July 2015

Eastern Airlines v. Floyd: Airline Passengers Denied Recovery for Emotional Distress Under The Warsaw Convention

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EASTERN AIRLINES V. FLOYD: AIRLINE PASSENGERS DENIED RECOVERY FOR EMOTIONAL DISTRESS UNDER THE WARSAW CONVENTION

INTRODUCTION

Close your eyes and imagine yourself flying over the Atlantic Ocean en route to the Bahamas for a week of relaxation in the sunshine. Suddenly, one of the aircraft's engines fails, and the plane must turn around and return to the airport.

You are now returning to land, without the benefit of one engine. To your horror, the remaining two engines fail, and the plane plummets towards the ocean. Miraculously, one engine regains its power before the plane hits water, and you land safely at the airport.

To what extent have you, the passenger, experienced fright, horror, or shock? What will be the psychological effects of the trauma you have just experienced? Should you be compensated for these types of emotional injuries?

In *Eastern Airlines v. Floyd*,[1] the U.S. Supreme Court considered the novel issue of whether the Warsaw Convention[2] allows recovery for mental distress[3] in the absence of any bodily injury. Historically, district and appellate courts have disagreed[4] in their attempts to translate the meaning of the language in the Warsaw Convention.[5] By using various analyses in attempting to determine the intent of the

[1] 111 S. Ct. 1489 (1991).

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (hereinafter Warsaw Convention). Article 17 sets forth conditions under which an international air carrier can be held liable for injuries to passengers. Notes, following 49 U.S.C.A. § 1502 (West 1976).

[3] "Mental distress" is one of several ways of referring to this type of injury (mental injury absent any physical manifestation). Other terms often used interchangeably with "mental distress" include emotional distress, psychological injury, mental trauma, or psychic injury.

[4] *Floyd*, 111 S. Ct. at 1493. *See, e.g.*, Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1156-57 (D.N.M. 1973), finding French law "distinguishes sharply between bodily injury (lesion corporelle) and mental injury (lesion mentale)" and that the Warsaw Convention does not include recovery for purely emotional distress; Palagonia v. TWA, 110 Misc. 2d 478, 442 N.Y.S. 2d 670 (1978), finding "term 'lesion corporelle' includes concept of mental injury as a recoverable damage, even in absence of concomitant physical manifestation."

[5] The only authentic text of the Warsaw Convention is in French, which must govern any analysis. Air France v. Saks, 470 U.S. 392, 399 (1985). The French text reads as follows:

> "Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lesion corporelle* subie pay un voyuageur lorsque l'accident qui a cause le dommage s'est produit a board de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement." 49 Stat. 3005 (emphasis added).

The American Translation of this text as employed by the Senate when ratifying the Convention reads as follows:

> The carrier shall be liable for damage sustained *in the event of the death or wounding*

drafters of the Warsaw Convention, the courts have succeeded in finding different meanings to the same translation.[6] The *Floyd* Court ended the lower courts' confusion. The Court held that the narrow translation of "bodily injury" of the relevant French phrase "lesion corporelle" excludes purely mental injuries.[7]

This Note reviews prior district court and appellate court decisions regarding the translation and scope of "bodily injury." Next, the Note discusses the Court's analysis in *Floyd*, including the arguments for and against allowing recovery for emotional distress under the Warsaw Convention. Finally, the Note examines the ramifications of the *Floyd* Court's interpretation and the uncertainties which remain in this area of the law.

BACKGROUND

Historical Overview

The Warsaw Convention arose out of several international conferences held in Paris beginning in 1925.[8] At that time, air travel on a commercial basis had just begun.[9] The framers of the Warsaw Convention realized that uniformity and regulation would best effectuate and encourage the growth of this developing industry.[10]

The purpose of the Warsaw Convention was twofold.[11] First, the drafters intended to set some limit on an air carrier's liability for lost cargo.[12] Secondly, the drafters sought to set predictable and internationally uniform terms and limits to aid the growth of the airline industry.[13] The framers felt the key to achieving uniformity was to create an international standard, one which would be free from the control of any one signatory country.[14]

The parties to the Warsaw Convention met initially in Paris.[15] As a result, the only authentic text of the Warsaw Convention is drawn in French.[16] When

of a passenger or any other bodily injury suffered by a passenger, if the accident which caused damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (emphasis added).

