granted summary judgment for the airline and held that the mother’s fear of miscarriage based on her “hurt tummy” was simply not enough.<sup>159</sup> If the strict requirement that mental injury flow from physical injury ever allowed recovery for mental injury, it ought to have allowed it here.

A similar case arose in *Rothschild v. Tower Air, Inc.*, when a passenger reached into the magazine pouch during flight and was stabbed by a hypodermic needle.<sup>160</sup> The passenger was permitted to testify and recover for her pain flowing from the needle prick, but she was barred from testifying about her fear of contracting AIDS and hepatitis because she could not show any exposure to these diseases.<sup>161</sup> Even though the alleged mental injury (fear of contracting AIDS) stemmed directly from the physical injury (needle prick), the court discounted her testimony based on state law,<sup>162</sup> finding that recovery for fear of contracting AIDS was too speculative and “[ran] counter to the purpose of the Warsaw Convention, which is to limit the liability of air carriers in order to foster growth of the fledgling commercial airline industry.”<sup>163</sup>

The “flows from” approach, which is often described as the majority approach,<sup>164</sup> permits recovery for emotional distress only to

---

another on the basis of an arbitrary and insignificant difference in their experience. “The happenstance of getting scratched on the way down the evacuation slide . . . [should] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash.”

*Id.* at \*5 (citation omitted).

157. No. 04 Civ. 0251(SAS), 2004 WL 1574637, at \*1 (S.D.N.Y. July 14, 2004).

158. *Id.* at \*2 (internal quotation omitted).

159. *Id.*

160. No. CIV.A.94-2656, 1995 WL 71053, at \*1 (E.D. Pa. Feb. 22, 1995).

161. *Id.* at \*2.

162. *Id.*; see also *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F. Supp. 2d 508, 512 n.5 (S.D.N.Y. 1998) (failing to reach question of whether claimant could recover for his mental injuries after he was stabbed by hypodermic needle because only questions before it were whether Warsaw applied and whether the airlines’ subcontractor was governed by Warsaw).

163. *Id.* (internal quotation omitted).

164. See, e.g., *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 376 (2d Cir. 2004); *In re Air Crash at Little Rock Ark.*, on June 1, 1999, 291 F.3d 503, 509 (8th Cir. 2002) (describing the flows from approach as the “mainstream view”), *cert. denied*, 537 U.S. 974 (2002).

the extent that the distress flows from the bodily injury itself. It conflicts with rulings that allow recovery for pre-impact fear and suffering, as well as with rulings that permit recovery for mental injury that accompanies physical injury but is caused by the accident rather than the physical injury.

### 3. Bent out of Shape

Adding to the confusion, the one holding that seemed clear—*Floyd's* ruling that bars recovery for purely mental injury—has also led to aberrant results. 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.”<sup>165</sup> 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?<sup>166</sup> 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.”<sup>167</sup>

In *Li v. Quraishi*, a drunk passenger exposed himself and urinated into the mouth and eyes and over the body of a two-year old girl and onto her mother’s lap.<sup>168</sup> The claimant alleged severe emotional and psychological damage to both her child and herself, but no bodily injury.<sup>169</sup> Defendants moved for summary judgment, arguing that Warsaw bars recovery for purely psychological damages—even if caused by intentional misconduct.<sup>170</sup> Citing *Floyd*, the court held that the bodily injury requirement precluded recovery even though the causative conduct was willful.<sup>171</sup>

In the UK case *Morris v. KLM Royal Dutch Airlines*, an unaccompanied minor fell asleep after her meal; when she awoke, she discovered the male passenger sitting next to her caressing her thigh.<sup>172</sup> The incident allegedly caused clinical depression, and she brought an action against the airline to recover for her mental injury

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

166. *Cf. Turturro v. Cont'l Airlines Inc.*, 128 F. Supp. 2d 170, 173 (S.D.N.Y. 2001) (reciting claimant’s allegation that when she tried to deplane in order to retrieve her medication, the flight attendant refused to allow her to do so and publicly humiliated her).

167. *Carey*, 255 F.3d at 1053 n.47.

168. 780 F. Supp. 117, 118 (E.D.N.Y. 1992).

169. *Id.* at 118–19.

170. *Id.* Claimant’s allegations against the airline included intentional conduct in permitting the drunk passenger to board and in continuing to serve the drunk passenger alcoholic beverages while he was intoxicated. *Id.*

171. *Id.* at 119–20.

172. [2002] 2 A.C. 628, at ¶ 2 (H.L.) (U.K.), available at [http://www.ipsfactoj.com/international/2001/Part08/int2001\(8\)-002.htm](http://www.ipsfactoj.com/international/2001/Part08/int2001(8)-002.htm).



even though she had suffered no bodily injury.<sup>173</sup> The court, again relying on *Floyd*, concluded that the child could not maintain a claim against the air carrier for her injury.<sup>174</sup>

In fact, several courts have announced that an airline cannot be liable for intentional misconduct if the passenger suffered no or minimal bodily injury. In *Carey v. United Airlines*, the claimant's children, who were sitting in coach, developed earaches but were not allowed to visit their father, who was sitting in first class.<sup>175</sup> A heated confrontation between the father and airline personnel ensued, leading to the father's allegations of embarrassment, insult, and profanity.<sup>176</sup> The claimant argued that Warsaw did not bar recovery since his claims arose out of the airline's intentional conduct.<sup>177</sup> Citing *Floyd's* restriction on recovery for purely mental injury and Warsaw's policy of protecting the "fledgling commercial aviation industry," the Ninth Circuit rejected the claimant's argument.<sup>178</sup> Even the Supreme Court has indirectly suggested the same result.<sup>179</sup>

Rejecting recovery for intentional misconduct merely because it does not result in overt bodily injury raises serious concerns. As long as a passenger is embarking on an international flight, are airlines free to deliberately discriminate based on race? Can a pilot insist that all African-Americans sit in the back of the aircraft? In *King v. American Airlines, Inc.*, African-American passengers who had been

173. *Id.* ¶ 3.

