The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries Under the Warsaw Convention

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THE AFTERMATH OF THE AIRPLANE ACCIDENT: RECOVERY OF DAMAGES FOR PSYCHOLOGICAL INJURIES ACCOMPANIED BY PHYSICAL INJURIES UNDER THE WARSAW CONVENTION

I. INTRODUCTION

The Convention for the Unification of Certain Rules Relating to International Transportation by Air,1 popularly known as the Warsaw Convention, took place when the commercial aviation industry was at its infant state of development.2 The United States became a signatory to the Convention in 1934.3 "The essential purpose of the Convention was to provide the world's fledgling airline industry with a 'legal basis' for its operation."4 The purpose of the Convention is also evident through a reading of the preamble that provided for regulation "in a uniform manner the conditions of international transportation by air in respect of the . . . liability of the carrier."5 Seventy years after the Convention went into effect6 commercial aviation is no longer an infant industry. American passengers rely on international transportation by air to conduct their business and to take vacations. In 1929, "the only international air flight from the United States was between Key West, Florida, and Havana, Cuba."7 Today it is possible to reach any destination in the world.

Because the commercial aviation industry has significantly developed and gained unparalleled strength, the Warsaw Convention

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3. See Eaton, supra note 2, at 563.


5. The Warsaw Convention, supra note 1, 49 Stat. at 3014:


should no longer be viewed as a protective measure that limits the liability of airlines for injuries suffered by passengers during the course of international transportation. Instead, the Warsaw Convention should be viewed as a tool that allows international passengers recovery for the damages suffered during an air accident. The majority of courts in the United States fail to see the Convention in such a light.

In *Eastern Airlines, Inc. v. Floyd*, the Supreme Court of the United States decided that air carriers cannot be liable for purely psychological injuries under the Warsaw Convention. The court of last resort on questions of treaty interpretation applied a narrow construction of the French term *lesion corporelle* and ignored the plea for a broad construction of the Warsaw Convention. The ramifications of *Floyd* are clear. For example, a passenger on an international flight who is told to prepare for an emergency landing and suffers from apprehension of near death, cannot recover for the emotional injuries, if the plane does not crash and no physical damages are suffered. The Supreme Court, however, "express[ed] no view as to whether plaintiffs can recover for mental problems accompanied by physical injuries."

The brethren of the *Floyd* decision continue to endorse the narrow interpretation of the Convention without paying much attention to the plain meaning of the text. On the issue left unanswered by the Supreme Court, the courts have consistently held that the primary objective and the dominant purpose of the Convention was to limit the liability of air carriers for injuries arising out of accidents that take place during the course of international travel. See, e.g., *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973); *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975), rev'd on other grounds, 550 F. 2d 152 (3rd Cir. 1977); *Domangue v. E. Air Lines, Inc.*, 722 F. 2d 256 (5th Cir. 1984); see also, Alois Valerian Gross, Annotation, *Limitation of Liability of Air Carrier For Personal Injury or Death*, 91 A.L.R. FED. 547 (1999).

9. See Gross, *supra* note 8, at 547 (providing a more complete list).

10. 499 U.S. 530 (1991). Because the Warsaw Convention is a treaty, the Supreme Court has jurisdiction to hear cases arising under it. See U.S. CONST. art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").


12. From French "bodily injury." See id. at 536.

13. "Court [was] not persuaded by argument that French law permitted recovery for mental distress when the Convention was drafted in 1929; Court [was] not persuaded by argument that Berne Convention permitted recovery for purely emotional injuries; Court [was] not persuaded by substitution of the phrase 'personal injury' in place of the phrase 'bodily injury' on passenger tickets and in subsequent international agreements; Court [was] not persuaded by contrary holding of Israel Supreme Court." Eaton, *supra* note 2, at 583 n.133 (citations omitted).

Court, several district courts have held that merely claiming that physical injuries led to psychological damages in the aftermath of an accident occurring in the course of international transportation is insufficient for recovery under the Warsaw Convention.\(^5\) Instead, the Alvarez court and the Carey court adopted a similar reasoning requiring that a passenger, who suffers psychological injuries accompanied by physical injuries, prove a strong causal nexus between mental and physical injuries.\(^6\) Other federal courts refuse to hold that psychological injuries that are coupled with physical injuries, but not caused by them, are not recoverable under the Warsaw Convention.\(^7\) Instead, these courts hold that recovery for psychological injuries, even if unrelated to the physical trauma, is allowed as long as there are some physical injuries.\(^8\)

This Comment examines the conflicting decisions that address the issue of recovery of psychological damages that are accompanied by some physical damages under the Warsaw Convention. This Comment argues that the plain language of the Convention does not require a showing of the "strong causal nexus" between the physical injuries and the psychological injuries. Instead, the Convention requires a simple causal connection between the accident and the injuries that result therefrom.\(^9\) This Comment concludes that the Supreme Court must revisit its 1991 Floyd decision to clarify the issue for the lower courts. The modern commercial aviation industry is advanced enough to

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18. See id.


The carrier shall be liable for damages 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.

The Warsaw Convention, supra note 1, at art. 17. (emphasis added).
minimize air disasters. Yet, it is not immune from them. The horrific crashes and "near miss" accidents have occurred with unfortunate frequency in the past years. The Warsaw Convention already limits the liability of the air carriers but should not be used by them as a shield to avoid liability altogether. The Supreme Court must preserve the intent of the framers who wanted to limit the liability of the air carriers. Yet, the injured plaintiffs must have the ability to recover for their psychological injuries accompanied by physical injuries, caused by the air carriers' tortious conduct.