[6] *Compare* Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322 (S.D. Cal. 1975) (finding purely emotional injury covered) *with Burnett*, 368 F. Supp. 1152 (excluding purely mental injury).

[7] *Floyd*, 111 S. Ct. at 1490.

[8] For a discussion of the background of the Warsaw Convention, see Block v. Compagnie Nationale Air France, 386 F.2d 323, 326-27 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[9] Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1467 (11th Cir. 1989).

[10] Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 13 (English Translation by Robert C. Horner and Didier Legrez, 1975) (hereinafter Minutes).

[11] TWA v. Franklin Mint Corp., 466 U.S. 243, 256 (1984), *reh'g denied*, 467 U.S. 1231 (1984).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] See *Saks*, 470 U.S. at 401.

[16] *Id.* at 397.

interpreting any provision of the Warsaw Convention, the authentic French text must guide one's analysis.[17] Thus, when analyzing the French text for interpretation, the intent of the drafters must be ascertained from the French legal meaning of the terms used.[18]

Uncertainty in Examination of Authentic French Text

Uncertainty over the French legal meaning of the terms[19] used in the Warsaw Convention has been the source of unpredictability among courts regarding the scope of compensable injuries under Article 17.[20] When the United States adopted the Warsaw Convention in 1934, the Senate employed the following text:

> 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. . .on board the aircraft. . .[21]

The pertinent French text provides that a carrier is liable for damage in the event of "mort, de blessure ou de toute autre lesion corporelle."[22] Thus, the hair-splitting issue is whether "lesion corporelle," translated as bodily injury, encompasses claims for purely emotional distress.[23]

Over the years, courts and commentators have performed gymnastics in reaching different conclusions about the scope of "lesion corporelle."[24] Various analyses have been used to determine the drafters' intent by their use of this particular language.[25]

A common analysis is to examine the French legal[26] meaning of "lesion corporelle" to determine the drafters' intent.[27] Courts tend to first consult bilingual dictionaries,[28] which suggest that "bodily injury" is the correct translation of "lesion

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[17] *Id.* at 399.
[18] *Id.* For a thorough discussion concerning French legal meaning for guidance in interpretation, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-500 (1967).
[19] "Lesion corporelle" (bodily injury) is the relevant term for purposes of this discussion.
[20] *Floyd*, 111 S. Ct. at 1494-96. Article 17 of the Warsaw Convention creates a presumption of liability for injuries sustained by passengers as a result of an accident on board an aircraft. *See* Warsaw Convention, *supra* note 2.
[21] 49 Stat. 3018 (emphasis added).
[22] 49 Stat. 3005. The English translation reads "death, wounding or any other bodily injury." 49 Stat. 3018.
[23] *Floyd*, 111 S. Ct. at 1494.
[24] *See generally* Lowenfeld & Mendelsohn, *supra* note 19.
[25] *See* Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle*, 25 TEX. INT'L L.J. 127, 131-42 (1990).
[26] *See generally Saks*, 470 U.S. 392. French legal meaning may be ascertained by examining French legal materials as well as considering the linguistic meaning of the words. *Id.*
[27] *Floyd*, 111 S. Ct. at 1494.
[28] *Id.*

corporelle."[29] Such a linguistic interpretation would necessarily preclude any claims without an accompanying bodily or physical injury.[30]

