

# NOTES

## RECOVERY FOR MENTAL INJURIES THAT ARE ACCOMPANIED BY PHYSICAL INJURIES UNDER ARTICLE 17 OF THE WARSAW CONVENTION: THE PROGENY OF *EASTERN AIRLINES, INC. v. FLOYD*

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### I. INTRODUCTION

In *Eastern Airlines, Inc. v. Floyd*,<sup>1</sup> the United States Supreme Court held that Article 17 of the Warsaw Convention,<sup>2</sup> which sets forth the conditions under which an international air carrier can be held liable for injuries to passengers, does not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.<sup>3</sup> The Court did not, however, express a view as to whether passengers can recover for mental injuries that *are* accompanied by physical injuries.<sup>4</sup> In the four years since the *Floyd* decision, a number of lower federal courts have addressed this issue. This Note analyzes the various approaches that these courts have adopted.

As background, there is a discussion of the Warsaw Convention, a review of the type of cases that led up to *Floyd* and a synopsis of the *Floyd* decision itself. The main focus of this Note, an analysis of the various approaches courts have adopted as to whether passengers can recover for emotional distress that is accompanied by bodily injury in Warsaw Convention cases, follows.

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\* J.D., 1996.

<sup>1</sup> 499 U.S. 530 (1991).

<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

<sup>3</sup> *Floyd*, 499 U.S. at 552.

<sup>4</sup> *Id.*

## II. HISTORICAL BACKGROUND

The Warsaw Convention governs the international carriage of passengers, baggage and cargo by air and regulates the liability of international air carriers.<sup>5</sup> The 1929 treaty applies only to international flights.<sup>6</sup> The Convention was the result of an international conference held in Paris in 1925, the work done by the interim Comité International Technique d'Experts Juridique Aériens (a committee created by the Paris Conference) and of a second conference held in Warsaw in 1929.<sup>7</sup> Although initially signed by only twenty-three countries, the Warsaw Convention is now, due to the remarkable growth of civil aviation since 1929, recognized by over 120 nations, making it both a widely recognized and significant international agreement.<sup>8</sup>

The purpose of the Warsaw Convention was twofold.<sup>9</sup> First, recognizing that air travel traverses national boundaries and involves varying languages, customs and legal systems, the participants believed that uniform rules governing parties to international air carriage contracts would be beneficial.<sup>10</sup> The second goal of the Convention was to limit the liability of air carriers and thus help promote the growth of an industry in its infancy.<sup>11</sup>

The Warsaw Convention did, to some extent, achieve its goal of eliminating the uncertain legal implications of international air travel.<sup>12</sup> The terms of the original treaty established a presumption that air carriers were liable for passengers' damages resulting from negligent conduct.<sup>13</sup> In order

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<sup>5</sup> Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Meaning of Lésion Corporelle*, 25 TEX. INT'L L.J. 127, 129 (1990).

<sup>6</sup> Warsaw Convention, *supra* note 2, art. 1.

<sup>7</sup> Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967).

<sup>8</sup> Dafna Yoran, Comment, *Recovery of Emotional Damages Under Article 17 of the Warsaw Convention: The American Versus the Israeli Approach*, 18 BROOK. J. INT'L L. 811, 814 (1992).

<sup>9</sup> Lowenfeld & Mendelsohn, *supra* note 7, at 498.

<sup>10</sup> *Id.*; Yoran, *supra* note 8, at 814; Sheila Wallace Holmes, Casenote, 58 J. AIR L. & COM. 1205, 1207 (1993).

<sup>11</sup> Lowenfeld & Mendelsohn, *supra* note 7, at 499; Holmes, *supra* note 10, at 1207-08.

<sup>12</sup> Dale M. Eaton, Note, *Recovery for Purely Emotional Distress Under the Warsaw Convention: Narrow Construction of Lésion Corporelle in Eastern Airlines, Inc. v. Floyd*, 1993 WIS. L. REV. 563, 569.

<sup>13</sup> *Id.*

to counterbalance this presumption, the liability of air carriers was strictly limited (except in cases of willful misconduct) to \$8,300 per passenger.<sup>14</sup> Moreover, carriers could rebut this presumption by showing that all possible safety measures had been taken to avoid harm to passengers.<sup>15</sup>

Although the United States did not participate in the original drafting of the Warsaw Convention,<sup>16</sup> the Senate ratified the Convention on June 15, 1934,<sup>17</sup> and the United States officially joined the treaty on October 29 of that year when President Franklin D. Roosevelt proclaimed the nation's adherence to it.<sup>18</sup>

The significant limits on air carrier liability prompted sharp criticism and debate among the signatories almost immediately after the Warsaw Convention went into effect.<sup>19</sup> Because of this dissatisfaction, the parties to the treaty met at the Hague in 1955 to consider its revision.<sup>20</sup> The result was the Hague Protocol.<sup>21</sup> The primary effect of the Protocol was to increase the limit on air carrier liability to \$16,600.<sup>22</sup> The Hague Protocol also redefined certain terms, simplified some documents of carriage, provided for awarding costs of litigation and made the Convention applicable to agents and servants of the carriers.<sup>23</sup> The United States and other parties to the Warsaw Convention continued to express opposition to the limit on liability even after it was doubled and never adhered to the Protocol.<sup>24</sup>

Because of its continued discontent over the low recovery limits under the Warsaw Convention, the United States gave notice of its denunciation of the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> The following countries participated in the original drafting of the Warsaw Convention: Austria, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, the German Reich, Great Britain, Greece, Hungary, Iceland, India, Ireland and the British Dominions, Italy, Japan, Latvia, Luxembourg, Mexico, the Netherlands, Norway, Poland, Rumania, Russia, Spain, Sweden, Switzerland, Venezuela and Yugoslavia. Eaton, *supra* note 12, at 570 n.27.