As background, Part I of this Comment analyzes the history of the Convention, and the intent of the framers not to limit the recovery for specific injuries. Part II examines the reasoning of the lower courts and the conflicting interpretation of the treaty by the Supreme Court. Part III analyzes the express language of the treaty under the traditional canons of interpretation used by courts in other contexts. It concludes that the language does not require a proximate causal connection advocated by some of the lower federal courts and urges the Supreme Court to revisit its 1991 *Floyd* decision and announce that plaintiffs who suffer psychological injuries accompanied by physical injuries can recover under the Warsaw Convention.

II. DISCUSSION

A. The Treaty

In 1929, more than thirty countries participated in the drafting of the original international treaty that had a purpose of providing protection...

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20. On January 30, 2000 Kenyan Flight 461 from Abidjan, Kenya to Lagos, Nigeria crashed, killing 169. On January 31, 2000, Alaskan Airlines Flight 261 went down off the coast of Southern California. On October 31, 1999, EgyptAir Flight 900 originated in Los Angeles and then departed from New York's JFK International Airport at 1:19 a.m. EST. The Boeing 767 jet, carrying 217 passengers, was destined for Cairo, Egypt, before it plunged sharply into the Atlantic Ocean off Nantucket, Massachusetts. No one survived. See generally *ABC News Special Report on Sunday, October 31, 1999* (available at LEXIS News Group File: Most Recent-90 days) (visited Sept. 15, 2000). There have been reported allegations that a relief co-pilot and member of the crew, Gameel El Batouty, committed a wrongful act that caused the plane to crash. If these allegations are substantiated with concrete evidence, the potential plaintiffs will have a strong claim against the airline that it is guilty of "willful misconduct." On November 16, 1999, the first wrongful death suit was filed against EgyptAir on behalf of the estate of Ghassan Koujan, a 38-year-old resident of New Jersey who died in the crash. See *First Suit Filed Against Egyptian Air & Boeing* <http://www.courttv.com/national/1999/waiting/complaint_text_doc.htm>. (visited Sept. 15, 2000).
to the commercial aviation industry. The United States did not participate in the drafting process but ratified the treaty in 1934. The liability of air carriers for death or any bodily injuries of passengers was limited to $8,300. Immediately after the treaty went into effect, the signatories became dissatisfied with the low amount of air carrier liability. The parties attempted to address this dissatisfaction by adopting the Hague Protocol of 1955. The United States, however, never adhered to the Hague Protocol.

Dissatisfaction with the low liability limit culminated on November 15, 1965, when the United States notified other signatories that it was denouncing the Warsaw Convention, and was withdrawing from it effective May 16, 1966. To address the problem, a special meeting was called in Montreal in February 1966. The parties resolved the problem through the Montreal Agreement, "the effect of [which] was to increase the liability limit to $75,000 per passenger for international flights originating, stopping over, or ending in the United States." The agreement abolished the negligence standard and replaced it with a strict liability policy for damages. The United States withdrew the denunciation notice on May 13, 1966.

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21. See Eaton, supra note 2, at 570, n.27 (indicating that the list includes the German Reich, Austria, Belgium, Brazil, Bulgaria, China, Denmark, Iceland, Egypt, Spain, Estonia, Finland, France, Great Britain, Ireland and the British Dominions, India, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, the Netherlands, Poland, Rumania, Sweden, Switzerland, Czechoslovakia, Russia, Venezuela, and Yugoslavia). Id.

22. Id. at 563.

23. See Gross, supra note 8, at 561 (stating that originally, there was a presumption of air carriers' negligence. This presumption could be rebutted by showing that the air carrier acted reasonably and had taken all proper measures to prevent an accident and subsequent harm to the passengers).

24. See Eaton, supra note 2, at 570 (citing Lowenfeld & Mendelsohn, supra note 2, at 502).

25. See Lowenfeld & Mendelsohn, supra note 2, at 504. The authors indicated that the liability was increased to $16,600 per passenger. See id at 507.

26. See id. at 509-16.

27. See Gross, supra note 8, at 568.

28. See Boulee, supra note 19, at 507.

29. See id.

30. Eaton, supra note 2, at 571.

31. See id. Following the adoption of the Montreal Agreement, the courts expressed the view that the agreement did not affect Article 17 of the Warsaw Convention and added no substantive changes to the overall purpose of the Warsaw Convention. See, e.g., MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971).

There were additional attempts to increase the liability of airlines, undertaken both domestically and internationally. In 1992, ten Japanese air carriers voluntarily signed an agreement and waived the Warsaw Convention liability limits. To implement the change, the Japanese air carriers changed the language on conditions of carriage, a contract between a passenger and an airline, regarding liability for passenger's injuries in the course of international transportation Other international air carriers did not immediately follow the Japanese airlines because of fear of increased insurance costs.

Several local and international air carriers took action in 1996 to adopt the International Air Transport Association ("IATA") Intercarrier Agreement. The agreement "requires carriers to 'voluntarily' waive the Warsaw Convention's liability cap and the application of strict liability principles to claims as high as approximately U.S. $135,000." Additionally, plaintiffs can recover in excess of this sum, if the airline fails to prove it is without fault. Although this effort should be praised, the IATA Agreement is merely a contract, and as such, it does not have the same legal effect as the Warsaw Convention, a treaty, and, thus, a law in the United States and in the other countries that ratified the 1929 Convention.

On May 9, 1997, the International Civil Aviation Organization ("ICAO") ratified a draft of a new international convention changing the liability limits established by the Warsaw Convention. The draft convention provides for a two tiered system: strict liability is used for damages below $135,000, and fault-based liability is used to recover damages in excess of $135,000. Although the draft convention is similar to the IATA agreement in its purpose of lifting the limited

35. See Buff, supra note 33, at 1789.
36. See id. at 1791.
37. See Pickelman, supra note 33, at 276.
38. Id.
39. See id.
40. See Buff, supra note 33, at 1831 n.479.
41. See id. at 1830.
42. See Pickelman, supra note 33, at 278.
liability, there are two important differences. First, the draft convention has the effect of law, not merely a contract. In addition, certain provisions of the Draft Convention, such as an 'Updating Clause,' which provides for periodic adjustments of the liability limitations, go far beyond that endeavored by the IATA.