Using a slightly different approach, the court in *Palagonia v. Trans World Airlines* [31]delved deeper into the French *legal* meaning rather than relying on the dictionary or literal translation.[32] The *Palagonia* court found persuasive the fact that experts in French Civil law drafted the original text of the Convention.[33] French Civil law did not recognize a categorical distinction between physical and mental damages.[34] That is, French Civil law allows recovery for both types of damages.[35] Therefore, the *Palagonia* court limited their inquiry to this legal meaning of the French text. The court concluded that 'lesion corporelle' " includes the concept of mental injury as a recovery for damage, even absent concomitant physical manifestation."[36]

Other courts recognize that nothing in either historical French legal text nor the Minutes of the Warsaw Convention itself indicates whether the drafters intended that "lesion corporelle" specifically includes or excludes emotional distress as a compensable injury.[37] This analysis proceeds under the premise that since the drafters made no attempt to define what they meant by injury, it is unnecessary to inquire into the precise meaning of "lesion corporelle."[38]

Subsequent Conduct of the Parties to the Warsaw Convention

In *Air France v. Saks*,[39] the Court stated that "reference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps

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[29] *Id. See also Burnett*, 368 F. Supp. 1152 at 1156-57, finding sharp distinction between bodily injury (lesion corporelle) and mental injury (lesion mentale).

[30] *Floyd*, 111 S. Ct. at 1494-95 n.5.

[31] 110 Misc. 2d 478, 442 N.Y.S. 2d 670 (1978).

[32] *Id.* at 480-82, 442 N.Y.S. 2d at 672-76.

[33] *Id.* at 480, 442 N.Y.S. 2d. at 672..

[34] *Id.* at 481, 442 N.Y.S. 2d. at 673. The court relied heavily on testimony by Professor Rene H. Mankiewicz, an internationally known expert on the Warsaw Convention and aviation law. Professor Mankiewicz further testified to the German translation of "lesion corporelle" which allows recovery for ". . . any other harm to health of the person." Germany thus includes recognition of emotional injuries in its translation of "lesion corporelle". *Id. See also* Mankiewicz, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER (1981).

[35] *Palagonia*, 110 Misc. 2d. at 481, 442 N.Y.S. 2d at 673.

[36] *Id.* at 478, 442 N.Y.S. 2d at 671. The court later noted that they were not applying French law in the choice of law sense but looking at the specific meaning of lesion corporelle as used in French law. *Id.* at 482, 442 N.Y.S.2d at 676.

[37] Rosman v. TWA, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S. 2d. 97 (1974). The court proceeded to find the ordinary meaning of bodily injury connotes a physical injury and thus excluded recovery for mental injuries unaccompanied by physical manifestations. *Id.* at 400, 314 N.E. at 857, 358 N.Y.S. 2d. at 110.

[38] *See* Lowenfeld, *Hijacking, Warsaw and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM., 345, 347-49 (1973), expressing the opinion that no one "can get any clue to the solution of [the] problem by looking to France-either the French language or French law." *Id.* at 348-49.

[39] 470 U.S. 392 (1985).

clarify the meaning of the term."[40] In 1966, several parties to the Warsaw Convention met at Montreal to discuss a re-establishment of the Warsaw Convention.[41] The parties subsequently formed the Montreal Agreement, which modified the Warsaw Convention in the United States.[42]

While the signatory countries at Montreal did not discuss whether Article 17 provided recovery for purely emotional injuries,[43] the Montreal Agreement substituted the phrase "personal injury" for "wounding or other bodily injury" several times.[44] Relying on this change in wording, the court in *Krystal v. British Overseas Airways Corp.*[45] found that the Montreal Agreement permitted recovery for mental distress under the Warsaw Convention.[46]

In another attempt to amend the Warsaw Convention, 55 countries met in 1971 at Guatemala City and drafted a protocol which again resulted in a change of liability for air carriers.[47] As with the Montreal Agreement, the English text substituted "personal injury" for "wounding or other bodily injury,"[48] while the French text remained "lesion corporelle" in Article 17.[49] However, while this amendment may be persuasive, it cannot be considered controlling as the United States has not yet ratified the Protocol.[50]

Apparently, only one other signatory nation has addressed the question of compensation for purely mental injuries under the Warsaw Convention.[51] The Supreme Court of Israel entertained an action in which passengers sought recovery for emotional injuries arising from a hijacking.[52] The Israeli court examined the

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[40] *Id.* at 403. The court in *Saks* defined the term "accident" in Article 17 as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405.