<sup>17</sup> Yoran, *supra* note 8, at 815.

<sup>18</sup> Eaton, *supra* note 12, at 570.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Protocol Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol].

<sup>22</sup> Yoran, *supra* note 8, at 816.

<sup>23</sup> LAWRENCE B. GOLDHIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 6 (1988).

<sup>24</sup> Eaton, *supra* note 12, at 570.

Convention on November 15, 1965.<sup>25</sup> As a result of this notice, a special meeting of contracting states was called in Montreal in February of 1966 to find a solution that would convince the United States to withdraw its impending denunciation, scheduled for May 16, 1966.<sup>26</sup> The solution to the problem came in the form of the Montreal Agreement,<sup>27</sup> which is in essence a contract between consenting carriers and passengers whose tickets have points of departure, destination or agreed stopping points in the United States.<sup>28</sup> The Agreement's most important impact was to raise the limit of air carrier liability to \$75,000.<sup>29</sup> It also abolished the negligence standard of the original Warsaw Convention and replaced it with a new policy of strict liability for damages to passengers, cargo and baggage.<sup>30</sup> Further, the Montreal Agreement required that air carriers provide passengers with notice of the limits on air carrier liability.<sup>31</sup> Because of the Agreement, the United States withdrew its notice of denunciation of the Warsaw Convention on May 13, 1966.<sup>32</sup>

### III. LEGAL BACKGROUND

The parties to the Warsaw Convention first met in Paris; the authentic text of the Convention is, as a result, written in French.<sup>33</sup> Thus, the French text must guide courts' analysis when interpreting any provision of the treaty.<sup>34</sup> American courts have found that using the French text to analyze the Convention is difficult. In particular, the courts have been frustrated in

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<sup>25</sup> *Id.* at 570-71; Yoran, *supra* note 8, at 816.

<sup>26</sup> Yoran, *supra* note 8, at 816. The threatened denunciation by the United States was of great concern to other countries because a major portion of all international air carriers and passengers were American in 1965. Donald M. Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483, 487 (1973).

<sup>27</sup> Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18900, *approved by* C.A.B. Order No. E-28680, May 13, 1966, 31 Fed. Reg. 7302 (1966), *reprinted in* ANDREAS F. LOWENFELD, *AVIATION LAW DOCUMENTS* 971 (Supp. 1981) [hereinafter *Montreal Agreement*].

<sup>28</sup> GOLDBIRSCHE, *supra* note 23, at 7.

<sup>29</sup> *Id.*

<sup>30</sup> Yoran, *supra* note 8, at 816-17.

<sup>31</sup> *Id.* at 817.

<sup>32</sup> *Id.*

<sup>33</sup> Lisa A. Fromm, Note, *Eastern Airlines v. Floyd: Airline Passengers Denied Recovery for Emotional Distress Under the Warsaw Convention*, 25 AKRON L. REV. 425, 426 (1991).

<sup>34</sup> *Id.* at 426-27.

attempts to reach definitive interpretations of Article 17 of the treaty.

Article 17 of the Warsaw Convention sets forth the conditions under which an international air carrier can be held liable for injuries to passengers.<sup>35</sup> The official American translation of Article 17, as employed by the Senate when it ratified the Convention in 1934, reads as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury 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>36</sup>

This translation has been repeatedly disputed by the courts since the 1970s<sup>37</sup> in their efforts to determine whether the original French text allows recovery for mental distress unaccompanied by physical injuries.<sup>38</sup>

In 1991, the United States Supreme Court decided *Eastern Airlines, Inc. v. Floyd*,<sup>39</sup> the landmark case involving the issue of whether Article 17 of the Warsaw Convention allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury. The Court granted certiorari to hear that case because of the confusion in

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<sup>35</sup> *Air France v. Saks*, 470 U.S. 392, 397 (1985).

<sup>36</sup> *Id.* The authentic French text of Article 17 reads as follows:

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

*Id.* at n.2.

<sup>37</sup> The dispute did not arise until the 1970s because American courts did not originally view the Warsaw Convention as creating a cause of action. Holmes, *supra* note 10, at 1209. Rather, courts first interpreted the Convention as simply limiting monetary damages on otherwise applicable law. *Id.* Courts thus viewed the treaty as creating only a presumption of liability, instead of an independent cause of action. *Id.* at 1209-10. It was not until the late 1970s that courts began to construe the Warsaw Convention as the "universal source of a right of action." *Id.* at 1210 (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)).

<sup>38</sup> Yoran, *supra* note 8, at 818.

