I. INTRODUCTION

On the morning of May 5, 1983, Eastern Airlines flight 855 left Miami en route to Nassau in the Bahamas. During the flight, one of the three engines of the Lockhead L-1011 lost oil pressure and was shut down. With only two engines of the airplane operable, the crew decided to return to Miami. Unfortunately, the second and third engines failed soon thereafter. Without power, the airplane quickly lost altitude and the passengers were informed that it would have to be “ditched” into the Atlantic Ocean. After several attempts, the crew was able to restart the engine that had initially failed and safely land the plane at Miami International Airport.

Following the incident, twenty-five separate actions were instituted by passengers of flight 855 against Eastern Airlines under Article 17 of the Warsaw Convention, the principal treaty addressing international air travel. The cases were consolidated in the federal district court of the Southern District of Florida in Miami. In the consolidated suit the plaintiffs claimed damages for mental distress arising out of the incident. However, the consolidated case was dismissed.

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2 All of the engines were later found to be missing O-rings, critical components of each engine. It was the responsibility of the plane’s mechanic to inspect them after each flight. Id.
3 The plane was carrying 162 passengers and ten crew members. Its last engine failed at approximately 16,000 feet and the tail engine was not restarted until the plane fell below 4,000 feet. Id.
4 Id.
5 Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989). Two of the suits were filed in the Court of Common Pleas for Allegheny County, Pennsylvania, but were subsequently removed to the U.S. District Court for the Western District of Pennsylvania based upon diversity jurisdiction. The remaining actions were filed in the Florida state court, there being no diversity of citizenship present in any of the cases.
7 See 28 U.S.C. Sec. 1407(a) (the multi-district litigation consolidation statute).
for failure to state a cause of action because of the plaintiffs' failure to allege that any physical injury had occurred.\(^8\) On appeal, in *Floyd v. Eastern Airlines*, the Eleventh Circuit Court of Appeals reversed and remanded the case after determining that the precedents on which the trial court had relied incorrectly interpreted the Warsaw Convention.\(^9\) It held that the lower court should have interpreted the term *lésion corporelle* by using its French legal meaning which provides for recovery for purely emotional injuries unaccompanied by physical trauma.\(^10\)

The *Floyd* case frames some of the difficult questions concerning the interpretation of the Warsaw Convention.\(^11\) Before the case can be analyzed, however, a brief survey of the development of international air law with respect to passenger liability claims against air carriers will be examined. The evolution of aviation law will be traced from the ratification of the first treaty governing international air travel to the treaty's most recently proposed amendments. The different methods of interpretation used by various courts—including the United States Supreme Court—will then be analyzed in determining the proper means of interpreting the treaties. The decisions analyzed have involved several interpretative approaches, each often reaching inconsistent results.

The analysis will then address which rules of treaty interpretation should correctly apply, and will apply those rules to the issue of whether emotional injuries unaccompanied by any physical trauma are compensable injuries under the Warsaw Convention. Arguments will be presented in support of the decisions which hold that the French legal meaning is binding and allows recovery for such emotional distress. The paper concludes that in light of recent decisions

\(^8\) In *Re Eastern Airlines, Engine Failure*, Miami International Airport on May 5, 1983, 629 F. Supp. 307 (S.D. Fla. 1986). The two plaintiffs sought leave to amend their complaints to allege physical injury resulting from the events on the flight. These motions were denied.

\(^9\) 872 F.2d 1467 (11th Cir. 1989).

\(^10\) 872 F.2d at 1480.

When connected with a physical injury, [''mental anguish or injury''] includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety. In other connections, and as a ground for divorce or for damages or an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.


\(^11\) *Floyd*, 872 F.2d at 1462.
and the better reasoned interpretative doctrines, the Floyd court correctly decided that the French legal meaning of *lésion corporelle*, which provides that mental injuries unaccompanied by physical trauma are indeed compensable under the Convention, should control the construction of the Warsaw Convention.

II. LEGAL BACKGROUND

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter Warsaw Convention or Convention) is the principal treaty that addresses air carrier liability arising from international air transportation. Originally signed by twenty-three countries in 1929, the Convention has been ratified by

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12 2. Warsaw Convention, supra note 6.
13 Note, *Air France v. Saks: An Accidental Interpretation of the Warsaw Convention*, 1 Am. U. J. Int'l L. & Pol'y 195 (1986) (hereinafter American University Note). Articles 1 and 3 state the threshold requirements for the Convention to apply. Article 1(1) provides: "This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

Article 1(2) provides:

For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that party is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Article 3(1) provides:

For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The agreed stopping places . . .;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Warsaw Convention, supra note 6, arts. 1(1), 1(2), and 3(1).

14 With the exception of the United Kingdom, the original signatories were all civil law countries. Warsaw Convention, supra note 6. Stanculescu, *Recovery for Mental Harm under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle*, 8 Hastings Int'l & Comp. L. Rev. 339 (1985).
many other countries, with the United States complying in 1934.\textsuperscript{15} Presently, over 120 nations are signatories.\textsuperscript{16}

Shortly after ratifying the Convention, the United States criticized it as being too beneficial to the airline industry at the expense of individual plaintiffs, and proposed modifications. The most controversial changes involved air carrier tort liability limitation.\textsuperscript{17} Many countries felt that the limitation was too low while others saw no reason for a change. As a result of this growing dissention among the various signatory nations, representatives reconvened in The Hague to discuss a possible amendment to the Convention in 1955. The United States favored raising the $8,000 U.S. limit on recoverable damages allowed under the Convention.\textsuperscript{18} Negotiations nearly broke down; and after two of its proposals were rejected, the United States threatened to denounce the treaty.\textsuperscript{19} The countries finally signed an agreement, however, which doubled the original liability limitations.