174. *Id.* ¶¶ 101–102.

175. 255 F.3d 1044, 1046 (9th Cir. 2001).

176. *Id.*

177. *Id.*

178. *Id.* at 1052–53; *see also* Bloom v. Alaska Airlines, 36 F. App'x 278, 279–80 (9th Cir. 2002) (rejecting a claim for emotional distress based on claimant's confrontation with a flight attendant because Warsaw creates no exception for injury suffered as a result of intentional conduct).

179. In *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, the claimant was subjected to an intrusive fifteen-minute search before boarding an international flight to Israel. 525 U.S. 155, 163–64 (1999). She was taken to a private security room where she was told to remove her shoes, jacket, and sweater, and to lower her blue jeans to mid-hip, at which point a security guard searched her body outside her clothes by hand. *Id.* Claimant alleged she was traumatized and required medical and psychiatric treatment. *Id.* at 164. She argued that air carriers will escape liability for their intentional torts if passengers are not permitted to pursue personal injury claims outside Warsaw's ambit. *Id.* at 172. What if an airline employee simply wanted to molest a captive passenger? The Supreme Court stated that, assuming the search was an "accident" under Warsaw, "she sustained no bodily injury and could not gain compensation . . . for her solely psychic or psychosomatic injuries." *Id.* It further noted that liability caps may be inapplicable for acts of willful misconduct, suggesting Warsaw would still be the exclusive remedy in such a case. *Id.* at 163 n.7; *see also* Dazo v. Globe Airport Sec. Servs, 295 F.3d 934, 940 (9th Cir. 2002) ("If a plaintiff establishes willful [sic] misconduct by the carrier, Article 25 lifts the Convention's limits on liability, but the Convention remains the exclusive source for the plaintiff's remedy." (citing *Carey v. United Airlines, Inc.*, 255 F.3d. 1044, 1049–51)).

bumped from an international flight for which they held confirmed tickets and boarding passes sued the airline under Section 1981 and the Federal Aviation Act, alleging that they had been discriminated against based on race.<sup>180</sup> Because the dispute arose while claimants were embarking on an international flight, these claims were preempted by Warsaw, which the court held to be the claimants' sole remedy.<sup>181</sup> But under this exclusive remedy, the claimants "would not be able to maintain an action under Article 17 for non-bodily injuries stemming from the discriminatory bumping."<sup>182</sup> As a result, claimants alleging discrimination on international flights may only sue under Warsaw—a treaty that does not allow recovery for racial discrimination.<sup>183</sup> Once again, the court justified its ruling by relying on Warsaw's now-irrelevant<sup>184</sup> policy "to foster the growth of the nascent commercial airline industry."<sup>185</sup>

In another discrimination case, four months after 9/11, the claimant alleged that he was harassed, falsely imprisoned, and defamed.<sup>186</sup> The claimant was allegedly asked very personal questions by an airline employee in a loud voice, attracting other passengers' attention.<sup>187</sup> The employee announced that the claimant would be seated next to a U.S. Marshal, and upon boarding claimant

180. 284 F.3d 352, 355 (2d Cir. 2002).

181. *Id.* at 358–60.

182. *Id.* at 359 ("Article 17's substantive scope extends to all passenger injuries occurring on board the aircraft or in the course of any of the operations of embarking and disembarking—even if the claim is not actionable under the treaty.") (internal quotations and citation omitted).

183. *Id.* at 360; *see also* *Turturro v. Cont'l Airlines*, 128 F. Supp. 2d 170, 180–81 (S.D.N.Y. 2001) (dismissing discrimination claim because it was preempted by Warsaw, despite claimant's argument that "if all federal and state anti-discrimination laws are preempted, domestic airlines will escape all punishment for egregious acts of discrimination on their international flights"); *Waters v. Port Auth.*, 158 F. Supp. 2d 415, 429–430 (D.N.J. 2001) (dismissing claimant's discrimination claims, stating that "although [the] cause of action is grounded in discrimination statutes, the thrust of his claim is one of personal injury. Undoubtedly, this falls within the scope of the Convention and the goal of providing a uniform scheme of liability."); *Brandt v. Am. Airlines*, No. C98-2089 SI, 2000 WL 288393, at \*4 (N.D. Cal. Mar. 13, 2000) (holding that federal discrimination claim was preempted by Article 17 when the conduct complained of occurred on board the aircraft). *But see* *Dasrath v. Cont'l Airlines, Inc.*, 228 F. Supp. 2d 531, 542–43, 543 n.20 (D.N.J. 2002) (holding claimants' discrimination claims seeking declaratory and injunctive relief were not preempted by Warsaw).