<sup>39</sup> 499 U.S. at 530.

interpretation among lower federal courts.<sup>40</sup> For example, in *Burnett v. Trans World Airlines, Inc.*,<sup>41</sup> one of the cases leading to *Floyd*, the court held that Article 17 of the Warsaw Convention does not encompass purely psychic damages.<sup>42</sup> In contrast, *Husserl v. Swiss Air Transport Co.*<sup>43</sup> allowed recovery for purely psychic injuries under Article 17.<sup>44</sup>

In *Burnett*, the plaintiffs boarded a Trans World Airlines flight from Athens to New York in September of 1970.<sup>45</sup> After boarding additional passengers in Frankfurt, the plane was hijacked by members of the Popular Front for the Liberation of Palestine, who diverted the aircraft to Jordan, forcing it to land on a dry lake bed in the desert outskirts of Amman.<sup>46</sup> The plaintiffs claimed that they feared for their lives during their period of captivity and thus that they experienced severe emotional trauma.<sup>47</sup>

The plaintiffs sued TWA for their purely emotional distress under Article 17 of the Warsaw Convention.<sup>48</sup> The parties agreed that the Warsaw Convention and the Montreal Agreement applied, that an accident did in fact take place<sup>49</sup> and that to the extent Article 17 enumerated injuries alleged by the plaintiffs, TWA's liability could only be based on the Convention and in any event would be limited to \$75,000.<sup>50</sup>

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<sup>40</sup> *Id.* at 534.

<sup>41</sup> 368 F. Supp. 1152 (D.N.M. 1973).

<sup>42</sup> *Id.* at 1158. Other courts that have held that Article 17 does not encompass purely psychic damages include: *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (Ct. App. N.Y. 1974).

<sup>43</sup> 388 F. Supp. 1238 (S.D.N.Y. 1975).

<sup>44</sup> *Id.* at 1250. Other courts that have allowed recovery for purely psychic injuries under Article 17 include: *Borham v. Pan American World Airways*, No. 85 Civ. 6922 (CBM), 1986 WL 2974 (S.D.N.Y. Mar. 5, 1986); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Palagonia v. Trans World Airlines, Inc.*, 442 N.Y.S.2d 670 (Sup. Ct. 1978).

<sup>45</sup> *Burnett*, 368 F. Supp. at 1153.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *Air France v. Saks*, 470 U.S. 392, 405-06 (1985) (holding "that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger," and not where "the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft," in which case it has not been caused by an accident under Article 17).

<sup>50</sup> *Burnett*, 368 F. Supp. at 1153-54.

The court held that damages for mental anguish alone could not be recovered under Article 17 of the Warsaw Convention.<sup>51</sup> After rejecting the plaintiffs' argument that the tort law of New Mexico should control the scope of the phrase "bodily injury", the court looked to the French legal meaning of the term for guidance.<sup>52</sup> The court noted that French law distinguishes sharply between "bodily injury" ("lésion corporelle") and "mental injury" ("lésion mentale") and consequently decided that the two phrases were mutually exclusive.<sup>53</sup> To support this conclusion, the court relied on *Husserl v. Swiss Air Transport Co.*,<sup>54</sup> where another district court proceeded under similar analysis.<sup>55</sup> In addition, the court examined the legislative history of the Convention and found a strong inference that the drafters intended to exclude recovery for purely emotional distress by using a narrow definition of "lésion corporelle".<sup>56</sup>

To further support its conclusion that mental anguish alone does not fall within the reach of "lésion corporelle", the court analogized the Berne Convention on International Rail Transport.<sup>57</sup> The court explained that the first draft of the Berne Convention closely paralleled the language of Article 17 of the Warsaw Convention and permitted recovery for bodily injury only and that the Berne Convention allowed recovery for mental injuries only

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<sup>51</sup> *Id.* at 1158.

<sup>52</sup> *Id.* at 1155. The court explained, "[T]he meaning of the Warsaw Convention is a matter of federal law. It is a sovereign treaty and as such is the supreme law of the land, preempting local law in the areas where it applies. United States Constitution, Art. VI, cl. 2; *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971)." *Id.*

<sup>53</sup> *Id.* at 1156.

<sup>54</sup> 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973). This decision should not be confused with *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975), which is discussed *infra*.

<sup>55</sup> *Burnett*, 368 F. Supp. at 1156.

<sup>56</sup> *Id.* at 1157. The court explained:

By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates decided otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

*Id.*

<sup>57</sup> *Id.*

after it was modified by the addition of the words "ou mentale".<sup>58</sup>

The facts of *Husserl v. Swiss Air Transport Co.*<sup>59</sup> are strikingly similar to those of *Burnett*. In *Husserl*, the plaintiff boarded a Swiss Air direct flight from Zurich to New York in September of 1970.<sup>60</sup> Shortly after takeoff, members of the Popular Front for the Liberation of Palestine hijacked the plane and directed the pilot to fly to a desert area near Amman.<sup>61</sup> Once there, the plaintiff was forced to stay on the plane for approximately twenty-four hours under circumstances "less than ideal for . . . mental health."<sup>62</sup>

Once she returned to New York, the plaintiff filed suit under the Warsaw Convention, alleging that from the time the terrorists took control of the aircraft until she returned to Zurich she suffered "severe mental pain and anguish resulting from her expectation of severe injury and/or death."<sup>63</sup> Swiss Air filed a motion for summary judgement, contending that the plaintiff could not recover under the Warsaw Convention because her injuries were purely emotional ones.<sup>64</sup>