\textsuperscript{17} See generally Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967). The limitation set by the Convention was the equivalent of about $8,000 U.S. The provision which contained the liability limitation stated:

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Warsaw Convention, supra note 6, art. 22(1).

\textsuperscript{18} The United States originally moved to raise the limitation on liability to $25,000, but later reduced its proposed figure to $20,000. Comment, The Revised Warsaw Convention and Other Aviation Disasters, 8 CUMB. L. REV. 764, 768 (1978) (hereinafter Cumberland Comment).

\textsuperscript{19} Id., The final agreement raised the limitation to just $16,000, approximately doubling the previous amount.
of the Convention. This treaty amendment became known as the Hague Protocol.  

The United States remained dissatisfied with the Convention, however, and in 1965 formally denounced the treaty. A State Department press release indicated that the United States would retract its notice of denunciation before it took effect if a higher limitation on recovery could be agreed upon. This change could have been effected either through a contractual agreement among the various air carriers involved or by a revision of the Convention itself. In February of 1966 the various signatory nations met in Montreal to address this issue. An agreement was reached to raise the liability limit to approximately $75,000 U.S. As a quid pro quo for this heightened standard, the carriers agreed to waive the due care defense provided by Article 20(1) of the Convention, thereby imposing virtual strict liability on the carriers. The agreement, entitled the Montreal Agreement, remains valid today.

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21 Article 39 of the Warsaw Convention governs the procedure for denouncing the treaty. The article states:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Warsaw Convention, supra note 6, art. 39; see Lowenfeld and Mendelson supra note 17 at 546-52.

22 Cumberland Comment, supra note 18, at 771. The text of the notice was printed in Press Release No. 268, Nov. 15, 1965, 50 Dep't St. Bull. 923, 929 (1965).

23 Cumberland Comment, supra note 18, at 771.


25 Id. at 387. The new limitation, equivalent to $75,000 U.S., includes legal fees and costs.

26 Article 20(1) provides: “The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.” Warsaw Convention, supra note 6, art. 20(1).

27 The defense of passenger contributory negligence was retained. Comment, Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on
In 1971, negotiations between signatory nations resulted in another agreement entitled the Guatemala Protocol. It attempted to raise the liability limitations imposed by the Montreal Agreement, while adopting the same standard of strict liability. Unlike the Montreal Agreement, the Protocol would have required the member nations to adopt the Protocol. It was not a contractual agreement among the air carriers, but an attempt to revise the Convention itself. Unwilling to accept the terms of the Protocol, the United States refused to ratify it. Although it does bind the nations which have adhered to it, it has no binding effect in United States courts.

Following these amendments, other revisions to the treaty have been frequently submitted. The most recent attempts have come via the proposed Montreal Protocols 3 and 4. Their effect would have been to increase the liability limitations while removing the exceptions allowing recovery in excess of the limitations in cases involving willful misconduct, or failure to give notice of the limitations. The United States Senate, however, refused to ratify either Protocol. Consequently, the Montreal Agreement has remained the only modification of the Warsaw Convention that is currently recognized by the United States.


The Warsaw Convention allows a special contract (such as the Montreal Agreement) to raise the liability limitation imposed by the Convention. Article 22(1) provides in pertinent part: “Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.” Warsaw Convention, supra note 6, art. 22(1).


31 Several possible reasons exist for the failure to ratify. One may have been that the $100,000 limitation on liability was felt to be inadequate. Another reason may have been that the airline industry successfully lobbied to bar such ratification. Chicago-Kent Comment supra note 27, at 854.

32 Miami Comment, supra note 30, at 543.


Although numerous attempts have been made to amend the Convention, most proposals to modify the air carrier liability regime have involved the liability limitations. The other provisions have remained virtually unchanged since the Convention was first promulgated.\textsuperscript{35} The original provisions, the result of two international air conferences,\textsuperscript{36} addressed and achieved two primary goals: a uniformity of rules regarding commercial air travel and a limitation of air carrier liability for accidents associated with international air travel.\textsuperscript{37}

The first of these goals was achieved by two different methods. First, the Convention itself provided a uniform body of rules by which to establish the legal rights of international air carriers, passengers and shippers.\textsuperscript{38} Second, from a practical standpoint, the only official version of the Convention ratified by the signatory countries was the French language draft, thereby providing the ultimate textual authority for purposes of construction.\textsuperscript{39} The framers' intention was to achieve a uniform application of the treaty by recognizing only one official language to which to refer for interpretive solutions.\textsuperscript{40} The United States recognized this goal and in turn ratified only the official French version of the treaty.\textsuperscript{41} An English translation was

\begin{footnotes}
\footnotetext[35]{American University Note, \textit{supra} note 13.}
\footnotetext[36]{The First International Conference of Private Air Law, held in Paris in 1925, adopted a resolution creating an International Technical Committee of Aerial Experts. (In French, Comité International Technique d'Experts Juridiques Aériens (CITEJA)). The committee was formed to study problems connected with private liability in the international operation of aircraft and to codify the law in area. The Second International Air Conference on Private Air Law reconvened in 1929 in Warsaw to consider the CITEJA studies and deliberations. It adopted the committee proposals and thereby established the Warsaw Convention. Lowenfeld & Mendelsohn, \textit{supra} note 17, at 498. Ide, \textit{The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)}, 3 J. AIR L. & COM. 27, 30-36 (1932).}
\footnotetext[37]{American University Note, \textit{supra} note 13, at 196-97; Warsaw Convention, \textit{supra} note 6, at preamble.}
\footnotetext[38]{The terms of the Convention regarding the second goal of limiting air carrier liability provided that the maximum recovery for an air travel-related accident was originally established at 125,000 Poincaré Francs (about $8,300 U.S.). This limit was subsequently increased to $75,000 by the Montreal Agreement of 1966, and then to $100,000 by the Guatemala Protocol of 1971, which has not yet been ratified by the United States. Lowenfeld & Mendelsohn, \textit{supra} note 17, at 499.}
\footnotetext[39]{French was the predominant working language in international diplomatic relations at the time of the Convention. American University Note, \textit{supra} note 13, at 210.}
\footnotetext[40]{\textit{Id.} A single copy of the French version of the Convention was deposited with the Polish Ministry of Foreign Affairs. Warsaw Convention, \textit{supra} note 6, art. 36.}
\footnotetext[41]{The United States adhered to the Convention pursuant to Article 38, but subject}
provided by the Department of State along with the French version to the United States Senate at the time of ratification; but the English version was not ratified and should therefore not be authoritative.\footnote{United States courts, nevertheless, have at times used the English translation as a "quasi-official" authority in their deliberations. Their resulting decisions have raised the specter of inconsistent interpretation and have drawn criticism from legal scholars.}