184. The Supreme Court has signaled that the policy concern for vulnerable, fledgling airlines may no longer be relevant. *See El Al Isr. Airlines, Ltd.*, 525 U.S. at 170 (1999) ("This exposure inhibited the growth of the *then*-fledgling international airline industry.") (emphasis added); *see also* *Tseng v. El Al Isr. Airlines, Ltd.*, 122 F.3d 99, 107 (2d Cir. 1997) (concluding that with the "increasing strength of the airline industry, the balance has properly shifted away from protecting the carrier and toward protecting the passenger").

185. *King v. Am. Airlines, Inc.*, 284 F.3d 352, 356 (2d Cir. 2002).

186. *Elnajjar v. Northwest Airlines, Inc.*, No. Civ.A. H-04-680, Civ.A. H-04-681, 2005 WL 1949545, at \*1–2 (S.D. Tex. Aug. 15, 2005).

187. *Id.* at \*1.

was seated in a seat other than the one he had reserved and not with his companion.<sup>188</sup> An airline employee allegedly taunted and laughed at the claimant, loudly declaring that the claimant was seated so everyone could watch him.<sup>189</sup> While seated, the employee continually circled the claimant, wishing him a merry Christmas in a sarcastic tone more than a dozen times.<sup>190</sup> As the plane was preparing to depart, two people identifying themselves as U.S. Secret Service agents boarded the airplane and removed claimant and his friend from the airplane.<sup>191</sup> The agents, in full combat gear with automatic weapons, escorted both men off the airplane and through the airport.<sup>192</sup>

The defendant airline moved to dismiss the suit for failure to state a claim upon which relief could be granted, arguing in part that Warsaw preempted the claimant's state law causes of action. The court agreed and held that, even though Warsaw preempted and was therefore the only remedy for most of claimant's allegations, "the claims are not cognizable under Article 17 because Plaintiffs allege only that they suffered mental and emotional harm and not physical injury."<sup>193</sup>

#### IV. THE MONTREAL CONVENTION

Given the disparate rulings stemming from diverse interpretations of "bodily injury," and in light of the several efforts by other nations in previous international conventions to broaden available recovery by substituting "personal injury" for "bodily injury," it was no surprise that amending the bodily injury requirement took priority in the Montreal Convention of 1999.<sup>194</sup> On the first day of the conference, the Convention president set the tone by arguing for a shift in international policy away from protecting fledgling airlines and toward protecting an "individual's right to restitution."<sup>195</sup>

---

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at \*2.

192. *Id.*

193. *Id.* at \*4 (citing *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 162 (1999)).

194. *See generally* Montreal Minutes, *supra* note 13.

195. *Id.* at 37.

The initial balance of interests between the desire on the part of governments to protect the infant airline industry from undue financial burden and the individual's right to restitution in case of accident has been the subject of discussion and review for a significant period of time. This review has certainly to take adequate account of the fact that the aviation industry has matured. Increased sensitivity towards the legitimate interests of the air transport user

The success of the Convention hinged in large part on the participation of the United States, the only “superpower” involved in the Convention. The U.S. delegate recognized that the United States’ “continuing reluctance to schedule and participate in this Conference” stemmed from a perception that agreement could not be reached on four of its key goals.<sup>196</sup> Among these “essential elements” that the “new agreement must include” was a clear provision allowing recovery for mental injury: “[A]s had been contemplated in earlier drafts of the Convention, separate recovery from mental injury in the absence of accompanying physical injury would have to be provided for.”<sup>197</sup> In accordance with that desire, the clear majority of delegates negotiated for abandonment of the bodily injury limitation in favor of broader language. But somehow, in the final days of the Convention, a few delegates managed to convince the entire Convention that the then-current interpretation of bodily injury as established by judicial precedent was broad enough to encompass mental injury sufficiently.<sup>198</sup>

Although the new treaty retains “bodily injury” without textual modification, courts interpreting the meaning of that phrase in the wake of Montreal should take special note of the delegates’ negotiations and the prevailing sentiment in favor of a more permissive interpretation.<sup>199</sup>

#### A. Broader Recovery: *The First Pass*

From day one of the eighteen-day conference, the expansion of allowable damages beyond mere “bodily injury” was at the forefront of negotiations. The delegate from Brazil wanted recovery for mental injury included in the new treaty, noting that the traveling public had

---

requires that the balance of interests should also accommodate the need for a better and swifter resolution of the consequences of an accident.

*Id.*; see also S. EXEC. REP. NO. 108-8, at 2 (2003) (“The new Montreal Convention represents the culmination of decades of efforts by the United States and other countries to establish a regime providing increased protection for international air travelers and shippers . . .”).

196. Montreal Minutes, *supra* note 13, at 44.

197. *Id.*

198. See ICAO, Convention for the Unification of Certain Rules for International Carriage by Air, Explanatory Note for Article 17, May 28, 1999 (entered into force on Nov. 4, 2003), reprinted in S. TREATY DOC. NO. 106-45 (1999) (“Following extensive debate, the Conference decided not to include an express reference to recovery for mental injury, with the intention that the definition of ‘bodily injury’ would continue to evolve from judicial precedent developed under Article 17 of the Warsaw Convention, which uses that term.” (citing Montreal Minutes, *supra* note 13, at 201)).