[41] *See* Lowenfeld, *supra* note 38 at 346. The focus of this meeting concerned raising the carriers' limit of liability as well as disposal of the due care defense retained by air carriers.

[42] 31 Fed. Reg. 7302 (1966).

[43] *See* Lowenfeld, *supra* note 38.

[44] *Floyd*, 872 F.2d at 1474. The *Floyd* court considered this evidence another factor in allowing recovery for purely mental injuries. *Id.*

[45] 403 F. Supp. 1322 (S.D. Cal. 1975).

[46] *Id.* at 1323. The court rejected defendant's argument that the change in wording from "death, wounding or other bodily injury" to "death or personal injury" had no legal significance and was necessary only to accommodate printing space in passengers' ticket booklets to provide them with a warning. *Id.*

[47] *Saks*, 470 U.S. at 403, noting imposition of liability for "event" causing death or injury rather than "accident." *See also* Mankiewicz, *The 1971 Protocol of Guatemala City*, 38 J. AIR L. & COM. 519 (1972).

[48] *Floyd*, 872 F.2d at 1475.

[49] *Id.*

[50] Day v. TWA, 528 F.2d 31, 36 (1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977). It should be noted, however, that the Guatemala City Protocol has been considered by the U.S. Supreme Court in textual interpretation. *Saks*, 470 U.S. at 403. In *Saks*, the court looked at the Protocol as evidence of the subsequent interpretations of the Conventions' signatories which aided in clarification of the meaning of the term "accident." *Id.*

[51] *Floyd*, 111 S. Ct. at 1501.

[52] *Id.* at 1501, citing Cie Air France v. Teichner, 39 Revue Francaise de Droit Aerien at 243, *reprinted in* 23 EUR TR.L. 87, 102, (1988), and noting that the only published version of the Supreme Court of Israel's opinion appears in French. *Id.* n.14.

development of the law in recognizing claims for emotional distress.[53] The court "determined that 'desirable jurisprudential policy' favored an expansive reading of Article 17 to reach purely psychic injuries."[54] The court also stated that any other interpretation would lead to "conflict between the French and English versions of the Guatemala City Protocol."[55]

STATEMENT OF THE CASE

Statement of Facts

Eastern Airlines flight 855 departed May 5, 1983 from Miami, Florida en route to Nassau, Bahamas.[56] Shortly after the flight departed, one of the plane's engines began losing oil pressure.[57] The flight crew was forced to shut down the engine and turn the plane around for a landing in Miami.[58] Thereafter, the plane lost power in the remaining two engines.[59] As the aircraft plummeted toward the Atlantic Ocean without power, the crew prepared the passengers for ditching.[60] After a period of descending without power, the crew managed to restart one of the engines.[61] With the benefit of only one working engine, the plane landed safely in Miami.[62]

The Trial Court

Passengers of flight 855 commenced twenty-five actions against Eastern Airlines for damages based on the mental distress they suffered in this incident.[63] The claimants did not allege any physical injury, bodily injury, or physical contact arising out of the occurrence.[64]

The U.S. District Court for the Southern District of Florida consolidated the cases and dismissed the complaints.[65] The court determined that the plaintiffs failed to state a claim upon which relief could be granted under either Florida or Federal law.[66] In examining the text of the Warsaw Convention, the trial court found that