United States courts, nevertheless, have at times used the English translation as a "quasi-official" authority in their deliberations. Their resulting decisions have raised the specter of inconsistent interpretation and have drawn criticism from legal scholars.\footnote{Such interpretive difficulties have haunted United States courts because no generally accepted rules of treaty interpretation have been promulgated or recognized to guide their analyses.} As a result of

to the reservation that the first paragraph of Article 2 of the Convention not apply to international transportation performed directly by the state. Warsaw Convention, supra note 6, art. 38; 78 CONG. REC. 11,582 (1934).

Warsaw Convention, art. 2(1), provides: "This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1." Warsaw Convention, supra note 6, art. 2(1).

\footnote{78 CONG. REC. 11,587 (1934) (Senate approving resolution of ratification supporting adherence to the French version of the Warsaw Convention by voice vote without floor debate).}

\footnote{McKenny, Judicial Jurisdiction Under the Warsaw Convention, 29 J. AIR L. & COMM. 205, 207 (1963); Stanculescu, supra note 14, at 351.}

\footnote{Stanculescu, supra note 14, at 351-52. It should be noted that the United States has not ratified the Vienna Convention on the Law of Treaties, which arguably would impose a narrower, more textual mode of treaty construction than that mandated by the Supreme Court. An interesting issue is raised when nations party to a treaty expressly endorse different methods of its construction. Vienna Convention on the Law of Treaties, opened for signature May 28, 1969, 1155 U.N.T.S. 331, arts. 31, 32.}

Article 31 states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so
this lack of uniform rules, two separate paths have been followed by courts when deciding cases involving construction of the Convention.\textsuperscript{45} Courts following the first path have used only the English translation in their analysis without regard to the legal meanings of the corresponding French terms.\textsuperscript{46} Courts pursuing the other path have recognized the French version as controlling their analysis and have attempted to decipher the French legal meaning of each crucial term.\textsuperscript{47}

The first path chosen by the United States courts has caused their decisions to lack the interpretive uniformity that the drafters of the Convention desired.\textsuperscript{48} As a result, courts from most of the signatory countries are applying the French legal meanings in deciding their cases while some United States courts are applying an Anglo-American common law meaning that is not necessarily the intent of the Convention.\textsuperscript{49} This dilemma is especially evident in cases involving Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

\textsuperscript{45} Grippando, \textit{Warsaw Convention—Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits}, 19 GEO. WASH. J. INT'L L. & ECON. 59, 68-74 (1985). The author divides the approaches into two views which he calls the "Preclusive View" and the "Non-exclusive View." Under the Preclusive View, the range of permissible tort claims was limited, precluding suits if the mental injury did not accompany bodily harm. Under the Exclusive View, any action seeking recovery for injuries comprehended by art. 17 of the Warsaw Convention could be brought only according to the Convention's conditions and limitations. Claims neither explicitly nor implicitly covered by art. 17, however, could "give rise to causes of action not subject to any of the conditions or limitations of the Warsaw Convention." Husserl v. Swiss Air Transport, 388 F. Supp. 1238, 1240 (S.D.N.Y. 1975). Thus, this language approves of an independent tort action for mental injury.

\textsuperscript{46} Grippando, \textit{supra} note 45, at 68. This view precludes suits if the mental injury does not accompany bodily harm, because bodily injury does not encompass mental injury. If a different result were desired, the drafters could have used the term "personal injury"—which would include both physical and mental injury.

\textsuperscript{47} Id. at 72-77. This view includes all judicial attempts to avoid preclusion, including the Non-exclusive view and expansive interpretations of Article 17.


\textsuperscript{49} "Judicial disunification of a uniform law convention is practically unavoidable
17 of the Convention in addressing carrier liability for tortious injury.\textsuperscript{50} In those cases which have hinged on the meanings of the terms found in Article 17,\textsuperscript{51} some United States courts have refused to use the corresponding French terms to aid in interpreting and analyzing the Convention.\textsuperscript{52} Instead, they have applied legal connotations to the term as developed through the common law system of Anglo-American jurisprudence.\textsuperscript{53} Fortunately, in 1985 the United States Supreme Court settled the conflict between the lower courts by affirming the requirement that courts look to the French legal meaning of the term at issue.\textsuperscript{54}

In the landmark case of \textit{Air France v. Saks},\textsuperscript{55} the Supreme Court implicitly adopted the view that the Warsaw Convention itself creates a cause of action. Nevertheless, the Court held that an airline passenger who became permanently deaf because of the negligent maintenance and operation of an aircraft's pressurization system could not avail herself of that cause of action because she was not a victim of an "accident"\textsuperscript{56} for which the airline could be held liable under

where the convention is based on, or uses, concepts of a legal system, for which no exact equivalent exists in other legal systems." Mankiewicz, \textit{The Judicial Diversification of Uniform Private Law Conventions}, 21 \textit{Int'l & Comp. L.Q.} 718, 737 (1972) (including an in-depth contrast and comparison between the interpretations of the Warsaw Convention by United States courts with the courts of other nations).