199. Cf. Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 382 (2d Cir. 2004) (“[W]e interpret the scope of Article 17 in a manner that is consistent with the negotiating history of the Warsaw Convention.”).

already “required” the same “for some time.”<sup>200</sup> The observer representing the European Community agreed that “mental injury as a concept was acceptable for the vast majority of EC member states.”<sup>201</sup> The representative from the Latin American Association of Air and Space Law noted that Latin American legal experts also agreed that “mental injury should be included among the kinds of injury covered.”<sup>202</sup> On the heels of such rhetoric, Sweden’s and Norway’s delegates proposed to add the phrase “or mental” to Article 17, so that it would read as follows: “The carrier is liable for damage sustained in the case of death or bodily *or mental* injury of the passenger . . . .”<sup>203</sup> The Swedish delegate noted that the right to recover for mental injury “should apply whether or not the passenger also suffered bodily injury.”<sup>204</sup>

The proposal enjoyed immediate support from several states, including, but not limited to, Chile, Denmark, France, the United Kingdom, the Dominican Republic, Panama, Lebanon, Namibia, Bahrain, Colombia, Switzerland, Finland, the Vatican, Canada, and Spain.<sup>205</sup>

The approving delegates offered several arguments in support of expanding recovery to include mental injury. Norway insisted that the “bodily injury” limitation fragments rather than unifies international law because many states interpret the phrase differently.<sup>206</sup> Sweden noted that other international transportation agreements allowed recovery for mental injury and that air passengers should be entitled to the same protection.<sup>207</sup> Delegates from a number of countries emphasized the impossibility of parsing mental injury from physical injury.<sup>208</sup> One representative declared it

200. Montreal Minutes, *supra* note 13, at 41.

201. *Id.* at 47.

202. *Id.* at 49.

203. *Id.* at 67 (emphasis added).

204. *Id.*

205. *See id.* at 67–74.

206. *Id.* at 71. (“Bodily injury did not have a universal definition and would lead to different interpretations of the Convention in different States. This has been shown by jurisprudence on the present Convention and also by discussions at the Conference. The present draft did not promote unification of legal rules . . .”).

207. *Id.* at 67.

208. The delegate from Chile stated that “it was not possible to divide human beings up into purely physical or mental elements.” *Id.* The delegate from the United Kingdom followed by saying that “one could not sensibly distinguish between passengers who had suffered solely physical injury from those who had suffered solely a mental injury.” *Id.* at 68. The delegate from Namibia similarly stated that:

[A]s a matter of policy and law it was inconceivable that in the interest of modernization one could justify a differentiation between aviation accident victims solely on the basis of the type of injury they had suffered despite the fact that both types of injury resulted from the same accident.

an ethical obligation to protect passengers' rights.<sup>209</sup> In response to concerns voiced by a few dissenting countries that any passenger could recover for "fear of flying,"<sup>210</sup> delegates from several states reminded the Convention that a claimant would still be required to overcome the burden of proof with credible medical evidence.<sup>211</sup>

### B. Broader Recovery: The Second Pass

Other delegates agreed that there ought to be recovery for mental injury but suggested different wording. Multiple nations, for example, advocated replacing "bodily injury" with "personal injury."<sup>212</sup> Damage to "health" was also a suggested alternative.<sup>213</sup> The representative for Pakistan proposed removal of the term "bodily," pointing out that, standing alone, the term "injury" encompassed both mental and bodily damage.<sup>214</sup> The delegate from Chile suggested permitting recovery for "mental injury which had an adverse effect on health."<sup>215</sup> The following definition of "mental injury" was also proposed: "In this Article, the term 'mental injury' in a case *where there is no accompanying bodily injury* means a mental injury which has a substantial adverse effect on health."<sup>216</sup>

Still, other states, while voicing a desire for mental injury recovery, declared that it was already available under Warsaw's original text. The German delegate argued that the French phrase "lésion corporelle" already encompassed mental injury: "[T]he German wording included 'injured or otherwise harmed health wise.'<sup>217</sup> According to the German delegate, "only the English

*Id.* at 72. Finally, the delegate from the Russian Federation summarized by stating "that [the] single term 'health' was used in view of the difficulty of separating the body from the psyche." *Id.* at 112.

209. The delegate from the Dominican Republic stated that "[p]assengers' rights had to be protected and there was no legal or ethical reason to deny this." *Id.* at 68; *see also id.* at 73 (supporting recovery for mental injury, the delegate of the Holy See added nations should "protect the interests of the consumers in international carriage by air and the need for equitable compensation based on the principle of restitution").

210. The observer for the International Union of Aviation Insurers argued that fear of flying and other such anxieties would give rise to fraudulent claims and protracted litigation. *Id.* at 69.

211. *See id.* at 71–74, 116.

212. *Id.* at 71–72, 74.

213. *Id.* at 112 ("The Delegate of the Russian Federation . . . proposed that reference be made . . . to 'damages to health,' averring that it would reflect the views expressed as the term 'health' encompassed both bodily and mental injury.>").

214. *Id.* at 70. The Pakistani delegate also noted that "injury" appears in another Article within the treaty. *Id.* at 70. Removing "bodily" would streamline the treaty and allow courts to determine recovery without arbitrary confinement to the nature of the injury.

215. *Id.* at 112.

216. *Id.* at 115 (emphasis added).

217. *Id.* at 68.

version of the text needed to be amended in order to cover both elements.”<sup>218</sup> Several other states reiterated this notion. The delegate from Saudi Arabia pointed out that the Arabic text for “bodily” injury could encompass both mental and physical injury.<sup>219</sup> Representatives from the Ukraine,<sup>220</sup> Uzbekistan,<sup>221</sup> Spain,<sup>222</sup> the Russian Federation,<sup>223</sup> the Syrian Arab Republic,<sup>224</sup> and Cameroon<sup>225</sup> also maintained that mental injury was already included in the Warsaw text.