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[53] Teichner, 39 Revue Francaise at 242, 23 EUR. TR.L. at 101.
[54] *Id.* at 243, 23 EUR. TR.L. at 102.
[55] *Id.* at 243-44, 23 EUR. TR.L. at 102.
[56] In Re Eastern Airlines, Inc. Engine Failure, 629 F. Supp. 307, 309 (S.D. Fla. 1986).
[57] *Floyd*, 872 F.2d at 1466.
[58] *Id.*
[59] *Id.*
[60] *Id.* In this case, the plane was prepared to make an emergency landing without power in the Atlantic Ocean.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *In Re Eastern Airlines*, 629 F. Supp. at 309. Two passengers did allege physical injuries in the original action. These two claims were considered separately from the complaints without factual allegations of physical injury. *Id.* at 316.
[65] *Id.*
[66] *Id.* The court determined that plaintiff's alternative theories of recovery under state law were likewise unpersuasive. Absent any impact or the allegation of a recognized intentional tort, plaintiffs were prohibited under Florida law from recovering for pure emotional distress. *Id.* at 309-12.

"mental anguish alone is not encompassed within the French legal meaning of bodily injury."[67]

The Court of Appeals

The United States Court of Appeals, Eleventh Circuit, reversed the trial court's decision.[68] In its examination of the French meaning of the relevant text, the court adopted the view that the "literal translation of lesion corporelle does not fully capture its French legal meaning."[69] The court reasoned that the drafters of the Convention would not have included a specific type of physical impact such as "blessure" (wounding) as a compensable injury if "lesion corporelle" was intended to cover only physical impact-type injuries.[70]

The court further outlined the history of the Montreal Agreement and Guatemala City Protocol.[71] The court was persuaded by the change in the English text to "personal injury" while "the authentic French text of the amended Article retained the expression 'lesion corporelle.'"[72]

Finally, the court utilized a practical approach and viewed the policies underlying the Warsaw Convention.[73] The circuit court recognized that a fundamental goal of the Convention was "to provide a comprehensive scheme of rules governing international air travel."[74] The court reasoned that if it found the Convention did not allow recovery for emotional distress, plaintiffs might still be able to pursue their claims based on state law.[75] Unfortunately, the availability of state law claims is not uniform, which conflicts with the goal of achieving an international standard.[76] Further, the court feared this might enable plaintiffs to recover damages in excess of the limit set by the Warsaw Convention.[77] Based upon these considerations, the court found the Warsaw Convention provided recovery for purely emotional injuries unaccompanied by physical injuries.[78]

The United States Supreme Court

Recognizing the conflicting holdings and uncertainties in the lower courts, the

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[67] *Id.* at 314.
[68] *Floyd*, 872 F.2d at 1463.
[69] *Id.* at 1471.
[70] *Id.* at 1472-73.
[71] *Id.* at 1474-75.
[72] *Id.*
[73] *Id.* at 1479.
[74] *Id.*
[75] *Id.* at 1479-80. The court expressly states that they are not passing on the question whether a state law cause of action would be preempted by the Convention. *Id.* at 1482.
[76] *Id.* at 1479-80.
[77] *Id.*
[78] *Id.* at 1463.

United States Supreme Court granted Eastern's petition for certiorari.[79] The Court began its analysis within the text of the treaty itself.[80] Aided by several bilingual dictionaries, the Court was satisfied that "bodily injury" is the best translation of "lesion corporelle."[81] As such, the ordinary meaning of the words dictate that purely mental injuries are not included.[82]

The Court then proceeded, to no avail, to search French legal materials from 1929 to the present to ascertain what the French authorities' understanding of "lesion corporelle" in the legal sense encompassed.[83] However, although the Court concedes that France allowed recovery for emotional distress in 1929 under its civil law, it nevertheless did not believe "lesion corporelle" encompassed such injuries.[84] The Court concluded that absent any indication to the contrary, the drafters did not specifically intend to include a remedy for emotional injuries under the terms of the Warsaw Convention.[85]

Finally, the Court examined the subsequent conduct of the parties to the Warsaw Convention.[86] The Court found that the post-1929 conduct of the signatory countries in the Montreal Agreement and Guatemala City Protocol was not evidence of any substantive change in or clarification of the term "lesion corporelle."[87] In sum, the Supreme Court believed their construction of Article 17 was consistent with the dual purposes of the Warsaw Convention: the achievement of uniformity in claims arising from international air travel; and the limitation of air carriers' liability.[88]

ANALYSIS

The Court's approach in *Floyd* was based extensively on its interpretation of the relevant Article 17 phrase, "lesion corporelle."[89] While its opinion thoroughly examined and supports the narrow translation of "lesion corporelle," its purported adherence to the Warsaw Convention's purpose[90] was not achieved.