\textsuperscript{50} The English version of Article 17 reads:

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

Warsaw Convention, \textit{supra} note 6, art. 17.

\textsuperscript{51} The two most litigated terms from Article 17 of the Convention are "accident" and "bodily injury." See infra notes 56-61 and accompanying text.


\textsuperscript{53} See Rosman 34 N.Y.2d at 385. The Court relies on the common and ordinary meaning of "bodily injury" in reaching its conclusion that mental injuries unaccompanied by physical trauma are not compensable. \textit{Id}.


\textsuperscript{55} \textit{Id}.

\textsuperscript{56} \textit{Id.} at 398. The Court distinguishes between an accident that \textit{causes} injury and one that \textit{is} the injury. The French version of the disputed portion of Article 17 at issue in \textit{Saks} is as follows: "l'accident qui a causé le dommage." This phrase has
In deciding this case, the Supreme Court set forth the proper method by which United States courts are to interpret a clause in an international treaty to which the United States is a party. The Court declared that "to determine the meaning of the word 'accident' in Article 17 we must consider its French legal meaning." As a result, in future controversies, the lower courts will be bound to consider the French legal meanings of the terms of the Convention, instead of resorting to their common law meanings, which could sometimes dictate different results.

Although restating the rule for treaty construction, the holding in Saks shed light only on the definition of the word "accident." This is not, however, the only Warsaw Convention term subject to diverse interpretation.

The expression "bodily injury" as it is found in Article 17 has a history of inconsistent and sometimes tortured construction by lower courts. Two courts attempted to apply the French legal meaning of the phrase, in conformity with Saks; and they reached opposite results. The French phrase at issue in those cases was lésion corporelle.

been officially interpreted to mean "the accident which caused the damage." Warsaw Convention, supra note 6, art. 17 (see both the French and English translations).

Saks, 470 U.S. at 406-08; Warsaw Convention, supra note 6, art. 17.

The Court relied on prior decisions to guide it through the proper interpretation of a clause in an international treaty to which the United States is a party. E.g., Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) ("treaties are constructed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); Maximov v. United States, 373 U.S. 49, 53-54 (1963) (analysis must begin with the text of the treaty and the context in which the written works are used).

Saks, 470 U.S. at 392 (emphasis added).

According to the Saks Court, "this is true not because we are forever chained to French law by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Id. at 398; see also Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976).

Saks, 470 U.S. at 398.

The French term lésion corporelle was officially interpreted to mean "bodily injury" in the official translation of the Warsaw Convention located at 49 U.S.C. sec. 1502 (1976).

of which "bodily injury" is the corresponding official English translation. A problem that has divided the courts constructing this term is whether a cause of action exists under the Convention for emotional injuries unaccompanied by physical injury. Some courts respond by declaring that "bodily injury" could in no way encompass purely emotional trauma, while others find to the contrary. To understand the state of the law concerning this part of Article 17, the cases reaching inconsistent results should be examined to determine whether they were analyzed correctly in light of Saks.

The leading authority holding that Article 17 does indeed contemplate recovery for mental anguish unaccompanied by physical trauma is the New York District Court decision in Husserl v. Swiss Air

6 France is a civil law country that recognizes two types of legally cognizable injuries: physical injuries (dommage matériel) and non-physical injuries (dommage moral). The wording of Article 17 (lésion corporelle) strongly suggests that the drafters did not intend to exclude any particular category of damages. If they had, it seems likely that they would have referred to one of the two basic types of damages, rather than using a term which does not readily evoke the sharp distinction found in French law. G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 125 (1977).

65 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.

Warsaw Convention, supra note 6, art. 17 (emphasis added).

66 No cause of action under the Warsaw Convention for any type of injury was recognized by American courts after two cases that were decided in the 1950's by the Second Circuit: Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d. Cir. 1957), cert. denied, 355 U.S. 907 (1957), and Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953), cert. denied, 348 U.S. 820 (1954). However, the trend of finding that no cause of action existed under the Warsaw Convention was reversed after the Noel case was overruled by Benjamins v. British European Airways, 572 F.2d 913, 916 (2d. Cir. 1978), cert. denied, 439 U.S. 1114 (1979); see also In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 415 (9th Cir. 1983) (Warsaw Convention does create a cause of action).

That court rejected the argument that the French legal meaning controls, but still found that the types of injury enumerated in the Convention should be construed expansively to include purely emotional trauma. Husserl II held that the common law meaning of "bodily injury" includes purely mental distress. This holding is an expansive interpretation that reaches a broad and arguably beneficial conclusion from a policy standpoint, but one analytically incorrect in light of Saks. Several other courts have followed this decision, but none have added significantly to its analysis.

Another court has, however, engaged in an exhaustive analysis of the French legal meaning of lésion corporelle. In Palagonia v. Trans World Airlines, the New York Supreme Court relied on expert testimony to conclude that lésion corporelle does include mental injury absent physical trauma as the basis for recovery. In relying solely on the French legal meaning, however, the court failed to examine the prior and subsequent history of the Convention. With regard to treaty construction, the Supreme Court has previously declared that "[t]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Because the Palagonia court failed to include an analysis of the Convention’s history, some commentators have concluded that its analysis was incomplete. Nevertheless, the Supreme Court’s rule of analysis requires that such an approach be

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69 The court in Husserl II reversed the previous holding in Husserl I interpreting the French legal term lésion corporelle to encompass nervous shock and mental suffering.
70 Husserl II, 388 F. Supp. at 1250.
71 Furthermore, Husserl II was decided before Benjamins v. British European Airways, 572 F.2d 913 (2d. Cir. 1978), cert. denied, 439 U.S. 1114 (1979), the incorrect analysis of which was based on the wrong premise that the Warsaw Convention merely imposed limits on state law causes of action.
74 Id. at 483, 442 N.Y.S.2d. at 675.
75 See supra text accompanying note 61.
77 Stanculescu, supra note 14, at 353.
made. An interpretation as required by Saks was followed in Palagonia. Therefore, Palagonia remains valid and enforceable precedent although failing to pursue an exhaustive analysis.