Germany’s conclusion—that “lésion corporelle” covers mental injury—clashes with the analysis and result reached by the U.S. Supreme Court in *Eastern Airlines v. Floyd*, which held that “neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that ‘lésion corporelle’ should be translated other than as ‘bodily injury’—a narrow meaning excluding purely mental injuries.”<sup>226</sup> Curiously, the French delegate “confirmed that ‘lésion corporelle’ did indeed cover both physical and mental injury, [and that] there was always coverage of the problem as a whole.”<sup>227</sup> The French delegate’s statement that “lésion corporelle” *always* included mental injury seemingly refutes the Court’s analysis of French law in *Floyd*.

Despite extensive debate on how to reach the solution, a consensus emerged that the new treaty should permit recovery for mental injury in one way or another.<sup>228</sup> The few countries expressing reservations wanted to limit recovery for mental injury to either that

218. *Id.* at 68.

219. *Id.* at 69.

220. *Id.* at 71.

221. *Id.* at 74.

222. *Id.*

223. *Id.* at 112.

224. *Id.* at 115.

225. *Id.* at 116.

226. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 542 (1991).

227. Montreal Minutes, *supra* note 13, at 68. The delegate from the United Kingdom also recognized that, while the French version included mental injury, the English version did not. As a result, the delegate “had no difficulty with the text of Article 16, paragraph 2 as drafted in the French language version, but did have some concerns with the English to the effect that something was missing as compared to the French.” *Id.* at 175.

228. *Id.* at 117 (“The Chairman noted that there was certainly an emerging consensus that . . . mental injury independent of bodily injury would be covered only where it resulted in a substantial or significant impairment of the health of the passenger.”); *id.* at 120 (“[T]he Group . . . had just agreed by consensus on a definition of damages that was somewhat broader than before as it encompassed mental injury which was not closely associated with bodily injury.”); *id.* at 121 (noting that “a compromise had just been reached that pure mental injury was recoverable”); *id.* at 167 (“In consultations within the group there had emerged a consensus on the first issue which had arisen, that being the scope of liability in respect of mental injury.”); *id.* at 186 (stating that the Chairman reiterated that the “consensus which had been arrived at in relation to mental injury”).

which *directly results from* bodily injury or that which is *associated with* bodily injury.<sup>229</sup>

The most ardent critic was not a signatory state but an observer from the IATA who argued that half of the passengers on any given flight experience fear of flying and that any slightly abnormal event could potentially cause mental injury. “[I]f mental injury were included as a separate compensable of Article 17, this would lead to escalated claims and would be highly prejudicial to the interests of air carriers . . . .”<sup>230</sup> The airline organization argued that more and more lawsuits would result in costly litigation and costly settlements to avoid litigation, as well as higher insurance costs for airlines. Other countries, including China,<sup>231</sup> Yemen,<sup>232</sup> Mauritius,<sup>233</sup> Egypt,<sup>234</sup> Cameroon,<sup>235</sup> India,<sup>236</sup> Algeria,<sup>237</sup> and Ethiopia<sup>238</sup> echoed concerns regarding the vagueness of mental injury and the concomitant risk of fraudulent claims.

But even the most skeptical delegates agreed that recovery for mental injury associated with or resulting from bodily injury ought to be permitted. In fact, the Convention’s chairman repeatedly announced that a consensus had been reached.<sup>239</sup> The French delegate stated that “the Group . . . had just agreed by consensus on a definition of damages that was somewhat broader than before as it encompassed mental injury which was not closely associated with bodily injury.”<sup>240</sup>

On the tenth day of the conference, the chairman presented a “draft consensus package.” This “package” included three elements: (1) mental injury would include not only mental injury associated with or resulting from bodily injury but also mental injury *independent* of bodily injury if it significantly impaired the health of the passenger; (2) the word “bodily” qualifying “injury” was deleted; and (3) a new paragraph defined “injury” as “bodily injury, or mental injury which significantly impairs the health of the passenger.”<sup>241</sup>

---

229. *See id.* at 70–72.

230. *Id.* at 73.

231. *Id.* at 70.

232. *Id.* at 73.

233. *Id.* at 71.

234. *Id.* at 70.

235. *Id.*

236. *Id.* at 142.

237. *Id.* at 72.

238. *Id.* at 71.

239. *Id.* at 116–17, 167, 186.

240. *Id.* at 120. The delegate from Cameroon also stated that “a compromise had just been reached that pure mental injury was recoverable.” *Id.* at 121.

241. *Id.* at 167 (emphasis added).



### C. *Broadsided and Passed Over*

Notwithstanding the facts that (1) the majority of delegates agreed to add mental injury independent of bodily injury as a ground for compensation; (2) several nations already recognized recovery for mental injury by interpreting the old Warsaw text to include mental injury; and (3) the chairman presented a “consensus” draft that embodied this accord, somehow no change was made to the 1929 Warsaw text.