A basic policy of the Warsaw Convention was "to provide a comprehensive

[79] *Floyd*, 111 S. Ct. at 1493 (1991).
[80] *Id.*
[81] *Id.* at 1494.
[82] *Id.* at 1494-95.
[83] *Id.* at 1495-97. Specifically, the Court noted that in 1929 lawyers trained in French civil law relied on legislation, judicial decisions and scholarly writing. *Id.* at 1495.
[84] *Id.* at 1495-96. Significant to the Court's reasoning is the fact that most other signatory countries did not recognize claims for purely emotional distress as a cause of action at the time the Warsaw Convention was drafted.
[85] *Id.* at 1496-97.
[86] *Id.* at 1499-1502.
[87] *Id.* at 1499-1501.
[88] *Id.* at 1502.
[89] *Id.* at 1490-92.
[90] *Id.* at 1502. The Court recites the Warsaw Convention's stated purpose as "achieving uniformity of rules governing claims arising from international air transportation." *Id.*

scheme of rules governing international air travel."[91] Only one other signatory country has addressed the issue of recovery for purely emotional distress under Article 17.[92] In doing so, Israel found that purely emotional injuries were compensable under the Convention.[93] The United States Supreme Court's contrary ruling contravenes this goal of uniformity among nations.[94] Further, by refusing to decide whether the Convention provides the exclusive cause of action for injuries arising from air carrier accidents,[95] lower courts may continue to be uncertain as to when a valid claim exists.

Ambiguous Translation Narrowly Interpreted

It is well-settled that the *Floyd* Court was required to determine the French legal meaning of the Convention's terms.[96] However, after an exhaustive search for French legal materials dating post-1929, the Court was unsuccessful in ascertaining the meaning of the term "lesion corporelle."[97] In short, the Court utilized considerable time begging the question, and finally conceded the following:

> There is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of 'lesion corporelle'. . . . Two explanations commonly are offered for why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury.[98]

The *Floyd* Court felt that recovery for emotional distress alone was not included in the Convention because it was not recognized under the common law of many of the signatory countries.[99] This analysis proceeds under the premise that if in most countries such a remedy was unavailable, "the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery."[100]

However, the *Floyd* Court failed to give weight to the fact that in 1929 the

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[91] *Floyd*, 872 F.2d at 1479.

[92] *See* Teichner, 39 Revue Francaise at 243, 23 EUR. TR.L. 87.

[93] *Id.*

[94] *Floyd*, 872 F.2d at 1473.

[95] *Floyd*, 111 S. Ct. at 1492. The Court states that "the issue whether passengers can recover for mental injuries accompanied by physical injuries is not presented or addressed here. . ." and further, that the Court did not "reach the question whether the Convention provides the exclusive cause of action for injuries sustained during international air transportion. . ." *Id.* at 1492.

[96] *Saks*, 470 U.S. at 399.

[97] *Floyd*, 111 S. Ct. at 1493-98.

[98] *Id.* at 1498.