In contrast, some courts have held that Article 17 does not provide for recovery for purely emotional or psychological injuries unaccompanied by physical trauma. The leading case expressing this view is Rosman v. Trans World Airlines. The Rosman court used the ordinary meaning of the English terms "bodily injury" in reaching its conclusion. The court stated that "only by abandoning the ordinary and natural meaning of the language of Article 17 could we arrive at a reading of the terms 'wounding' or 'bodily injury' which might comprehend purely mental suffering without physical manifestation." The court failed, however, to consider the French legal meaning of the terms and even declared that "absolutely no dispute exists over the proper translation of the liability provisions of the Convention," and that French law was therefore irrelevant in interpreting the Convention once a proper translation was agreed upon.

The analysis in Rosman has received considerable negative commentary and must be questioned in light of Saks.

However, the court in Burnett v. Trans World Airlines reached the same conclusion as that expressed in the Rosman decision. However, unlike the court in Rosman, the Burnett court professed to use the French legal meaning of the English terms "bodily injury." The Burnett court determined that the equivalent French definition for "bodily injury" was "an infringement of physical integrity."

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78 Saks, 470 U.S. at 392.
79 The Palagonia case has not been expressly overruled and it still stands as one of the few court decisions handed down before Saks that interpreted the legal meaning of the French term when deciding a case under the Convention.
80 See Husserl I, infra note 120 at 708; Gam, infra note 115 at 230.
82 Id. at 397, 314 N.E.2d at 855, 358 N.Y.S.2d at 107.
83 Id.
84 Id. at 393, 314 N.E.2d at 852, 358 N.Y.S.2d at 103.
85 Id. at 394, 314 N.E.2d at 853, 358 N.Y.S.2d at 105.
87 Id.
89 Id. at 1156.
court held that since this definition gives no indication that mental injuries should be included, the language of the treaty therefore does not allow recovery for such injuries.\(^9\)

While *Burnett* appears to follow the mandate of *Saks*, it reaches a conclusion at odds with that in *Palagonia*, which also appeared to follow the mandate of *Saks*.\(^9\) The varying results reached by the courts in attempting to follow *Saks* seems to show that whether a particular plaintiff will recover for purely mental injuries will depend on the court in which he brings suit. Fortunately, a federal circuit court has recently ruled on this issue. Its thorough analysis of the mandate prescribed by *Saks* indicates the correct procedure by which a court must construe treaties drafted in a controlling foreign language.

### III. ANALYSIS

In *Floyd v. Eastern Airlines*,\(^9\) the plaintiffs challenged a lower court’s holding that a claim could not be brought under the Warsaw Convention for the intentional infliction of emotional distress.\(^9\) The plaintiffs contended that the language of the treaty implicitly provided a remedy for mental injuries and emotional distress unaccompanied by physical trauma.\(^9\) In deciding this issue, the crucial determination became the proper interpretation and analysis of the English translation, “bodily injury,” of the French term “lésion corporelle.”\(^9\) The plaintiffs claimed that the French legal meaning controlled and that this meaning encompassed a claim for the intentional infliction of emotional distress.\(^9\) Eastern argued that Article 17 of the Convention does not provide a claim for purely emotional injuries.\(^9\)

The 1985 Supreme Court decision in *Air France v. Saks*\(^9\) clearly dictates the method of treaty interpretation that the *Floyd* court was

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\(^9\) *Id.*

\(^9\) The court in *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972) (*Husserl I*), also based its holding on reasoning similar to that of the *Palagonia* court where it stated in dicta that mental anguish alone is not compensable under Article 17.

\(^9\) 872 F.2d 1462 (11th Cir. 1989).


\(^9\) *Floyd*, 872 F.2d at 1470.

\(^9\) *Id.* at 1471.

\(^9\) *Id.* at 1467.

\(^9\) *Id.* at 1479.

bound to employ in deciding the case. A court "must" look to the French legal meaning of the disputed Warsaw Convention term. Since Saks had only defined the term "accident," the Floyd Court was faced with interpreting lésion corporelle, for which no controlling authority on point existed. Instead, the only authority available to the court was conflicting persuasive authority, the analysis of which was obsolete after Saks because of the decisions' reliance on English interpretations. After the Floyd court disposed of such cases, declaring their analyses flawed, it moved on to discuss the two cases which had used the French meaning of the appropriate terms in interpreting the disputed terms.

First, the Floyd court examined Burnett v. Trans World Airlines where the New Mexico district court applied the French language meaning of "bodily injury" to determine that lésion corporelle means "an infringement of physical integrity." This definition, held the Burnett court, fails to give "the slightest indication that mental injuries are to be included in its domain." The court in Floyd, however, correctly reasoned that the Burnett analysis only purported to apply the French legal meaning of Article 17 (as required by Saks). Instead, the analysis was actually limited to the purely linguistic meaning of the French terms at issue. Because Burnett did not determine the legal meaning of the phrase under French law, the Floyd court found the analysis to be unpersuasive, and refused to follow that decision.