It is difficult to discern how, after such apparent consensus, the tables turned. Certainly, criticism from a few countries evidenced a fear that mental injury as an independent head of damages was too vague. India, for example, found it difficult “to agree to any inclusion of the concept of mental injury as presented”; it argued that “a situation did not exist today to introduce the new concept of mental injury independent of bodily injury, as there was no way it could be measured or quantified.”<sup>242</sup>

But the most likely reason the Montreal Convention retained the reference to bodily injury stems from a fear of disrupting developed jurisprudence. Several of the more “progressive” nations that initially pushed for mental injury recovery viewed the new compromise language as a step backward.<sup>243</sup> If their jurisprudence already recognized mental injury under the old text, why adopt new language that restricted mental injury recovery to that which *results from* bodily injury?<sup>244</sup>

Ironically, the United States may have been the catalyst. In what appears to be a flatly wrong interpretation of U.S. jurisprudence,<sup>245</sup> the U.S. delegate announced that “[t]he general prevailing attitude in the Courts interpreting the Warsaw Convention in the United States was that mental injury *associated with* bodily injury had generally been recoverable in cases coming under the Warsaw Convention.”<sup>246</sup> As noted in Part III, the majority trend allows recovery only for mental injuries *resulting from* bodily injury.<sup>247</sup> Based on his flawed premise, the U.S. delegate professed

242. *Id.* at 142. The Indian delegate continued by stating that “[t]he only injury that could be recognized at present was bodily injury, and mental injury would necessarily have to be an outcome of that bodily injury.” *Id.*

243. *Id.* at 112–13. The delegate for the United States questioned “whether the additional language being considered would swallow up mental injuries associated with bodily injuries which might already be recoverable . . . and which might be rendered non-recoverable by the suggested qualifications.” *Id.* at 113.

244. *See id.* at 112.

245. *See Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 399 (2d Cir. 2004) (stating the United States delegate’s “understanding of applicable case law is incorrect”).

246. Montreal Minutes, *supra* note 13, at 112 (emphasis added).

247. *See Ehrlich*, 360 F.3d at 376 (“The ‘mainstream view’ adhered to by courts that have addressed the scope of Article 17 and considered the issue before us ‘is that

that “if the only progress which the Conference were able to make would be to refer to mental injury *resulting from* bodily injury, then it might, in fact, be a step backwards from where the state of [U.S.] jurisprudence on mental injury was to begin with.”<sup>248</sup>

It is very possible, even likely, that the Montreal Convention failed to give textual recognition to mental injury due to this misstatement of U.S. jurisprudence. The very nation that reluctantly joined the conference on the condition that it recognize the “essential element” of “separate recovery from mental injury in the absence of accompanying physical injury”<sup>249</sup> was likely the same nation responsible for retaining the 1929 phrase “bodily injury.”

Not only does the retention of “bodily injury” conflict with the prevailing sentiment of the delegates at Montreal, it also undermines the Convention’s goal of achieving uniformity. China, Egypt, Cameroon, the United Arab Emirates, and Senegal, for example, maintain that any recovery for mental injury, if at all, must be directly tied to and result from bodily injury.<sup>250</sup> By contrast, Germany, France, the Russian Federation, Spain, and others represented that bodily injury already includes recovery for mental injury.<sup>251</sup> The United Kingdom, New Zealand, Slovenia, Lebanon, Switzerland, and Canada all advocated recovery for mental injury regardless of bodily injury.<sup>252</sup> Despite these deviations, the chairman announced that each state’s judicial precedent should remain undisturbed.<sup>253</sup> In the first days of the Montreal Convention, the need for uniformity was emphasized.<sup>254</sup> Maintaining the 1929 language when the interpretation of “bodily injury” among signatory nations has been fragmented prevents the realization of this goal.

#### D. Broader Recovery: A Passing Hope

Domestically, a question arises as to whether U.S. courts will view the retention of “bodily injury” as ratifying the majority rule, which allows mental injury recovery only when it *results from* bodily injury. A strong argument can be made that, despite the retention of

---

recovery for mental injuries is permitted only to the extent the [emotional] distress is caused by the physical injuries sustained.” (quoting *In re Air Crash at Little Rock Ark.*, on June 1, 1999, 291 F.3d 503, 509 (8th Cir. 2002), *cert. denied sub nom* Lloyd v. Am. Airlines, Inc., 537 U.S. 974 (2002)).

248. Montreal Minutes, *supra* note 13, at 112 (emphasis added).

249. *Id.* at 44.

250. *Id.* at 70 (China, Egypt, Cameroon); *id.* at 72 (Senegal and the United Arab Emirates).

251. *Id.* at 68 (Germany and France); *id.* at 74 (Spain); *id.* at 112 (Russian Federation).

252. *Id.* at 113 (United Kingdom, Sweden, Switzerland, Canada); *id.* at 114 (Slovenia and Lebanon).

253. *Id.* at 201.

254. *Id.* at 37, 46–47.

the “bodily injury” language, the Montreal Convention broadened allowable recovery and that, at the very least, recovery for mental injury associated with bodily injury is now available.

Using *Eastern Airlines v. Floyd* as a template, courts must review the negotiation history of the Montreal Convention as well as the policies that inform the Convention.<sup>255</sup> Unlike the negotiations from the 1929 Warsaw Convention,<sup>256</sup> protection of the nascent airline industry did not frame the debate in Montreal. The great majority of comments voiced in Montreal espoused modernization, uniformity among signatories, and passenger protection. Whereas the bodily injury limitation in the 1920s “was deliberately consistent with the primary purpose of the Contracting Parties to the Convention, to limit the liability of air carriers in order to foster the growth of a then fledgling commercial aviation industry,”<sup>257</sup> the retention of the bodily injury limitation in 1999 must reflect the “[i]ncreased sensitivity towards the legitimate interests of the air transport user.”<sup>258</sup> Courts investigating the intent of the delegates in negotiating the new treaty should start with this well-recognized and fundamental policy shift.