In determining whether the phrase "en cas de mort, de blessure ou de toute autre lésion corporelle" ("in the event of the death or wounding . . . or any other bodily injury") comprehended mental and psychosomatic injuries, the court attempted to ascertain the intention of the drafters and signatories of the Warsaw Convention, instead of following other courts that had concluded that " 'the binding meaning of the terms (of the Convention) is the French legal meaning.' "<sup>65</sup> The court was, however, unable to ascertain the specific intent of the Convention's framers and thus concluded "that the parties probably had no specific intention at all about mental and psychosomatic injuries because, if they had, they would have clearly expressed their intentions."<sup>66</sup> The court therefore construed "bodily injury" to be consistent

<sup>58</sup> *Id.*

<sup>59</sup> 388 F. Supp. 1238 (S.D.N.Y. 1975).

<sup>60</sup> *Id.* at 1242.

<sup>61</sup> *Id.*; *Hijackers Win Release of 6 of 7 Guerrillas; 184 Passengers Still Held; 747 Is Blown Up*, WALL ST. J., Sept. 8, 1970, at 3.

<sup>62</sup> *Husserl*, 388 F. Supp. at 1242.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1248-49 (quoting *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973)).

<sup>66</sup> *Id.* at 1249.

with the purpose of the treaty, to create uniformity and limit liability.<sup>67</sup> Consequently, the court held "that the phrase 'death or wounding . . . or any other bodily injury,' as used in Article 17, does comprehend mental injuries."<sup>68</sup> Importantly, this holding did not grant recovery for purely emotional distress in every action pursued under Article 17, but rather permitted recovery only where the applicable substantive law (the state law) provided for such a cause of action.<sup>69</sup>

In 1990, the United States Supreme Court granted certiorari in *Eastern Airlines, Inc. v. Floyd*<sup>70</sup> to resolve the question debated among lower federal courts of whether Article 17 of the Warsaw Convention allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.<sup>71</sup> The unanimous Court, in an opinion written by Justice Thurgood Marshall, held that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer

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<sup>67</sup> Eaton, *supra* note 12, at 575. The court stated:

Although the draftsmen probably had no specific intent as to whether Article 17 comprehended mental and psychosomatic injuries, they did have a general intent to effect the purpose of the treaty and apparently took some pains to make it comprehensive. That they may have neglected one area should not vitiate the purpose of the Convention. There is no evidence they intended to preclude recovery for any particular type of injury. To regulate in a uniform manner the liability of the carrier, they must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within the ambit and are, therefore, comprehended by Article 17.

*Husserl*, 388 F. Supp. at 1250.

<sup>68</sup> *Husserl*, 388 F. Supp. at 1252.

<sup>69</sup> Eaton, *supra* note 12, at 576-77. Eaton also notes that the *Husserl* reasoning was applied by the court in *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975): "In *Krystal*, however, the court seemingly went further, holding that purely mental injuries were compensable under Article 17 as a matter of law, without addressing substantive California state law governing the recoverability of mental injuries alone." Eaton, *supra* note 12, at 577.

<sup>70</sup> 499 U.S. at 530.

<sup>71</sup> Holmes, *supra* note 10, at 1205; Yoran, *supra* note 8, at 811. The Court stated, "We granted certiorari to resolve a conflict between the Eleventh Circuit's decision in this case and the New York Court of Appeals' decision in *Rosman v. Trans World Airlines, Inc.*, which held that purely psychic trauma is not compensable under Article 17." *Floyd*, 499 U.S. at 534 (citations omitted).

death, physical injury, or physical manifestation of injury."<sup>72</sup>

The case arose out of a May 5, 1983, Eastern Airlines flight from Miami to the Bahamas.<sup>73</sup> Shortly after the plane took off, one of its three jet engines lost oil pressure.<sup>74</sup> The flight crew shut down the failed engine and turned the plane around to return to Miami.<sup>75</sup> Then, the plane's other two engines failed due to loss of oil pressure.<sup>76</sup> As the plane began losing altitude rapidly, the passengers were informed that the plane would be ditched in the Atlantic Ocean.<sup>77</sup> After a period of descending flight without power, the crew was able to restart one of the engines and land the plane safely at Miami International Airport.<sup>78</sup>

A number of passengers on the flight brought separate complaints against Eastern claiming damage solely for emotional distress arising out of the accident.<sup>79</sup> The district court consolidated the cases.<sup>80</sup> Although Eastern conceded that the engine failure and preparation for ditching the plane constituted an accident under Article 17 of the Warsaw Convention,<sup>81</sup> they argued that Article 17 makes physical injury a condition of liability.<sup>82</sup> The district court relied on the *Burnett* court's analysis of the French authentic text and negotiating history of the Convention and held that mental anguish alone is not compensable under Article 17.<sup>83</sup> After examining the French legal meaning of the phrase "lésion corporelle", the concurrent and subsequent history of the Warsaw Convention and cases interpreting Article 17, the circuit court reversed, concluding that the term "lésion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress.<sup>84</sup>

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<sup>72</sup> *Floyd*, 499 U.S. at 552.