**B. The Warsaw Convention and the Supreme Court**

The Warsaw Convention has been interpreted by a great number of federal courts. Since 1985, the Supreme Court has battled with the language of the Warsaw Convention six times, each time adding a new layer of interpretation. It is evident that in each of its decisions, the Supreme Court was trying to preserve the dual purpose of the Warsaw Convention, as it was envisioned by the original drafters.

At least in *Eastern Airlines, Inc. v. Floyd*, however, the Supreme Court incorrectly interpreted the Convention and did not do justice to either the individual plaintiffs or to the spirit of the Convention.

Generally, the Supreme Court has held that the Warsaw Convention is a self-executing treaty. This means that no domestic legislation is necessary to give the Treaty the force of law in the United States. Subsequently, the Supreme Court decided in *Air France v. Saks* that the interpretation of the Warsaw Convention was governed by the

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43. See id.
44. See id.
45. Id.
46. See David J. Bederman, *Revivalist Canons And Treaty Interpretation*, 41 UCLA L. REV. 953, 981 n.155 (1994). "Judging by the number of interpretative cases involving the Warsaw Convention, it is probably the most litigated treaty in U.S. courts." Id.
48. The writers of the Convention wanted to achieve two goals. First, was to achieve a certain degree of uniformity in the industry. Second, was to limit the liability of international air carriers. See generally Lowenfeld & Mendelsohn, *supra* note 2, at 497.
51. Treaties have the same force as statutes and, therefore, are the law of the land. The United States Constitution empowers the federal courts with the jurisdiction to hear "Cases... arising under... the Laws of the United States, and Treaties made, or which shall be made, under their Authority...." U.S. CONST. art. III, § 2. See Bederman, *supra* note 46, at 954.
The Saks decision is noteworthy because the Court interpreted the word "accident" and held that it means "an unexpected or unusual event or happening that is external to the passenger." In Saks, the Court emphasized the importance of the fact that the Convention imposed liability for injuries caused by an "accident." Second, the Court found it significant that "the text of Article 17 referred to an accident, which caused (French 'qui a causé') the passenger's injury, and not to an accident which was the passenger's injury."

In 1989, the Supreme Court held that the commercial airline that engages in international transportation does not lose the cap on liability provided by the Warsaw Convention, even if the notice to the passengers is in smaller type than allowed by the Montreal Agreement. The Montreal accord required those airlines that executed it to provide passengers with the notice, in at least a 10-point font, that liability for injuries suffered in the course of international air transportation is limited.

The passengers in Chan, all of whom were killed when the aircraft was destroyed while in the air, received tickets with a notice appearing on them in an 8-point font. The Court interpreted the language of the Convention that lifts limited liability if the air carrier "accepts a passenger without a passenger ticket having been delivered." According to the Court, this language means that the limited liability shield is available so long as there is no shortcoming that is so extensive that the document issued to the passenger cannot be described as a

53. See id. at 397-99. The official French text of Article 17 reads: "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." Floyd, 499 U.S. 530 at 535. For the official English translation, see supra note 19.

54. 470 U.S. at 405. Specifically, the Court stated: "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries ... In cases where there is contradictory evidence, it is for the trier of fact to decide whether an "accident" as here defined caused the passenger's injury ..." Id.

55. See id. at 398-99.


59. See Chan, 490 U.S. at 124.

60. The Warsaw Convention, supra note 1, at art. 3(2).
In *Floyd*, Justice Marshall, writing for a unanimous Court, concluded 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." The Court expressed no opinion on whether psychological damages that are accompanied by physical damages are recoverable, or whether the Warsaw Convention is the only cause of action available to plaintiffs who suffered injuries during the course of international air transportation.

In *Floyd*, the passengers were on a flight between Miami and the Bahamas. The plane experienced engine failures and began to descend with an abnormal speed towards the Atlantic Ocean. The pilots announced that the "plane would be ditched." Fortunately, the crew restarted the engine, and the plane was landed safely at Miami Airport.

Passengers on this Eastern Airlines flight sued the air carrier for emotional damages caused by the loss of engine power during the flight. Because loss of engine power during a flight constituted an accident, Article 17 applied. The plaintiffs were not able to recover, however, because they did not allege that they suffered any physical damages as a result of the air accident.

On January 12, 1999, the Supreme Court decided the question left open by the *Floyd* decision: whether the Warsaw Convention is the only cause of action available to a plaintiff injured in the course of international air transportation.

Before Tsui Yuan Tseng, a passenger, boarded an El Al flight from New York to Tel Aviv, El Al subjected her to an intrusive security search. She sued El Al in state court in New York for assault and false

61. See Gross, supra note 8, at 630-31.
63. Id. at 552.
64. See id. at 552-53.
65. See id. at 553.
66. See id. at 553.
67. Id. at 533.
68. Id.
69. See id.
70. See id.
71. See id.
73. See *Tseng*, 525 U.S. at 160. Ms. Tseng was told "to take off her jacket, sweater, shoes,
imprisonment and claimed the search made her extremely sick and upset. The suit was removed to federal court, and then dismissed on the basis that the plaintiff failed to establish an injury recognized under the Warsaw Convention. The Court of Appeals for the Second Circuit reversed, holding that a plaintiff who did not qualify for relief under the Convention could seek relief under local law for an injury sustained in the course of international air travel.

In an 8-1 decision authored by Justice Ginsburg, the Supreme Court reversed the Second Circuit and decided that the Warsaw Convention "precludes a passenger from maintaining an action for personal injury damages under local law when . . . the claim does not satisfy the conditions for liability" established by that treaty. Recourse to local law, the Court concluded, would undermine the uniform regulation of international air carrier liability under the Convention.