Beyond policy, courts must still interpret the text of the Convention. In contrast to the Warsaw record, the Montreal record is replete with delegates’ calls to expand “bodily injury” to include recovery for mental injury.<sup>259</sup> The delegates expressly acknowledged that the record made in Montreal would inform judicial decision making.<sup>260</sup> The Egyptian delegate suggested that divergent interpretations of “bodily injury” by various courts should no longer be problematic if “the record of the proceedings of the Conference reflect[ed] that the term ‘bodily injury’ covered mental injury

255. See *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 546 (1991); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 371 n.4 (2d Cir. 2004) (noting the policy change in the Montreal Convention from protecting the airline industry to protecting passengers).

256. See generally Warsaw Minutes, *supra* note 19.

257. Montreal Minutes, *supra* note 13, at 76. The Australian delegate continued by stressing that “it was absolutely essential that the language of the text adopted not be ambiguous in order that courts not conclude that the drafters’ intention of this issue was to exclude altogether liability for mental injury of any kind.” *Id.*

258. *Id.* at 37.

259. Compare Warsaw Minutes, *supra* note 19, with Montreal Minutes, *supra* note 13.

260. See Montreal Minutes, *supra* note 13, at 114.

[W]hat the Courts had done was to try and understand the intention of the Contracting Parties in the development of a given Convention, for the purpose of interpretation. . . . It was therefore necessary for the Group to be very clear in its own intention and to have it duly reflected in both the language of Article 16, paragraph 1, and in the record of the proceedings.

*Id.*

associated with bodily injury.”<sup>261</sup> The delegate continued by noting that the record could “show the intent behind that term and would give a unified meaning to it.”<sup>262</sup> At Montreal, the clear majority of states claimed a desire to expand available recovery for mental injury.<sup>263</sup> Conversely, no such record informed the judiciary’s analysis under Warsaw.<sup>264</sup>

#### *E. Broader Recovery Passed By*

Unfortunately, when the Second Circuit juxtaposed the two treaties in a 2004 decision, it passed up an opportunity to recognize broader recovery for “bodily injury” under the Montreal Convention.<sup>265</sup>

In that case, an arrestor bed abruptly stopped an American Eagle Saab 340 that had overshot the runway before the plane plunged into the waters of Thurston Bay.<sup>266</sup> The Ehrlichs alleged both physical and mental injuries stemming from the crash landing and evacuation.<sup>267</sup> The airline moved for summary judgment on the mental injury claims, arguing that they did not flow from bodily injuries and that carriers were liable under Warsaw only for “psychological injuries that were caused by bodily injuries.”<sup>268</sup> In other words, the back and knee injuries did not themselves cause the plaintiffs’ nightmares, hypertension, and fear of death; instead, because these mental injuries resulted from the near-death crash, they were not cognizable.<sup>269</sup> The Ehrlichs contended that carriers could be liable under Warsaw if a mental injury *accompanied* a physical injury, irrespective of whether the bruised back or the crash-landing gave rise to imminent fear of death.<sup>270</sup>

The accident occurred before ratification of the Montreal Convention, leaving Warsaw as the governing authority. Despite

261. *Id.* at 112.

262. *Id.*

263. *Id.* at 72 (“The delegate of Sweden was pleased to note that none of the Delegates has spoken for total exclusion of mental injuries. There was a consensus that mental injuries should be compensable, but with differing views on whether all or just some forms of mental injury should be compensated.”); *see also id.* at 120 (“[T]he Group . . . had just agreed by consensus on a definition of damages that was somewhat broader than before as it encompassed mental injury which was not closely associated with bodily injury.”).

264. *Compare* Warsaw Minutes, *supra* note 19, *with* Montreal Minutes, *supra* note 13.

265. *Ehrlich v. Am. Airlines*, 360 F.3d 366, 400 (2d Cir. 2004).

266. *Id.* at 367 n.1 (citing William J. Hughes FAA Technical Ctr., Atlantic City Int’l Airport, N.J., *Arrestor Bed Saves The Day at JFK*, INTERCOM, May 1999, available at <http://www.tc.faa.gov/intercom/may99.pdf>).

267. *Id.* at 368.

268. *Id.* at 368–69.

269. *See id.*

270. *Id.* at 369.

recognizing that it could not “offer [an] opinion as to whether, or under what circumstances, carriers may be held liable for mental injuries under Article 17(1) of the Montreal Convention,”<sup>271</sup> the court took great pains to address whether and how the Montreal Convention might apply.<sup>272</sup> Its characterization of the negotiations at Montreal is unsettling in three respects.