Next, the Floyd court turned to the New York state court decision in Palagonia v. Trans World Airlines. The Palagonia court ex-

99 Floyd, 872 F.2d at 1470; see also Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).
100 Saks, 470 U.S. at 399 (1985) (emphasis added).
101 No United States Supreme Court case nor Eleventh Circuit Court case has addressed the issue in Floyd regarding the correct interpretation of lésion corporelle.
102 Floyd, 872 F.2d at 1475-80.
103 Id.
104 Id.
106 Id. at 1156.
107 Id.
108 Floyd, 872 F.2d at 1477.
109 Id.; See, L. KREINDLER, 1 AVIATION ACCIDENT LAW sec. 11.03[2][b] at 11-43 (1988).
110 Floyd, 872 F.2d at 1477.
Floyd case

Floyd case has exhaustively analyzed the French legal meaning of Article 17. Relying on expert testimony, the court concluded that *lésion corporelle* does allow recovery for mental injury, even absent any physical trauma. Although the *Palagonia* court did not examine the subsequent and prior history of the Convention in arriving at its conclusion, the *Floyd* court found its reasoning persuasive. After finding that the Convention's subsequent and prior history supported the holding in *Palagonia*, the *Floyd* court decided the case before it accordingly.

Although cases involving purely mental injuries are rare, many involve the common element of terrorism. Admittedly, cases with *Floyd*-like fact patterns will be infrequent. However, given the prevalence of airplane hijackings, and the willingness of courts such as *Floyd* to hold mental injury unaccompanied by physical trauma to be compensable, it appears that Warsaw Convention claims involving purely mental injury will not be brought infrequently. Indeed, several cases have already been decided that have arisen in the context of terrorist attacks, including *Burnett, Husserl II*, and *Rosman*.

Interestingly, the first airplane hijacking is believed to have taken place in 1931, years before the above mental injury cases were decided. Unfortunately, since the Warsaw Convention was drafted in 1929, before hijackings became an issue of concern, as noted in *Husserl II*, airline hijackings were "probably not within the specific

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112 *Floyd*, 872 F.2d at 1479.
113 *Palagonia*, 110 Misc. 2d. at 482, 442 N.Y.S.2d. at 675.
114 *Floyd*, 872 F.2d at 1479-80.
116 One definition of terrorism is: "terror inspiring violence containing an international element that is committed by individuals or groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends." Silets, *Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks Under the Warsaw Convention and its Revisions*, 53 J. Air L. & Com. 321, 322 (1978).
117 One commentator has claimed that the world has "entered an 'age of terrorism,' the pattern of which is unlike any other period in history when ideological and political violence occurred." Y. ALEXANDER & S. FINGER, *INTRODUCTION TO TERRORISM: INTERDISCIPLINARY PERSPECTIVES* at xi (1977).
contemplation of the parties at the time the Warsaw Convention was promulgated . . . ”120 The increase in hijacking and terrorist incidents in the last three decades has lead one commentator to declare that the world has entered an “age of terrorism.”121

While not specifically addressed in the original promulgation of the Warsaw Convention, the subsequent Montreal Agreement modified the Convention and indirectly established that under the treaties hijackings are considered “accidents,” resulting injuries therefore being covered by the Warsaw Convention scheme.122 The main concern in this area regarding the Convention is whether passengers whose sole injuries are mental may recover damages therefore.123 The holdings on this issue have not been uniform—some courts holding that such injuries are compensable and others holding that they are not.124 After Saks and Floyd however, it appears that American courts will be increasingly prone to find such injuries compensable. Similarly, an Israeli court after the Entebbe hijackings found that purely mental injuries are compensable, although the court found that there was an inadequate interpretation of lesion corporelle under French law.125

The increasing propensity of courts to allow recovery for purely mental injuries under the Warsaw Convention is not surprising given the trend in recent years to award damages for an increasing number of psychological and mental injuries.126 Additionally, developments in medical technology have made it easier to distinguish simulated from actual mental injuries, thereby facilitating evidentiary findings in assessing mental injuries.127 Today, the airline industry needs less protection from excessive liability, an original goal of the Convention,

120 Husserl I, 351 F. Supp. at 706.
121 Y. Alexander & S. Finger, supra note 121.
122 Lowenfeld, Hijacking, Warsaw, and the Problem of Psychic Trauma, 1 Syracuse J. Int’l L. & Com. 345, 346 (1973); see supra text accompanying notes 23-27.
124 Herman v. Trans World Airlines, 34 N.Y.2d. 385, 400, 314 N.E.2d 848, 857 (1974) (holding that no damages are recoverable for the horror and mental suffering in connection with a hijacking; however, damages are recoverable for mental injuries so long as there are physical signs or symptoms of those mental injuries); Palagonia v. Trans World Airlines, 110 Misc. 2d. 478, 479, 442 N.Y.S.2d. 670, 671 (Sup. Ct. 1978) (holding that damages are recoverable for purely mental injuries unaccompanied by physical trauma).
126 Gam, supra note 119, at 231.
127 Id.
because of the availability of liability insurance. The court in Floyd recognized the trend of exposing airlines to a wider scope of liability and broadened it by allowing recovery for purely mental injuries under the Warsaw Convention.

Since Floyd was decided, only one United States federal court has addressed the issue of whether emotional trauma without accompanying physical injury is recoverable under the Warsaw Convention. In Gilbert v. Pan American World Airways the plaintiff sued Pan Am for the emotional distress and mental anguish she suffered prior to being struck by a “runaway bar cart.” The district court of the Southern District of New York applied the Floyd rule to find a valid cause of action did exist and that the plaintiff was entitled to recover the jury’s award of damages for mental injuries in her favor.

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128 One of the original goals of the Warsaw Convention was to protect the interests of the then fledgling airline industry. In 1929 the industry was young; but today insurance can help defray any monetary liability incurred by an airline.