The Supreme Court decisions made the Warsaw Convention alien and incomprehensible. The Court now looked at the language of articles 17, 18, 24 and 25. In finding almost every substantive provision of the treaty ambiguous, the Court created an unpredictable


74. See Tseng, 525 U.S. at 164.
75. See id. Tseng alleged psychic or psychosomatic injuries, but no "bodily injury," as that term is used in the Warsaw Convention. See id. Tseng argued that Article 24 of the Warsaw Convention should be construed to allow a plaintiff who does not satisfy the liability requirements of Article 17 to pursue the claim under state tort law. The airline, on the other hand, argued that the language of Article 24 is unambiguous in that it creates an exclusive cause of action. See id. Article 24, in its English version, provides:

In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention. In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The Warsaw Convention, supra note 1, art. 24, 49 Stat. at 3006; 137 L.N.T.S. at 26-27.
76. See Tseng v. El Al Israel Airlines, Ltd., 122 F.3d at 99 (2d Cir. 1997).
77. Tseng v. El Al Israel Airlines, Ltd., 525 U.S. 155, 176 (1999). The Supreme Court, just like the Second Circuit Court of Appeals, did not address the issue of whether the alleged injuries are recoverable under the Warsaw Convention. See id. The plaintiff was alleging that the Floyd requirement of "bodily injury" was satisfied because as a result of the search she developed headaches, nervousness and sleeplessness, all physical manifestations of psychological injury. See Tseng v. El Al Israel Airlines, Ltd., 919 F. Supp. 155, 157 (S.D.N.Y. 1996), rev'd in part, aff'd in part, Tseng, 122 F.3d 99 (2d Cir. 1998), rev'd, 525 U.S. 155 (1999).
78. See Tseng, 525 U.S at 171.
inconclusive environment for lower courts to engage in a frustrating and sometimes dangerous exercise of treaty interpretation.

Conflicting decisions of lower courts addressing the issue of recovery for psychological injuries accompanied by physical injuries.

The *Floyd* decision left the question of whether emotional damages are recoverable if physical damages exist unanswered. 79

C. Summary of Lower Federal Court Decisions

1. Decisions where recovery was denied.

Lower federal courts that deny recovery for emotional distress, if the distress is not caused by physical injuries, derive their reasoning from *Jack v. Trans World Airlines, Inc.* 83

In *Jack*, Trans World Airlines Flight 843 departed from New York's JFK bound for San Francisco on July 30, 1992. 81 The flight experienced "an aborted takeoff, crash and fire." 82 The fire completely destroyed the plane. 83 Fortunately, all passengers survived, although many suffered physical injuries. 84 Plaintiffs filed personal injury suits in state court, but the defendant, TWA, removed three of the filed actions to a federal court because the plaintiffs held tickets for international flights. 85

After making several evidentiary rulings, the court attempted to interpret Article 17 of the Convention and the meaning of the *Floyd* decision. 86 The court did not concentrate on the express language of the Convention. 87 It acknowledged, however, that "one construction is that the recoverable damages need not be caused by the bodily injury, and may instead be those caused by the accident." 88 The court then presented several approaches to this problem:

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81. See id. at 657.
82. Id. 83. See id. 84. See id. 85. See id. 86. See id. at 665.
87. See id. The court said it is unclear under Article 17 whether the recoverable damages are those caused by the bodily injury or by the accident itself. See id. "Article 17 provides that the carrier is liable for 'damage sustained in the event of ... bodily injury.' It does not state that the damages must be caused by the bodily injury. Causation is not implied in the French phrase 'dommage survenu en cas.' " Id. 88. Id.
There are four possible approaches regarding emotional distress in a Warsaw Convention case: (1) no recovery allowed for emotional distress; (2) recovery allowed for all distress, as long as a bodily injury occurs; (3) emotional distress allowed as damages for bodily injury, but distress may include distress about the accident; and (4) only emotional distress flowing from the bodily injury is recoverable.\(^{89}\)

The court refused to adopt the first approach because it was too restrictive of passengers' rights,\(^{90}\) even though it was consistent with the narrow construction of Article 17 by the *Floyd* Court.\(^{91}\) Then, the court refused to adopt a second approach that favored plaintiffs' position and advocated a broad construction of Article 17.\(^{92}\) The court declined to consider an expert's opinion regarding the "intrinsic physical effects" of emotional distress because it "would eviscerate *Floyd*."\(^{93}\)

Judge Caulfield, the author of the *Jack* opinion, stated that this approach is supported by the language of the Convention, by the *Floyd* court's careful avoidance of any mention of a need for a causal connection between the bodily injury and the damages recoverable under the Warsaw Convention," and by a general approach in tort cases, where the showing of a physical injury is a threshold requirement to recovery for emotional distress.\(^{94}\) This approach, however, could not be adopted because it treats emotional distress as a separate cause of action.\(^{95}\) The court summarily rejected this approach without providing adequate reasoning and without paying attention to the express language of the Convention.\(^{96}\) The third approach was rejected as a derivative of the second one.\(^{97}\)

Finally, the court analyzed the fourth approach and concluded that "damages are permitted for emotional distress only to the extent the

\(^{89}\) Id.
\(^{90}\) See id.
\(^{92}\) See *Jack*, 854 F. Supp. at 665.
\(^{93}\) See *Jack*, 854 F. Supp. at 666.
\(^{94}\) See *Jack*, 854 F. Supp. at 666.
\(^{96}\) See *Jack*, 854 F. Supp. at 666.
\(^{97}\) See *id.* at 667.
emotional distress is caused by the bodily injury." The court again did not analyze the language of the Convention; rather, it reasoned that the fourth approach prevents inequities among the passengers, and for this reason it should be adopted. Under this approach, a plaintiff cannot recover for the distress about the accident itself or for the distress associated with fear of a near crash. It is doubtful that the court, so concerned with equities and to some extent with passengers' rights, has achieved an equitable result.