<sup>73</sup> *Id.* at 533.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* See *In re Eastern Airlines, Inc.*, 629 F. Supp. 307 (S.D. Fla. 1986), *rev'd sub nom.*, *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 499 U.S. 530 (1991).

<sup>81</sup> See discussion *supra* note 49.

<sup>82</sup> *Floyd*, 499 U.S. at 533.

<sup>83</sup> *Id.* at 533-34.

<sup>84</sup> *Id.* at 534. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 499 U.S. 530 (1991).

The Supreme Court reversed the circuit court, holding that Article 17 of the Warsaw Convention does not allow recovery for mental injuries unaccompanied by physical injury or physical manifestation of injury.<sup>85</sup> The Court examined the text of the Convention as well as its history, negotiations and practical construction.<sup>86</sup>

First, the Court considered the French legal meaning of “*lésion corporelle*” to discern the expectations of the parties to the Warsaw Convention.<sup>87</sup> Upon consulting bilingual dictionaries, the Court found that “*lésion corporelle*” is translated as “bodily injury”, suggesting that Article 17 does not permit recovery for purely psychic injuries.<sup>88</sup> The Court then turned to French legal materials.<sup>89</sup> After a thorough examination of French legislation, cases and treatises, the Court found “neither that ‘*lésion corporelle*’ was a widely used term in French law nor that the term specifically encompassed psychic injuries.”<sup>90</sup>

Then, the Court examined the negotiating history of the Warsaw Convention and determined that translating “*lésion corporelle*” as “bodily injury” was consistent with that history.<sup>91</sup> A review of the documentary record of the treaty revealed that neither the drafters nor the signatories considered liability for psychic injury because most countries did not recognize recovery for such injuries at the time.<sup>92</sup> Justice Marshall thus decided that the drafters probably would have made an unequivocal reference

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<sup>85</sup> *Floyd*, 499 U.S. at 552.

<sup>86</sup> *Id.* at 534-35.

<sup>87</sup> *Id.* at 536.

<sup>88</sup> *Id.* at 536-37.

<sup>89</sup> *Id.* at 537.

<sup>90</sup> *Id.* at 538. As the Court noted, “The only reports of French cases we did find that used the term ‘*lésion corporelle*’ are relatively recent and involve physical injuries caused by automobile accidents and other incidents. These cases tend to support the conclusion that, in French legal usage, the term ‘*lésion corporelle*’ refers only to physical injuries.” *Id.* (footnote omitted). Then, the Court dismissed the fact that in 1929 France, unlike many other countries, permitted recovery for mental distress. *Id.* at 539. The Court found that “this general proposition of French tort law does not demonstrate that the specific phrase chosen by the contracting parties—‘*lésion corporelle*’—covers purely psychic injury.” *Id.* To follow up on this, the court stated its task: “‘to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.’” *Id.* at 540 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

<sup>91</sup> *Id.* at 542.

<sup>92</sup> *Id.* at 544.

to purely mental injury if they had intended to allow such recovery.<sup>93</sup> The Court then added, "The narrower reading of 'lésion corporelle' also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry."<sup>94</sup>

The Court also found that the post-1929 conduct and interpretations of the signatories supported a narrow translation of "lésion corporelle".<sup>95</sup> First, the Court mentioned a proposed substitution for the term that would have broadened the scope of Article 17, but was not implemented.<sup>96</sup> The Court then went on to voice its disapproval of the circuit court's reliance on the substitution of the term "bodily injury" for "personal injury" on passenger tickets and in subsequent international agreements.<sup>97</sup>

Finally, the Court consulted a decision of the Supreme Court of Israel (apparently the only judicial decision from another signatory addressing recovery for purely emotional injuries under Article 17) which held that Article 17 does allow recovery for purely psychic injuries.<sup>98</sup> The Supreme

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<sup>93</sup> *Id.* at 545. The Court noted that "when the parties to a different international transport treaty [the Berne Convention on International Rail Transport] wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect." *Id.*

<sup>94</sup> *Id.* at 546.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 546-47; Eaton, *supra* note 12, at 581. The Court explained:

In 1951, a committee composed of 20 Warsaw Convention signatories met in Madrid and adopted a proposal to substitute "affection corporelle" for "lésion corporelle" in Article 17. The French delegate to the committee proposed this substitution because, in his view, the word "lésion" was too narrow, in that it "presupposed a rupture in the tissue, or a dissolution in continuity" which might not cover an injury such as mental illness or lung congestion caused by the breakdown in the heating apparatus of the aircraft. The United States delegate opposed this change if it "implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury," but the committee adopted it nonetheless. Although the committee's proposed amendment was never subsequently implemented, its discussion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, "lésion corporelle" in Article 17 had a distinctively physical scope.

*Floyd*, 499 U.S. at 546-47 (citations omitted).

<sup>97</sup> *Floyd*, 499 U.S. at 547-50; Eaton, *supra* note 12, at 581.

<sup>98</sup> *Floyd*, 499 U.S. at 550-51. See *Air France v. Teichner*, 38 (III) P.D. 785 (Isr. 1984).