129 Floyd, 872 F.2d at 1479.

130 Gilbert v. Pan American World Airways, No. 85-4157 (S.D.N.Y. June 2, 1989) (Westlaw, Genfed Library, Dist file). Another case that has relied on Floyd concerning a matter unrelated to this note is In Re Alwan Brothers Co., 105 Bankr. 886 (Bankr. C.D. Ill. 1989). In footnote 7, the court relied on Floyd in deciding that the Warsaw Convention does not provide a recovery for punitive damages.

131 No. 85-4157 (S.D.N.Y. June 2, 1989) (Westlaw, Genfed Library, Dist file). That case involved a heavy wheeled bar cart that was unsecured during takeoff. Plaintiff, Mrs. Gilbert, was a former airline stewardess traveling as a passenger of the defendant at the time of the mishap. When she observed the unsecured bar cart, according to the court, she understood not only that she was in danger, but also that given the weight of the cart and the velocity with which it could be expected to bear down upon her, she was in a position of very serious danger. She even testified that she feared for her life, or that she would receive a maiming injury. The court noted that “Mrs. Gilbert’s prior experience uniquely qualified her to understand the danger into which defendant’s negligence had thrust her.” The court found that such emotional distress was compensable under the Warsaw Convention, under Floyd; and it upheld the jury’s verdict in favor of Mrs. Gilbert in the amount of $25,000.

132 The court’s finding that mental injury unaccompanied by physical trauma can create a valid cause of action under the Warsaw Convention is in line with commentary from other countries that have agreed to be bound by the terms and conditions of that treaty. Miller, Compensable Damages Under Article 17 of the Warsaw Convention, 1 AIR L. 210, 211 (1976), citing, H. & L. MAZEAUD, & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE, 416-17 (5th ed. 1957). When the Convention was drafted, any kind of damage, if “certain” and “direct,” could be compensated. Under French law, claims for mental injury were recognized at the time that the Convention was adopted. A British case also held that the official French text of the Convention prevails when inconsistent with the English text. Corocraft Ltd. v. Pan American Airways, 1 Q.B. 616, 652 (1968).
Gilbert the defendant had argued that "pre-impact emotional distress" was a recoverable damage only if the plaintiff had a fear of death and the fear was legitimate. The court rejected that argument and concluded that the plaintiff's damages were indeed recoverable under the Warsaw Convention.

As a district court in the Second Circuit, the Gilbert court was not required to follow the decision in Floyd, a decision handed down by the Eleventh Circuit Court of Appeals. However, the New York district court was persuaded to accept Floyd as a correct statement of the law. The well-reasoned Floyd decision should continue to be followed in the future by courts that wish to determine the correct interpretation of "bodily injury" under the Warsaw Convention.

Some recent foreign cases have also held that damages for purely mental injuries are recoverable. In Compagnie Air France v. Consorts Teichner, the Israeli Supreme Court allowed recovery for purely mental injuries under the Warsaw Convention, despite the lack of an adequate basis under French law by which to interpret the term lésion corporelle to include such injuries. The court based its decision on a finding that the prerequisites of the Convention had been changed dramatically by the development of civil aviation, thus necessitating the general extension of liability for mental injuries. Unfortunately, whether damages are recoverable under the Convention for mental injuries has rarely been addressed by courts outside of the United States. In fact, all judgments recognizing purely mental injuries as recoverable under the Convention have been handed down by United States courts, with the exception of Consorts Teichner. It should be noted that statements by the German and French delegates at the Convention indicated their approval of including purely mental injuries under Article 17.

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133 Gilbert, No. 85-4157 (Westlaw, Genfed Library, Dist file).
134 Id.
135 Floyd, 872 F.2d 1462 cited with approval in Gilbert, No. 85-4157 (Westlaw, Genfed Library, Dist file).
136 39 RFDA 232 (Israel S.C. 1985), reviewed by Gam, supra note 119, at 230. This case was a result of the hijacking at Entebbe, Uganda. Another case in the American courts that dealt with the detention of hostages in the airport building at Entebbe was Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971 (S.D.N.Y. 1977).
137 Gam, supra note 115, at 230.
138 Id.
139 Id. It remains to be seen whether the European courts will be ready for a similar construction of Article 17 of the Warsaw Convention.
140 Mankiewicz, 4 ANNALS OF AIR & SPACE L. 187 (1979) (including a deposition of himself as an expert witness in trial litigation).
To be sure, other foreign cases have held that the French meaning controls in cases of conflict between the French terms and the corresponding translated term. In Corocraft Ltd. v. Pan American Airways, the highest court of Great Britain held that the official French text of the Warsaw Convention prevails when inconsistent with the corresponding English text. Additionally, an English court in Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corporation recognized that the original French text is the only text to have international authenticity, prompting one commentator to write that, "Every schoolboy knows [that]... the French text prevails over the English in case of inconsistency." Article 36 of the Warsaw Convention recognizes the French text as the controlling version of the treaty. Yet, as previously mentioned, some courts remain reluctant to comply with this mandate.

A major problem in analyzing the French text of the Convention is determining just what is the legal meaning of the French text. A British court in Fothergill v. Monarch Airlines only recently expressed its approval of even discussing foreign judgments and writers. An Italian case, Coccia v. THY, has even shown hostility to the French text of the Convention by holding that parts of the Convention were unconstitutional and therefore unenforceable in Italian courts. The Floyd and Saks decisions, however, demonstrate the willingness of United States courts to resort to the meaning of a term as expressed in French decisions and commentary.