[99] *Id.* In 1929, many jurisdictions, both common and civil law, did not recognize claims for emotional distress. *Id.*

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

common law of France recognized recovery for mental anguish alone.[101] Additionally, French jurists, who were accustomed to the recognition of claims for purely emotional distress, drafted the Convention.[102] It is just as plausible to infer that the drafters did not specifically address liability for psychic injury because their common law doctrine provided recovery for these injuries.[103] Further, French law had no comparable counterpart to the English common law doctrine which distinguishes between physical injuries and purely emotional injuries.[104] Because the question was never specifically addressed, it is quite probable that psychic injury was intended to fall within the meaning of "lesion corporelle."[105]

The *Floyd* Court in holding otherwise is apparently imposing American common law doctrine into the French phraseology and attempting to determine what the French civil law experts intended. This process contravenes the principal espoused in *Saks* that French legal meaning controls:[106]

> We look to French legal meaning for guidance as to [the partites'] expectations because the Warsaw Convention was drafted in French by continental jurists.[107]

The *Floyd* Court's exhaustive examination of the *translation* of "lesion corporelle" detracts from the French legal meaning and focuses instead on the American common law doctrine of damages.

Goals of the Convention Furthered?

At the time the Convention was drafted, the limitation of liability was imposed to assist the industry in growth and prosperity.[108] Since its inception, the airline industry has expanded to become universal, and these limits have shifted from cargo loss to loss for personal injuries.[109] However, it is unclear whether the drafters intended to limit the *amount* of recoverable damages or the *types* of recoverable damages.[110] Since air travel was relatively scarce at the time the Warsaw Convention was drafted, it is likely the framers' focus was on limiting the amount of damages one could recover.[111]

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[101] *Floyd*, 872 F.2d at 1471.
[102] *Id.* at 1472.
[103] *Id.* at 1471, citing to a commentary on the Warsaw Convention stating that Article 17 "is full of pitfalls and obscurities" and that "it is not clear if mental injury is covered by the Article." K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. AIR L. & COM. 395, 401-02 (1949).
[104] *Floyd*, 872 F. 2d at 1472.
[105] *Id.* at 1471. *See also* Beaumont, *supra* note 103.
[106] 470 U.S. at 399.
[107] *Id.*
[108] *See* Franklin Mint, 466 U.S. 243. This liability limit was originally imposed for lost cargo. *Id.* at 256.
[109] *Floyd*, 872 F.2d at 1470.
[110] *Id.* at 1471.
[111] *See* Mankiewicz, *supra* note 28, at 148-50.

Assuming this to be true, the focus of the liability limit was to place a cap on money damages for which an air carrier might be liable.[112] It is unclear from the *Floyd* decision whether this goal of the Convention will be furthered.

The *Floyd* Court's decision holds that purely mental injuries are not compensable under the Warsaw Convention.[113] However, the Court refused to decide whether the Convention provides the exclusive remedy for injuries sustained in the event of an accident in international air travel.[114] Therefore, *Floyd* has left the question open as to whether jurisdictions recognizing purely emotional distress as an independent cause of action will be precluded from hearing a claim based on state law.

Some appellate courts have specifically held that the Convention creates a cause of action.[115] Under this reasoning, recognizing emotional distress as compensable under the Convention would create uniformity among jurisdictions regardless of state law. If the *Floyd* decision remains controlling, however, claimants alleging purely emotional distress in a jurisdiction whose state law does recognize such a cause of action nevertheless may be precluded from pursuing their claims.[116]

Some courts have found that the Warsaw Convention provides the exclusive remedy in the areas it governs.[117] If so, the Convention may pre-empt and disallow any state law claim for emotional distress, thereby leaving plaintiffs without a remedy. Interpretation of Article 17 in such a fashion would lead to the extinguishment of otherwise valid causes of action in substantive law.[118]

However, other courts have taken the contrary view and permitted litigants to pursue claims for emotional distress where state law recognizes such a cause of action.[119] Implicit in this reasoning is the presumption that the Warsaw Convention does not expand underlying substantive law or create any claim for relief.[120] However, if the injury sustained was not comprehended by the terms of the Warsaw Convention, causes of action may arise under state law which would not be subject

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[112] *Id.* at 151.

[113] *Floyd*, 111 S. Ct. at 1502.

[114] *Id.* at 1492.

[115] *See, e.g.*, In Re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 416 (9th Cir. 1983), holding the Warsaw Convention creates a cause of action for wrongful death claims.

[116] *Floyd*, 872 F.2d at 1479-80.