In *Terrafranca v. Virgin Atlantic Airways, Ltd.*, the Court of Appeals for the Third Circuit refused to allow recovery to a passenger whose emotional distress manifested in physical damages, following the approach adopted by the *Jack* court.

In this case Caroline Terrafranca and her family (husband and son) were passengers on an international flight to London. The captain learned of a bomb threat and, adhering to the airline's safety protocol, informed the passengers of the threat. Ms. Terrafranca became very concerned and frightened for the safety of her son. The plane safely landed at Heathrow, and none of the passengers suffered any physical injuries. Ms. Terrafranca, however, was afraid to fly back, and had to stay in London for six weeks. She was diagnosed with a post-traumatic stress disorder complicated by anorexia.

The district court found that the plaintiff failed to demonstrate a physical injury and denied recovery. The Court of Appeals affirmed, citing *Floyd*, and refused to interpret the decision of the Supreme Court as permitting recovery for psychological injuries so long as they are

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98. *Id.* at 667.
99. *See id.* at 668.
100. *See id.* ("Plaintiffs with physical manifestations may recover damages for the manifestations and any distress flowing from manifestations, but may not recover damages for the emotional distress that led to the manifestations. In both cases the emotional distress recoverable is limited to the distress about the physical impact or manifestation, i.e., the bodily injury"). *Id.*
101. 151 F.3d 108 (3rd Cir. 1998).
102. *See id.*
103. *See id.* at 109.
104. *See id.*
105. *See id.*
106. *See id.* at 109.
107. *See id.*
108. *See id.*
109. *See id.*
manifested by a physical injury.\textsuperscript{110}

In \textit{Alvarez v. American Airlines},\textsuperscript{111} one of the most recent affirmations of the \textit{Jack} reasoning, the United States District Court for the Southern District of New York held that the defendant American Airlines was not liable because the emotional injuries were "not proximately caused by physical injuries suffered during the accident."\textsuperscript{112}

On February 20, 1996, Francisco Alvarez traveled from New York to Santo Domingo on American Airlines Flight 587.\textsuperscript{113} Shortly after the plane left the gate, it stopped.\textsuperscript{114} Two minutes later "'a strong gas smell' suffused the passenger cabin, and the plane filled rapidly with smoke."\textsuperscript{115} After the flight attendant yelled "get out," Mr. Alvarez and other passengers pushed for the exits.\textsuperscript{116} During the subsequent evacuation from the burning plane, Mr. Alvarez was injured on an emergency slide.\textsuperscript{117} One month after the accident, Mr. Alvarez began to experience nightmares and anxiety attacks.\textsuperscript{118} He was diagnosed with a post-traumatic stress disorder.\textsuperscript{119}

The court first addressed the issue of Mr. Alvarez's physical injuries and concluded that they are recoverable under Article 17.\textsuperscript{120} The court stated that recovery is warranted because the requirement of "proximate causation" is satisfied.\textsuperscript{121} Proximate cause, however, is not a requirement under Article 17. This remark set the tone for the rest of the opinion, and it was not surprising to see the court imposing a requirement of proximate causation on the recovery of psychological injuries.\textsuperscript{122}

\textsuperscript{110} See \textit{id.} at 110-11. ("We ... hold that Ms. Terrafranca must demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety"). \textit{Id.} at 111.


\textsuperscript{112} \textit{Id.} at *17.

\textsuperscript{113} See \textit{id.} at *2.

\textsuperscript{114} See \textit{id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} See \textit{id.} at *2.

\textsuperscript{117} \textit{See id.}

\textsuperscript{118} See \textit{id.} at *3 ("Although his panic attacks occur[red] at various times, they [were] most likely to occur when [Mr.] Alvarez [was] overheated, or [was] in an enclosed space, as he was just before and during the evacuation"). \textit{Id.} at *3-4.

\textsuperscript{119} See \textit{id.} at *4.

\textsuperscript{120} See \textit{id.} at *7.

\textsuperscript{121} See \textit{id.} at * 7.

\textsuperscript{122} See \textit{id.} at *8-9 ("Although plaintiffs claim that Alvarez has suffered both physical and psychological injuries, they do not allege that there is any substantial causal connection between the two types of injury").
The court rejected Mr. Alvarez's claim for psychological injuries for three reasons.\textsuperscript{123} The first reason is the preservation of the substantive decision in \textit{Floyd}.\textsuperscript{124} The second reason is consistency of the Second Circuit Article 17 jurisprudence.\textsuperscript{125} The third and final reason is protection against "illogical results."\textsuperscript{126} In reaching its decision, the court did not attempt to interpret the language of Article 17. If it had, it would become clear that the requirement of "proximate cause," a creature of American tort law, does not appear in the language of the Article.

The reasoning of the \textit{Alvarez} court has received support from the United States District Court for the District of Oregon. Not finding any precedent in the Ninth Circuit, this district court recently held that the Warsaw Convention did not allow recovery for a plaintiff's claim that the intentional verbal insults by the flight attendant caused the plaintiff severe emotional distress, physically manifested by "nausea, cramps, perspiration, nervousness, tension, and sleeplessness."\textsuperscript{127}