Asian countries have failed to hand down decisions affecting the interpretation of the Warsaw Convention. Because the Warsaw

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141 1 Q.B. 616, 652 (1968).
142 3 All E.R. 359, 368 (1980).
144 Article 36 states:
This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.
Warsaw Convention, supra note 6, art. 36.
145 3 W.L.R. 491 (1979); Schoner, Partial Loss as Damage; Recourse to Travaux Préparatoires: Fothergill v. Monarch Airlines (House of Lords), 6 AIR L. 40, 42 (1981).
system was originally promulgated by western nations, many Asian countries were unaware of the Convention until their own air carriers began offering international service.\(^4\) Accordingly, the Convention’s application and interpretation is in its infancy stages relative to those countries which have adhered to the Convention for many years, Korea and Japan being the two most prominent countries affected.\(^5\) There is thus very little published information concerning the construction of the Warsaw Convention by the various Asian courts and governments.\(^6\)

Although a cause of action was found to exist in \textit{Floyd}, it should not be forgotten that the liability limitation of the Convention still applies to any resulting judgment.\(^7\) That limitation was the major goal behind the treaty and it still provides the airlines with a definitive ceiling on their potential liability.\(^8\) The plaintiffs will also not be able to pursue any other remedies because, under the Supremacy Clause,\(^9\) the Convention is found to preempt all state law causes

\(^{10}\) \textit{Warsaw Convention}, supra note 6.

\(^{11}\) U.S. \textit{CONST.} art VI cl. 2. (the Supremacy Clause). The Warsaw Convention as an international treaty accepted by the United States forms a part of the Supreme
of action. In cases such as *Floyd*, however, those passengers who suffer emotional injuries may still be able to recover a complete remedy for their psychological scars if their damages do not exceed the Convention's liability limitations. In essence, the Convention can now be used to expand the ability of injured passengers to recover compensation by allowing them to recover for their mental sufferings.

IV. CONCLUSION

The importance of the *Floyd* decision lies not in its declaration of a binding interpretation of *lesion corporelle*, for it will only bind those cases brought within the Eleventh Circuit. Instead, *Floyd* shows that American courts are willing to take an expansive look at the policies underlying the Convention and are broadening their views of the means by which the Convention should be applied. Previously, the United States had denounced the treaty, yet after the Montreal Agreement, it began interpreting the treaties literally. After the *Saks* and *Floyd* decisions though, the trend in United States courts appears to be not only to interpret the terms of the Convention broadly, but to view the policies underlying the Convention itself from the framers' perspectives. Such decisions are positive steps towards interpreting the Convention in a manner consistent with the framers' original intent. Such steps should be continued to ensure the treaty will be interpreted in a way parallel to that of the other signatory countries.

Mental injuries unaccompanied by physical trauma have only recently been recognized as compensable under the common law. Under the Warsaw Convention's compensation scheme, however, those damages may not be fully recoverable under the Convention's law of the land, preempting contrary state and local laws. *Domanque v. Eastern Airlines*, 722 F.2d 256, 262 (5th Cir. 1984); *Dalton v. Delta Airlines*, 570 F.2d 1244, 1246 (5th Cir. 1978) ("as an international treaty accepted by the United States, the Warsaw Convention is absolutely binding"). Any state law in conflict with a treaty of the United States is invalid. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978).

Depending on the amount of damages proven at trial, many cases may have damages totaling less than the $75,000 limitation imposed by the Convention, as amended by the Montreal Agreement.

155 *Brooklyn Note*, *supra* note 153, at 399-400.


157 *Lowenfeld & Mendelsohn*, *supra* note 17.

liability limitations. For years, the United States has desired changes in these limitations so that the limitations might better correspond to other areas of law. Such limitations imposed by the Convention have traditionally been difficult to modify, as evidenced by the United States only being able to do so on two occasions over the fifty-five years that the treaty has been recognized. Courts in the United States now have the Saks and Floyd decisions as persuasive authority by which to alter the Convention's scope of coverage through judicial reinterpretation. As a result, plaintiffs will be able to recover under a wider range of circumstances. Given the limitations imposed, such a result is desirable.

The airline industry is no longer fledgling, as it was at the time that the Convention was promulgated. It should be required to answer for the damages it causes. In contrast to their predecessors, airlines today are better able to spread the costs of liability exposure and prevention. Additionally, unlike international flights, no limitations are imposed on recoveries for damages sustained on domestic flights, and in such cases the airlines have had to pay full compensation to victims. In international flights, the limitations unfortunately still exist. However, after the Floyd decision, plaintiffs will be better able to recover for mental injuries, as well as the traditional physical injuries. To those victims of airline mishaps, the result is more fair than that which existed prior to Floyd.

Regardless of the limitations, damages for mental injuries unaccompanied by physical trauma resulting from an "accident" occurring while an individual is on an international flight should be compensable. Recent case law has uniformly recognized the compensability of purely mental injuries in other types of cases. The rationale no longer exists for the doctrine to be ignored in cases covered by the Convention. The Floyd court has aggressively reached for that result by allowing compensation for such mental injuries and in doing so has expanded the scope of the Convention. More importantly, the Floyd holding has shown a United States court's ability and willingness to sift through years of inaccurate precedents to lead the countries adhering to the Convention to an interpretation of the treaty which

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160 For example, if it could be shown that the plaintiff has incurred damages in excess of the limitation imposed by the Warsaw Convention as amended by the Montreal Agreement ($75,000 U.S.), then the plaintiff could only recover up to the stated limit.

161 Hague Protocol, supra note 20; see also Montreal Agreement, supra note 15.
should have been followed from the Convention’s inception. Although the holding was inevitable, it is a disquieting tribute to the wheels of justice that it took six decades for an American circuit court to make such a change.  

Larry Johnson

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162 Petition for certiorari was granted by the Supreme Court on June 4, 1990. Floyd v. Eastern Airlines, 872 F.2d 1467 (11th Cir. 1989), cert. granted, 110 S. Ct. 2585 (1990).