First, the court rejected the U.S. delegate’s characterization of how U.S. courts had interpreted bodily injury.<sup>273</sup> Instead, the court embraced the approach that recovery for mental injury is restricted to that which flows from, or is caused by, bodily injury.<sup>274</sup> This narrow reading of recoverable mental injury as that which results from physical injury is precisely the “step backwards” the U.S. delegation in Montreal hoped to avoid.<sup>275</sup> The court ascribed no weight to the U.S. delegate’s warning that this interpretation would be a “step backwards.” Instead, it described the delegate’s statements that mental injury was recoverable when associated with bodily injury as “incorrect” and “reject[ed] them as an unreasonable view.”<sup>276</sup> Flatly dismissing the delegate’s position as “unreasonable” and “incorrect” with little, if any, legal analysis undercuts the court’s own admonition that “we interpret the scope of Article 17 in a manner that is consistent with the negotiating history.”<sup>277</sup>

Second, the court repeats *Floyd’s* analysis of “lésion corporelle.” While the court may have felt compelled to adhere to *Floyd’s* ruling under *stare decisis*, it was not bound to parrot the same analysis, especially in light of new evidence. At the Montreal Convention, the French delegate “confirmed that ‘lésion corporelle’ did indeed cover both physical and mental injury, there was always coverage of the problem as a whole.”<sup>278</sup> While recognizing that it was obligated to examine the French text and consider the French legal meaning of the French phrase, the court ignored the French delegate’s statement, reverting to *Floyd’s* cursory analysis.<sup>279</sup>

271. *Id.* at 394 n.18. The *Ehrlich* court ruled that its instant issue was governed instead by the Warsaw Convention. *Id.*

272. *Id.*

273. *Id.* at 399.

274. *Id.*

275. Montreal Minutes, *supra* note 13, at 112 (“If the only progress which the Conference were able to make would be to refer to mental injury resulting from bodily injury, then that might, in fact, be a step backwards from where the state of American jurisprudence on mental injury was to begin with.”).

276. *Ehrlich*, 360 F.3d at 399–400.

277. *Id.* at 382. Although the court was referring to interpretation of the Warsaw treaty, it is logical to expect the same interpretive principle to apply to the interpretation of the Montreal Convention.

278. Montreal Minutes, *supra* note 13, at 68.

279. *Ehrlich*, 360 F.3d at 379–80 (noting that while “[s]uch damages were available in France when the Warsaw Convention was drafted and signed,” the *Floyd* Court “limited the scope of French materials it would consider as part of its analysis” to

Third, the *Ehrlich* court characterized the Montreal negotiations on mental injury as “divergent”<sup>280</sup> and as “a discordant chorus of voices.”<sup>281</sup> The court highlighted the dissenting voices of China, Cameroon, Egypt, Senegal and Yemen, and diluted the general consensus for mental injury recovery by depicting as antagonistic those factions that advocated differing ways to reach a common result.<sup>282</sup> It is true that not every delegate endorsed the exact language proffered by Sweden and Norway in their initial proposal, but the repeated declarations by both the chairman and the delegates that a consensus had been reached<sup>283</sup> belies the court’s conclusion that the negotiations “demonstrate that the Montreal Conference delegates did not share a common understanding.”<sup>284</sup>

While the court casts its holding as a Warsaw opinion, its detailed analysis of the Montreal Convention threatens the progress made in Montreal. 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.<sup>285</sup>

## V. CONCLUSION

In regulating international commercial air transportation before a broad market for air travel had developed, the 1929 Warsaw Convention was ahead of its time. Arbitrary damages caps, preclusion of punitive awards, and restriction of recovery to bodily injury advanced a policy to protect an emerging airline industry. As aviation innovations ushered in an era of global commercial air

---

those decisions that “involve a mental injury caused by fright or shock”) (citation omitted).

280. *Id.* at 393.

281. *Id.* at 391.

282. *See id.* at 392–93.

283. Montreal Minutes, *supra* note 13, at 116–17, 167, 186.

284. *Ehrlich*, 360 F.3d. at 394.

285. *See, e.g.*, *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1007, 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 injuries”); *Booker v. BWIA W. Indies Airways Ltd.*, No. 06-CV-2146(RER), 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 CV 8992(LBS), 2006 WL 2742051, at \*1, 4 (S.D.N.Y. Sept. 26, 2006) (citing *Ehrlich* for its conclusion that 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”).

travel, the once-nascent enterprise evolved into a robust and profitable industry. Although the policy of protecting the industry was no longer necessary, the treaty's strictures still applied.

To address perceived inequities, courts stretched to interpret the Warsaw language, and the resulting and fragmented judicial precedent threatened the uniformity Warsaw had hoped to achieve. Nations frequently convened to expand recovery beyond bodily injury but ultimately achieved only a patchwork of contractual agreements. The most comprehensive of such conventions, in Montreal, successfully modernized its dated progenitor in numerous regards but notably failed to alter Warsaw's language limiting recovery to "bodily injury."

The Convention chairman explained that the retention of the phrase was meant to allow signatory states to rely on and continue to develop their individual judicial precedents. Setting aside the fact that this decision admittedly undermined a major goal of the treaty—uniformity—courts in the United States should closely analyze the delegates' negotiations in developing new precedent. The U.S. Supreme Court has encouraged tribunals to go beyond the treaty's text by studying the history of the negotiations underlying the Montreal Convention.

It can be argued that retaining the language of "bodily injury" signals a validation of the majority trend, which allows recovery for mental injury only if it flows from bodily injury. But a thorough review of the negotiations in Montreal reveals that (1) multiple nations traditionally interpreted "bodily injury" as a form of personal injury; (2) France, as the presumptively superior interpreter of the original French phrase, always understood it to include mental injury; and (3) a great majority of delegates advocated for broader recovery than that afforded by "bodily injury," to say nothing of the fact that the U.S. delegate misrepresented U.S. precedent as more permissive of recovery than the majority trend. Because the policy and negotiation history behind the Montreal Convention differed dramatically from the Warsaw Convention, courts faced with claims under the Montreal Convention must undertake a decidedly different analysis than those courts that addressed similar claims under Warsaw.