Court of Israel reasoned "that 'desirable jurisprudential policy' . . . favored an expansive reading of Article 17 to reach purely psychic injuries."<sup>99</sup> The United States Supreme Court was not persuaded: "Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery."<sup>100</sup>

The Court concluded its opinion by reiterating its holding that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."<sup>101</sup> The Court did not reach two other issues: 1) whether a passenger can recover for mental injuries that are accompanied by physical injuries and 2) whether the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation.<sup>102</sup>

#### IV. ANALYSIS

There are four possible approaches to recovery for emotional distress that is accompanied by bodily injury in a Warsaw Convention case.<sup>103</sup> The first is to disallow recovery for emotional distress.<sup>104</sup> The second approach is to allow recovery for all emotional distress, as long as a bodily injury occurs.<sup>105</sup> The third possibility is to allow emotional distress as damages for bodily injury, including distress about the accident.<sup>106</sup> Lastly, a court can allow recovery only for emotional distress flowing from a bodily injury.<sup>107</sup>

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<sup>99</sup> *Floyd*, 499 U.S. at 551 (quoting *Teichner*, 38 (III) P.D. at 785).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 552-53.

<sup>102</sup> *Id.* The question of whether the Warsaw Convention provides the exclusive cause of action for injuries sustained during international flight is addressed in Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. AIR L. & COM. 587 (1994).

<sup>103</sup> *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 665 (N.D. Cal. 1994).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

### A. *Disallow Recovery for Emotional Distress*

The first approach is to disallow recovery for all emotional distress, even if bodily injury occurs.<sup>108</sup> Under this approach, an injured passenger could recover only pecuniary loss, such as medical expenses and lost income.<sup>109</sup>

This approach is in accord with the *Floyd* Court's narrow reading of Article 17's reference to bodily injury.<sup>110</sup> Denying emotional distress damages is also appropriate in light of the state of the law in many countries at the time of Warsaw Convention.<sup>111</sup> And, because this approach is so restrictive on passengers' rights, it furthers the pro-airline industry goals of the Convention.<sup>112</sup>

This approach is unacceptable, however, because it provides such minimal compensation for passengers who may have suffered traumatic injuries, either physical or mental.<sup>113</sup> The drafters of the Warsaw Convention attempted to strike a balance between passengers and airlines; this approach is too one sided.<sup>114</sup> Further, even though many jurisdictions denied recovery for mental distress in 1929, France recognized such claims, as did other countries, when accompanied by physical impact or manifestation.<sup>115</sup> Because of the numerous problems with this approach, American courts have not adopted it.

### B. *Allow Recovery for All Emotional Distress, as Long as a Bodily Injury Occurs*

The second approach is to allow recovery for all emotional distress, as long as a bodily injury occurs, regardless of the connection between the distress and the bodily injury.<sup>116</sup> Thus, a passenger with a scratched arm could recover for the trauma and fear due to the plane crash; the bodily

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* In *Floyd*, the Court noted that "such a remedy was unknown in many, if not most, jurisdictions in 1929." *Floyd*, 499 U.S. at 545.

<sup>112</sup> *Jack*, 854 F. Supp. at 665.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

injury opens the door to liability for emotional distress.<sup>117</sup>

In *Chendrimada v. Air-India*,<sup>118</sup> the court adopted this approach. There, the plaintiff brought suit for injuries arising out of a trip from New York to Bombay.<sup>119</sup> At a scheduled stop in Delhi, the plane was grounded for eleven and a half hours due to heavy fog.<sup>120</sup> The plaintiffs alleged that they were not allowed to leave the plane to go into the terminal and were not given anything to eat during the delay.<sup>121</sup> The plaintiffs claimed that as a result they became weak, experienced nausea, suffered severe cramps, pain and anguish and suffered malnutrition as well as mental injury.<sup>122</sup> Because the plaintiffs alleged physical injury, the court denied Air-India's motion for summary judgement.<sup>123</sup>

This approach is consistent with a broad reading of Article 17's imposition of liability for "damage sustained in the event of . . . bodily injury."<sup>124</sup> Significantly, the drafters did not use the phrase "damage caused by . . .

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<sup>117</sup> *Id.*

<sup>118</sup> 802 F. Supp. 1089 (S.D.N.Y. 1992).

<sup>119</sup> *Id.* at 1090.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1092.

<sup>123</sup> *Id.* One paragraph of the court's opinion is of particular relevance:

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

*Id.* (emphasis added).

<sup>124</sup> *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 666 (N.D. Cal. 1994).

bodily injury," which would have served as a signal that any mental distress must be connected to the bodily injury.<sup>125</sup> This approach is also supported by the fact that the *Floyd* Court did not mention a need for a causal connection between bodily injury and emotional distress.<sup>126</sup> Further, this approach is in line with the approach to mental distress taken in early tort cases, where a physical impact or manifestation was a prerequisite to recovery.<sup>127</sup>

However, this approach is undesirable for two reasons.<sup>128</sup> First of all, this approach treats mental distress as an independent cause of action, which is inconsistent with precedent that dictates that the Warsaw Convention creates a cause of action, not just a limit on remedies.<sup>129</sup> And, secondly, this approach treats mental distress as damages resulting from the accident, not the injury.<sup>130</sup>

### *C. Allow Emotional Distress as Damages for Bodily Injury, Including Distress About the Accident*

Emotional distress is considered an element of the damages for bodily injury under the third approach.<sup>131</sup> Under this approach, the distress does not need to be about the injury to be compensable.<sup>132</sup> This approach is different from the second approach in that the distress must occur at the same time or later than the bodily injury; one cannot, therefore, recover for the fear before the impact and bodily injury under this approach.<sup>133</sup>

The courts in the cases concerning the downing of Korean Air Lines Flight KE 007 on September 1, 1983, while the plane was in route from

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Under early tort law, the physical impact or manifestation was seen as proof that the emotional distress was not faked. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* See *supra* note 37.