The plaintiff and his three daughters traveled from Costa Rica to Portland in March of 1998.\textsuperscript{128} On the return flight from Costa Rica the flight attendant refused to allow the plaintiff to help his daughters cope with developed ear aches because that would have involved switching the plaintiff's seats in first class with his seats in coach.\textsuperscript{129} The attendant cited some Federal Aviation Administration ("FAA") regulation that prohibited switching seats and told the plaintiff that "an FAA representative was on board who could arrest plaintiff because plaintiff's children were leaving coach and going into the first class cabin."\textsuperscript{130} During a "heated exchange" the plaintiff was verbally insulted and publicly humiliated.\textsuperscript{131} He sued, alleging that the Warsaw Convention does not bar recovery for psychological injuries manifested by physical injuries.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{123} \textit{See id.} at *10-11.
\item \textsuperscript{124} \textit{See id.} at *10.
\item \textsuperscript{125} \textit{See id.} at *11.
\item \textsuperscript{126} \textit{Id.} at *13. The court, quoting from the \textit{Jack} opinion, expressed its fear that "passengers may be treated differently from one another on the basis of an arbitrary and insignificant difference in their [physical] experience." \textit{Id.} at *14 (citing \textit{Jack} v. Trans World Airlines, Inc., 854 F. Supp. 664, 668 (N.D. Cal. 1994)).
\item \textsuperscript{127} \textit{Carey} v. United Airlines, Inc., 77 F. Supp. 2d. 1165 (D. Or. 1999).
\item \textsuperscript{128} \textit{See id.} at 1167.
\item \textsuperscript{129} \textit{See id.} at 1167-68.
\item \textsuperscript{130} \textit{Id.} at 1168.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{See id.} at 1168-69.
\end{itemize}
In ruling for the airline, the district court first relied on *Tseng* because the plaintiff here, similar to the plaintiff in *Tseng*, alleged that physical manifestation of psychological injuries caused by an accident were recoverable.\(^{133}\) The district court stated that because the Supreme Court in *Tseng* did not address the issue of the *Floyd* requirement under the presented circumstances, "[t]he precedential value of the Court's determination that the plaintiff alleged no bodily injury . . . is somewhat questionable."\(^{134}\) The court immediately concluded, however, that "[the *Tseng* decision] is an indication that the Supreme Court would likely not find injuries purely descended from emotional distress to be compensable under the Convention."\(^{135}\) The court acknowledged the *Roselawn*\(^{136}\) decision and its interpretation of the language of Article 17, but questioned the continued validity of *Roselawn* in light of *Tseng*.\(^{137}\)

2. Decisions where recovery was allowed.

The following decisions have either permitted recovery for psychological injuries provided only that there are some physical injuries or alluded to the fact that such recovery is permitted under Article 17 of the Warsaw Convention.

In *Hunt v. TACA International Airlines, Inc.*,\(^{138}\) the court denied defendant's motion for summary judgment on the issue of recovery of mental distress damages.\(^{139}\)

Richard Hunt was a passenger on a TACA flight that originated in Belize City and was bound for New Orleans.\(^{140}\) During the course of the flight the plane lost one of its engines and embarked on a "frightening, erratic and uncontrolled path onto the Merida [Mexico] airport."\(^{141}\) The airplane landed safely.\(^{142}\) Ten months after the accident Mr. Hunt died from a brain condition known as Creutzfeldt-Jakob disease.\(^{143}\)

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135. *Id.*
136. *See infra* note 162 and accompanying text.
139. *See id.* at *1*.
140. *See id.* at *2*.
141. *Id.* This was not the first time Mr. Hunt experienced an air accident. In 1993 he was a passenger on a TACA flight that crashed in Guatemala City. After surviving that ordeal, Mr. Hunt developed a post-traumatic stress syndrome and was attended to by a psychiatrist. *See id.*
142. *See id.*
143. *See id.* A disease is described as "a gradually progressive infection of the brain
The plaintiff alleged that the 1996 accident caused a traumatic brain injury that facilitated the development of the Creutzfeldt-Jakob disease.\textsuperscript{144} The defendant filed a motion to dismiss.\textsuperscript{145} In opposing the motion, the plaintiff offered several medical records that, the plaintiff argued, indicated a physical injury the plaintiff suffered while on the plane.\textsuperscript{146}

In denying the motion, the court stressed that the plaintiff presented issues of material fact concerning whether the mental injuries relate to the physical manifestation of injuries.\textsuperscript{147} Unlike the \textit{Alvarez} court, the \textit{Hunt} court talked only about the relation between the physical injury or its manifestation and the psychological injuries.\textsuperscript{148} The \textit{Hunt} court did not discuss the "requirement" of proximate cause and did not attempt to harmonize the \textit{Floyd} decision.\textsuperscript{149} Rather, it accepted the plaintiff's argument that psychological damages can be recovered if a \textit{Floyd} requirement of presence of physical damages is satisfied.

In another case, \textit{Weaver v. Delta Airlines},\textsuperscript{150} the district court denied the defendant Delta's motion for summary judgment, and held that the Warsaw Convention allows recovery for the type of injury suffered by the passengers in \textit{Jack} or \textit{Alvarez}.\textsuperscript{151}

Kathy Weaver was a passenger on a Delta flight from London to Billings on November 7, 1996.\textsuperscript{152} Mechanical problems en route forced the emergency landing of the plane.\textsuperscript{153} Weaver alleged that during the

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\textsuperscript{144} See \textit{Hunt}, 1997 U.S. Dist. LEXIS 18370, at *3.
\textsuperscript{145} See \textit{id.} at *4.
\textsuperscript{146} See \textit{id.}
\textsuperscript{147} See \textit{id.} at *9. The plaintiff argued that the injuries suffered during the 1996 accident aggravated a post-traumatic stress disorder developed after the 1993 accident and additionally caused the development of the fatal disease. See \textit{id.} at *8.
\textsuperscript{148} See \textit{id.} at *9.
\textsuperscript{149} See \textit{id.} Judge Thomas G. Porteous, Jr. only cites the relevant passage from the \textit{Floyd} decision where the Supreme Court "express[ed] no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries." Eastern Airlines v. \textit{Floyd}, 499 U.S. 530, 552 (1991).
\textsuperscript{150} 56 F. Supp. 2d 1190 (N.D. Mo. 1999).
\textsuperscript{151} See \textit{id.} "The legal question in this case is simply whether the Warsaw Convention allows recovery for this particular kind of bodily injury, i.e., a brain injury, even with slight physical effects. The answer must be yes." \textit{Id.} at 1192.
\textsuperscript{152} See \textit{id.} at 1190.
\textsuperscript{153} See \textit{id.}
landing she experienced terror and "felt physical manifestations of that terror." A short time after the accident Weaver was diagnosed and received treatment for post-traumatic stress disorder.