[117] *See* Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985), where the court disallowed plaintiffs to pursue recovery of attorney fees under a state law negligence theory.

[118] *See generally* G. Miller, LIABILITY IN INTERNATIONAL AIR TRANSPORT 111-12 (1977). Such interpretation of the scope of the Warsaw Convention would in essence carve exceptions to the substantive law of emotional distress in jurisdictions where such a cause of action is recognized. *Id.*

[119] *See generally* Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238 (S.D.N.Y. 1975).

[120] *Id.* at 1243-45.

to the limits of the Convention.[121]

The *Floyd* decision makes it clear that the Convention does not apply to claims for purely emotional distress.[122] Therefore, any state law claims may have no limitation on damages.[123] Further, state law causes of action would not be uniformly available.[124]

Should this view be taken by courts in the future, the goals of the Warsaw Convention would be subverted. Claimants would be subject to no cap on damages, thereby removing the liability limit imposed for the benefit of air carriers.[125] Further, there would be no uniformity among the states in allowing plaintiffs to pursue a substantive cause of action.[126] These scenarios run afoul of the Warsaw Convention's purpose of uniformity and limiting liability by subjecting air carriers to claims in various forums without a cap on potential damages.

One can only speculate as to the policy reasons which prompted the Supreme Court to pronounce a decision which in effect leaves this area of the law in turmoil. Perhaps the Court was worried about fraudulent claims, increased litigation, or increased costs to the airline industry. However, in light of *Floyd* and the questions left unanswered, air carriers are now uncertain when and in what forum a claim for emotional distress will be pursued and, more important to the industry, whether its liability will be limited.

In addition, there is now uncertainty among the signatory countries to the Convention as to the scope of recoverable injuries.[127] This, too, is ironic in that the *Floyd* Court recognized uniformity among the signatory nations as a goal of the Warsaw Convention.[128] Certainly a decision showing no deference to the only other interpretation of Article 17 by a sister signatory cannot be construed as promoting uniformity.

Because the *Floyd* decision has done nothing to promote the predictability of claims or limit the liability of air carriers, the goals of the Convention are not realistically being furthered. The time is now appropriate for the signatory countries to once again meet and flesh out exactly the scope of recoverable injuries under Article 17. This would seem to be the only way to achieve a basic goal of the

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[121] *Id.* at 1246-48.

[122] *Floyd*, 111 S. Ct. at 1502.

[123] *See Floyd*, 872 F.2d at 1479-80.

[124] *Id.* at 1479, noting that states differ in allowing recovery for negligent infliction of emotional distress and intentional infliction of emotional distress.

[125] *Id.* at 1479-80.

[126] *Id.*

[127] *See* Teichner, 39 Revue Francaise 243, 23 EUR. TR.L. 87, where the Supreme Court of Israel found emotional distress within the scope of compensable injuries under Article 17.

[128] *Floyd*, 111 S. Ct. at 1501-02.

Convention: uniformity.

CONCLUSION

As a passenger in a powerless aircraft plummeting towards the Atlantic Ocean, you may have no recourse for any emotional distress suffered as a result of the incident. You may not be compensated for your recurrent nightmares, fear of flying and any other psychic trauma you experienced.

Although the Supreme Court purported to further the goals of the Warsaw Convention in precluding recovery for emotional distress under Article 17,[129] a practical evaluation of the effect of this decision suggests the Court has engaged in an unsuccessful endeavor.

It is unclear whether the Convention is the exclusive remedy for injuries arising out of air carrier accidents. It is equally unclear when and in what forums the Convention will pre-empt substantive law, either creating or extinguishing remedies.

Finally, decisions of the only two signatory countries who have addressed this issue are divergent, which directly contravenes the important goal of uniformity. Perhaps a revisionary conference is needed to provide guidance to the remaining signatories, as well as to alleviate the need for courts to proceed with semantic gymnastics in the interpretation of "lesion corporelle."

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[129] *Id.* at 1491.