<sup>130</sup> *Jack*, 854 F. Supp. at 666. This is problematic under the wording of Article 17 of the Convention and the reasoning of the Supreme Court in *Air France v. Saks*, 470 U.S. 392 (1985), where the Court noted that " 'the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury.' " *Jack*, 854 F. Supp. at 666 (quoting *Saks*, 470 U.S. at 398).

<sup>131</sup> *Jack*, 854 F. Supp. at 666.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

New York to Seoul, adopted this approach.<sup>134</sup> There, the plane strayed into Soviet airspace and was intercepted and destroyed by Soviet military aircraft over the Sea of Japan; all 269 passengers were killed.<sup>135</sup>

The numerous actions filed around the country for wrongful death of the deceased passengers were consolidated for common pre-trial proceedings and the trial of the common issue of liability.<sup>136</sup> After a jury found that Korean Air Lines engaged in willful misconduct that proximately caused the deaths, the individual cases were returned to the various jurisdictions where they had been filed in order to determine compensatory damages for each plaintiff.<sup>137</sup>

One court first noted that the 269 passengers aboard the plane were alive and conscious for ten or eleven minutes after the plane was hit by the missile and before it hit the sea, and possibly for a period thereafter.<sup>138</sup> The court then recognized that the passengers probably endured a considerable amount of emotional and physical (due to rapid decompression) pain during that period which ended in the death they were anticipating.<sup>139</sup> Consequently, the court held, "This is pain and suffering accompanied by physical injury, and logically must be permitted by Floyd."<sup>140</sup>

The logic behind the third approach is best illustrated by the comments of the court in *In re Air Crash Disaster Near Honolulu, Hawaii*:<sup>141</sup>

The Convention itself does not specify the elements of damages which a plaintiff might recover under Article 17. Instead, "commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention."<sup>142</sup>

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<sup>134</sup> *Id.*; *Zicherman v. Korean Air Lines Co.*, 814 F. Supp. 605, 606 (S.D.N.Y. 1993), *modified*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

<sup>135</sup> *Zicherman*, 814 F. Supp. at 606.

<sup>136</sup> *Id.* See *In re Korean Air Lines Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

<sup>137</sup> *Zicherman*, 814 F. Supp. at 606. The jury also awarded punitive damages, but on appeal they were set aside as non-recoverable in a Warsaw Convention Case. *Id.* See *In re Korean Airlines Disaster*, 932 F.2d 1475, 1490 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

<sup>138</sup> *In re Korean Air Lines Disaster*, 814 F. Supp. 592, 598 (E.D. Mich. 1993).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* See also *In re Korean Air Lines Disaster*, 807 F. Supp. 1073 (S.D.N.Y. 1992).

<sup>141</sup> 783 F. Supp. 1261 (N.D. Cal. 1992).

<sup>142</sup> *Id.* at 1264 (quoting *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1283 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991)).

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 Grafted onto our common law tradition, and recognizing the Warsaw Convention's adoption of "internal law" with respect to the measure of damages, Article 17 must be read to create a cause of action which encompasses the remedies traditionally provided by common law in personal injury actions, wrongful death actions, and survival actions.<sup>143</sup>

Although there is little federal common law on emotional distress, federal courts have indicated that emotional distress damages would be allowed for distress about the plane crash, not just the distress about the injury.<sup>144</sup> This approach—analagizing to other areas of federal common law—is unsatisfactory because of the uniqueness of the Warsaw Convention's exclusion of recovery for pure emotional distress.<sup>145</sup>

*D. Allow Recovery Only for Emotional Distress Flowing from a Bodily Injury*

Under the fourth approach, emotional distress flowing from the bodily injury is an element of damages allowed for the bodily injury.<sup>146</sup> Thus, damages are allowed for emotional distress only to the extent the emotional distress is caused by the bodily injury.<sup>147</sup> A passenger may, therefore, recover for fear related to his broken leg, but not for fear related to the plane crash.<sup>148</sup> Under this approach, emotional distress can also have a separate role as the causal link between the accident and the bodily injury; a passenger may, for example, recover for a heart attack caused by the distress

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<sup>143</sup> *Id.* at 1265.

<sup>144</sup> *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 667 (N.D. Cal. 1994). See, e.g., *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987) (allowing emotional distress damages for the trauma involved in a racially motivated arrest, not just for the minor injuries); *Lentz v. M/V Eastern Grace*, CIV. No. 85-1078-FR, 1988 WL 135809 (D. Or. Dec. 2, 1988) (awarding emotional distress damages for a seaman's discomfort around boats after an accident in which his boat was hit, although he suffered only bumps and bruises in the accident). *Jack*, 854 F. Supp. at 667.