Delta asserted a defense under *Floyd*, arguing Weaver's injuries were psychotic, and in the absence of physical injuries were not recoverable. The court rejected the defendant's position, stating that Weaver suffered a bodily injury (*Floyd*’s requirement) for which the Warsaw Convention provides compensation. To this court the central factor of the query was medical, not legal. The court accepted the testimony that "extreme stress causes actual physical brain damage, i.e., physical destruction or atrophy of portions of the hippocampus of the brain." With this decision, the court was not afraid to "eviscerate *Floyd*," and was not afraid, unlike the *Jack* and *Alvarez* courts, to open the floodgates of litigation. The *Weaver* court went further and rejected the *Jack* approach that injuries that arise from fear about the flight are not recoverable. Although this court did not base its decision in the language of the treaty, it did not do injustice to the latter by imposing a fictional requirement of "proximate cause."

Finally, in *In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994,* the court, after careful analysis of the treaty language and the *Floyd* decision, concluded that psychological damages that are accompanied by physical damages are recoverable under Article 17 of the Warsaw Convention.

This litigation stemmed from a 1994 crash of American Eagle Flight 4184 in which 68 people died. Several passengers used Flight 4184 in a course of international transportation, thus requiring the analysis of

154. *Id.*
155. *See id.*
156. *See id.*
157. *See id.* at 1191.
158. *Id.*
159. *See id.* at 1192. The *Jack* court, on the other hand, refused to hear the medical testimony that a post-traumatic stress disorder is characterized with physical effects. *See Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 664 (N.D. Cal. 1994).
160. *See Weaver*, 56 F. Supp. 2d at 1192.
162. 954 F. Supp. 175 (N.D. Ill. 1997) [hereinafter Roselawn].
163. *See id.* at 176.
164. *See id.*
their injuries under the Warsaw Convention. The court promptly noted that the case deals with the interpretation of the Convention.

After reviewing the Saks decision, the court repeated the oft-quoted language that Article 17 "establishes liability only for injuries caused by an accident." Then, the court discussed the Floyd decision and correctly observed:

[T]he Court in Floyd did not hold that there could never be any recovery for purely psychic injuries under Article 17, although the holding of Floyd is often characterized this way. Instead, the Court employed careful language to hold that "physical injury" was a precondition to liability. Nothing in Floyd states that once that precondition is met, and physical injury or death is present, damages for mental distress are not available.

The Roselawn court first distinguished this case from Floyd on the ground that in the latter case, the plaintiff did not allege any physical damages. The court could not distinguish the case at bar from the Jack case and similar ones that followed the reasoning of Jack. Although the court was "not unmoved by the reasoning" of the Jack court, it declined to follow it for one very important reason—"the [plain] commands of Article 17." With respect to the concern that the view adopted would create inequities, the court responded that it is equally likely that the Floyd and the Jack decisions result in greater inequities. More important, however, is the fact that the court refused to rewrite Article 17 and based its decision on the express language of the Treaty.

165. See id. The defendants in this case argued that the plaintiffs could recover for pre-impact fear because the latter were psychic injuries, and Floyd prevented recovery for such injuries. See id. The plaintiffs asserted that these psychic injuries are accompanied by physical injuries (death), and in such a case the Warsaw Convention permits recovery. See id.
166. See id.
167. Id. at 177 (quoting Air France v. Saks, 470 U.S. 392, 406 (1985)). The requirement is that "the passenger be able to prove that some link in the chain [of causes] was an unusual or unexpected event external to the passenger." Saks, 470 U.S 392, 406 (1985).
170. See Roselawn, 954 F. Supp. at 179. For the discussion of Jack and similar cases see notes 80-126 and accompanying text.
171. Id.
172. See id.
173. See id.
Other lower courts should adopt this principle of treaty interpretation when they decide similar issues in the future. The Supreme Court too should follow the express language of the Treaty and, contrary to the Alvarez decision, avoid writing any ambiguities into the express terms of Article 17.

III. TREATY INTERPRETATION

In interpreting the Warsaw Convention, the Supreme Court consistently placed heavy emphasis on such factors as the negotiating history, the intent of the drafters, the subsequent ratification efforts, and even the case law from other countries—signatories to the Convention. The justices set a very low level of textual ambiguity. This allowed them to break from the language of the text in order to find the true meaning of the provision.

The Court repudiated the textualist approach of treaty interpretation in favor of "its favorite techniques of verbal deconstruction, followed by structural reconstitution of the text." This approach created more ambiguities than lower federal courts could handle. The position adopted by the Jack court is consistent with the Supreme Court's methodology, but it is inconsistent with the text of the Warsaw Convention. The Supreme Court, in interpreting the Warsaw Convention as a treaty, was always concerned with the result. The Jack court too was unwilling to permit recovery because the result would have been inequitable. If the Court was concerned with following the

177. See, e.g., Floyd, 499 U.S. at 551 (1991) (relying on a number of extrinsic factors).
178. See generally Bederman, supra note 46, at 976.
179. See id.
180. Id. at 1025. In his article Professor Bederman argued that the Court cannot expect a treaty without ambiguity inherently present in it. The Court should adopt a "sensible threshold of ambiguity, even one self-consciously policy-based or result-oriented, so that courts could avoid the morass of indeterminacy." Id.
181. See supra notes 80-173 and accompanying text.
182. In Jack, the court adopted a view that damages are permitted for emotional distress only to the extent the emotional distress is caused by the bodily injury. See Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 667 (N.D. Cal. 1994).
183. Id. at 668.
text of Article 17, it would have adopted a position where psychological damages are recoverable so long as they are accompanied by physical damages. The text of the treaty is not so ambiguous as to permit the courts to evaluate extrinsic factors. Article 17 imposes a requirement of an accident causing the injuries. There is no requirement that physical injuries proximately cause psychological injuries.\textsuperscript{184}