<sup>145</sup> *Jack*, 854 F. Supp. at 667. See discussion *supra* notes 70-102 and accompanying text.

<sup>146</sup> *Jack*, 854 F. Supp. at 667.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

of the plane crash.<sup>149</sup>

In *Jack v. Trans World Airlines, Inc.*,<sup>150</sup> the court adopted this approach. *Jack* involved the aborted takeoff, crash and fire of TWA Flight 843 when departing New York's John F. Kennedy Airport for San Francisco.<sup>151</sup> All the passengers survived despite the fact that fire completely destroyed the plane.<sup>152</sup> During the aborted takeoff and evacuation, many of the passengers suffered minor physical injuries; many were traumatized by the accident.<sup>153</sup> The passengers filed suit, seeking damages for physical injuries and emotional distress, and TWA filed motions for summary judgement.<sup>154</sup>

The court held that the plaintiffs with impact injuries could recover for their impact injuries, the emotional distress flowing from their impact injuries and any physical manifestations of their emotional distress.<sup>155</sup> Further, the court decided that the plaintiffs with physical manifestations could recover for the manifestations and any distress flowing from the manifestations, but that they could not recover damages for the emotional distress that led to the manifestations.<sup>156</sup> The court was careful to note

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<sup>149</sup> *Id.* The comments of the court in *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (Ct. App. N.Y. 1974), help to illustrate the reasoning behind this position:

[T]he compensable injuries must be 'bodily' injuries but there may be an intermediate causal link which is 'mental' between the cause—the accident—and the effect—the 'bodily injury'. And once that predicate of liability—the 'bodily injury'—is established, then the damages sustained as a result of the 'bodily injury' are compensable including mental suffering . . . . However, only the damages flowing from the 'bodily injury', whatever the causal link, are compensable . . . .

. . . .

We hold, therefore, that defendant is liable for plaintiff's palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma.

*Id.* at 857.

<sup>150</sup> 854 F. Supp. at 654.

<sup>151</sup> *Id.* at 657. The case fell under the Warsaw Convention because many of the passengers held tickets for international flights. *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 668.

<sup>156</sup> *Id.*

that, in both instances, the emotional distress was limited to the distress about the physical impact or manifestation (the bodily injury) and that recovery was not allowed for the distress about the accident itself.<sup>157</sup>

Of the four approaches discussed herein, this fourth one is the most desirable for a number of reasons. First, this approach prevents serious inequities among the passengers subject to the Warsaw Convention.<sup>158</sup> Getting scratched on the way down an evacuation slide should not enable one passenger to obtain a much greater recovery than an unscratched fellow passenger who was equally terrified by the plane crash, and the fourth approach achieves this result.<sup>159</sup> And, this approach is consistent with the intentions of the drafters of the Warsaw Convention by making passengers' recoveries more reasonable and predictable.<sup>160</sup> This approach also allows for greater recovery with more severe injuries, presuming that more distress flows from more serious injuries.<sup>161</sup> Further, this approach even permits recovery in wrongful death cases.<sup>162</sup>

The fourth approach does, however, have one drawback. The difficulty is that emotional damages might not be allowed in a case like that involving the Korean Air Lines plane that was shot down in Soviet airspace.<sup>163</sup> For, if no impact injuries were suffered until the plane hit the water, no recovery would be allowed for the ten or eleven minutes of pre-crash terror.<sup>164</sup>

The numerous benefits of the fourth approach outweigh its one drawback. Courts should, therefore, adopt it and allow recovery only for emotional distress flowing from a bodily injury.

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<sup>157</sup> *Id.* TWA's motion for summary judgement was granted as to the 27 plaintiffs who complained of psychic trauma but did not complain of impact injuries or physical manifestations of emotional distress; TWA's motion for summary judgement was denied as to the 33 plaintiffs who claimed impact injuries and/or physical manifestation of their emotional distress. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* Survivors may recover for physical manifestations of their grief at the loss of a loved one. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

## V. CONCLUSION

In *Eastern Airlines, Inc. v. Floyd*,<sup>165</sup> the United States Supreme Court resolved the question debated among lower federal courts of whether Article 17 of the Warsaw Convention allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury by holding that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."<sup>166</sup> The Court left unanswered the question of whether a passenger can recover for mental injuries that are accompanied by physical injuries.<sup>167</sup> There are four possible ways to answer this question: 1) to disallow recovery for emotional distress, 2) to allow recovery for all emotional distress, as long as a bodily injury occurs, 3) to allow emotional distress as damages for bodily injury, including distress about the accident and 4) to allow recovery only for emotional distress flowing from a bodily injury.<sup>168</sup> An analysis of these four approaches reveals that the fourth and final one—to allow recovery only for emotional distress flowing from a bodily injury—is the most appropriate. The benefits of this approach include preventing inequities among passengers subject to the Warsaw Convention, furthering the intentions of the drafters of the Convention by making passengers' recoveries more reasonable and predictable, allowing for greater recovery with more severe injuries and permitting recovery in wrongful death cases.

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<sup>165</sup> 499 U.S. at 530.

<sup>166</sup> *Id.* at 552.

<sup>167</sup> *Id.*

<sup>168</sup> *Jack*, 854 F. Supp. at 665.