The Supreme Court should adopt the following principles of treaty interpretation: (1) begin interpretation with the text of the treaty; (2) adopt a high threshold of ambiguity; (3) consider sources other than text only when "the words of the text produce a result that is 'manifestly absurd or unreasonable.'"\textsuperscript{185} Additionally, the Supreme Court should be mindful of the "liberal expansive interpretation [of a treaty that] has its origins in the 1890 Supreme Court opinion in Geofroy v. Riggs."\textsuperscript{186}

Let us apply the test proposed above to Article 17 of the Warsaw Convention and see if psychological injuries that are accompanied by physical injuries, not necessarily caused by them, are recoverable. Article 17 provides:

The carrier shall be liable for damages 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.\textsuperscript{187}

\textsuperscript{184} See generally Alvarez, 1999 U.S. Dist. LEXIS 13656, at *1; See also Boulee, supra note 19, at 501 (arguing that the courts should adopt the same approach that the Jack court adopted because this approach prevents "serious inequities" among the passengers, and it is consistent with the intent of the drafters of the Warsaw Convention).

\textsuperscript{185} Bederman, supra note 46, at 1030 (quoting The Vienna Convention on the Law of Treaties, May 23, 1969 art. 32, 1155 U.N.T.S. 331). Professor Bederman, in criticizing the Supreme Court's methodology of treaty interpretation, urged the Court to follow the textualist approach and to adopt a level of ambiguity set forth in the Vienna Convention. See id. For example, in Saks, the Court stated that whoever interprets a treaty must consult the text first. 470 U.S. 392, 397 (1985). After acknowledging the overall effectiveness and desirability of the textualist approach, the Court immediately added that "the context in which the written words are used" must be considered as well. Id. The invitation to review the context opened the door for the consideration of extrinsic factors.

\textsuperscript{186} Bederman, supra note 46, at 966 (citing Geofroy v. Riggs, 133 U.S. 258 (1890)). Professor Bederman quotes from the opinion of Justice Field, "[T]reaties, ... shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them ... [W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Id. at 966-67 (quoting Geofroy v. Riggs, 133 U.S. at 271-72).

\textsuperscript{187} Official text as ratified by Senate in 1934, supra note 19.
The text of the treaty provides that in order to recover, a plaintiff needs to suffer either death, or wounding, or bodily injury that was caused by the accident. The text of the treaty does not require, unlike the *Alvarez* court, that bodily injuries cause the mental injuries. The *Floyd* decision interpreted the phrase "bodily injury" and stated that "pure psychic injury" is not part of the phrase.\(^\text{188}\) The unanimous Supreme Court thus made an interpretation that under the treaty, a physical injury is a prerequisite for recovery of whatever type. Where a plaintiff alleges a physical injury, thus satisfying *Floyd*, and states that the accident caused a psychological injury, thus satisfying the plain text of the treaty, the only logical conclusion is to permit recovery for the psychological injuries.

If the court was to adopt a high threshold of ambiguity, suggested by Professor Bederman, there would be no need to consult external sources, such as prior negotiations, French dictionaries, or intent of the drafters. The interpretation based on the plain meaning of the text is not "manifestly absurd or unreasonable."\(^\text{189}\)

Finally, the fear that "a back door would be impermissibly opened to recovery for purely psychological injuries"\(^\text{190}\) if the plain-text interpretation is adopted represents a result-oriented approach. This approach, although favored by the Supreme Court's jurisprudence, is contrary to the method of liberal expansive interpretation. The approach advocated by the *Alvarez* court does not recognize the principles of reciprocity and equality between the countries—signatories of the treaty. Rejection of psychological damages restricts the rights of the passengers and impermissibly shifts the balance of protection in favor of the airlines. Such a shift is not consistent with the express language of the treaty, the intent of the drafters, and the gruesome realities\(^\text{191}\) of today's commercial aviation industry.

\textit{189.} Bederman, \textit{supra} note 46, at 966 n.55.
\textit{191.} Two accidents during the course of international air transportation took place in January of 2000. On Sunday, January 30, 2000, Kenyan Flight 431 from Abidjan, Kenya to Lagos, Nigeria crashed just moments after take-off. The plane carried 10 crew members and 169 passengers. Only 10 people survived. It has been reported that an American citizen was on that plane. It is very much possible that the Warsaw Convention would be implicated in this matter. \textit{See Recovery Mission for KenyanJet} \texttt{<http://www.airdisaster.com/>}. (visited Sept. 15, 2000). On Monday, January 31, 2000 Alaskan Airlines Flight 261, en route from Puerto Vallarta, Mexico to San Francisco, went down in the Pacific Ocean, off southern California. 88 people died. \textit{See id.} Because this was an international flight, the airline's
IV. CONCLUSION

In Floyd, the Supreme Court left unanswered the question of whether a passenger who suffers injuries in the course of international transportation can recover for psychological injuries that are accompanied by physical injuries. Lower federal courts have divided on this issue. Most recently, federal district courts in Alvarez v. American Airlines and Carey v. United Airlines held that the Warsaw Convention requires a strong causal connection between physical and psychological injuries, and in the absence of the link, psychological injuries are not recoverable, even if accompanied by physical injuries. The holdings in Alvarez and Carey are inconsistent with the express language of the Warsaw Convention. This Comment argued that the Supreme Court must revisit its 1991 Floyd decision. The Supreme Court should interpret the Warsaw Convention consistent with its express language, should adopt a high threshold of ambiguity, and should hold that Article 17 permits recovery for psychological injuries that are accompanied by physical injuries.

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