

Immaterial Compensation for Passenger Who Had Traumatic Experiences in Air Passenger Transport

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ABSTRACT

The main purpose of this article is to analyze the compensation for immaterial loss for the passenger carriage by air transportation based Warsaw Convention and Montreal Convention. This article will answer several of these questions: (a) whether the air carrier shall be held liable to compensate the passenger who suffered mental distress during the flight, (b) which regimes shall govern the liability of the parties in that matter, (c) does that matter could also be seen from national law, and (d) could mental distress still be considered as an injury which may be compensated. The method used will be the legal dogmatic method. Regardless, damages for mental injuries unaccompanied by physical trauma resulting from an 'accident' occurring while an individual is on an international flight should be compensable. Furthermore, although a majority of jurisdiction continue to adhere to the traditional rule requiring some form of physical injury in order to obtain damage for mental injury, courts so far has been trying to overcome the mindset of the physical injury requirement as a guarantee of the genuineness of claims for mental distress.

ABSTRAK

Tujuan utama dari artikel ini adalah untuk menganalisis kompensasi kerugian immateriil bagi pengangkutan penumpang melalui transportasi udara berdasarkan Konvensi Warsawa dan Konvensi Montreal. Artikel ini akan menjawab beberapa pertanyaan berikut: (a) apakah maskapai penerbangan harus bertanggung jawab untuk memberikan kompensasi kepada penumpang yang menderita tekanan mental selama penerbangan, (b) rezim mana yang akan mengatur tanggung jawab para pihak dalam hal itu, (c) apakah hal tersebut juga dapat dilihat dari hukum nasional, dan (d) apakah tekanan mental masih dapat dianggap sebagai suatu kerugian yang dapat dikompensasikan. Metode yang digunakan adalah metode penelitian hukum dogmatis. Bagaimanapun, ganti rugi untuk cedera mental yang tidak disertai dengan trauma fisik akibat 'kecelakaan' yang terjadi saat seseorang dalam penerbangan internasional harus dapat diberikan kompensasi. Selain itu, meskipun mayoritas yurisdiksi masih terus mentaati aturan tradisional yang mensyaratkan adanya cedera fisik untuk mendapatkan kompensasi untuk tekanan mental, pengadilan sejauh ini telah berusaha untuk membuat perubahan atas syarat tersebut sebagai klaim kerugian untuk tekanan mental.

INTRODUCTION

Nowadays, air transport is one of the most frequently used mode of transportation to take people from one place to another.¹ Time wise, it is still the most efficient way to travel rather than road or sea transportation. 10 to 20 years ago, air transportation was still considered as an expensive mode of transportation.² Now with the rising of so called budget airlines, people are able to travel around the world for a reasonable price.

Safety still is one of the major issues in air transportation. Based on my preliminary research, in 2014 alone there were 5 accidents which resulted to tragic losses of life.³ This is one of the risks the air carrier should bear. With the focus to prevent accidents, by determining the causation and analyzing the previous accident, thus, risk of accident could be calculated. But still, even if they are minor, accidents do happen in air transportation. In air transport regimes, if accidents happen during the flight and cause injury or death, the airlines will be held liable, but yet there were issues about the compensable damages to the passengers, which is that not all forms of injury during flight could be compensated. While Supreme Court has held the plaintiff may not recover for pure psychic injury under Article 17 of the Warsaw Convention,⁴ the question of whether plaintiff may recover for something other than pure psychic injury has resulted in a wide range of opinions, some allowing no recovery at all and others allowing full recovery in certain circumstances.

Based on *Ehrlich's* case,⁵ under Article 17 of the Warsaw Convention, air carriers are liable for mental injuries that accompany, but are not cause by, bodily injuries. The District Court in that case, disagreed with that proposition and held that the Ehrlich could “*only recover for emotional damages caused by physical injuries*”. Previously recognize distinctions between purely psychic and physical injuries have become somewhat blurred, as the scientific and medical understanding of purely psychic injuries has evolved.

There are two regime governing the rule of air transportations which still applicable until this present time, which are The Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed in Warsaw, Poland, on 12 October 1929, which entered into force on 13 February 1933 (“**Warsaw Convention**”), and The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal, Canada, on 28 May 1999 (“**Montreal Convention**”). When the Warsaw Convention applies, the most critical provision for injuries or death is Article 17 of the Warsaw Convention, which imposes the requirements that: (i) there must have been an accident, (ii) which caused, (iii) death or bodily injury, (iv) while the passenger was on board the aircraft or was in the course of embarking or disembarking.⁶ In regards of

¹ Bijan Vasigh, Tom Tacker, and Ken Fleming, *Introduction to Air Transport Economics: From Theory and Applications* (Ashgate Publishing Limited 2008) 1.

² Bijan Vasigh, Tom Tacker, and Ken Fleming (n 1) 92–99.

³ ‘Accident & Incident Data’ (*Federal Aviation Administration*) <https://www.faa.gov/data_research/accident_incident>.

⁴ *Eastern Airlines v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489 (1991).

⁵ *Ehrlich*, 2002 U.S. Dist. LEXIS 21419.

⁶ Paul S. Dempsey and Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Center for Research in Air & Space Law, McGill University 2005) 124.

immaterial of mental injury, under the *Tseng* case,⁷ the Supreme Court offered up a “restatement” of *Floyd* case,⁸ when it declared that “the Warsaw Convention provides for compensation under Art. 17 only when the passenger suffers death, physical injury, or physical manifestation of injury.” While in Montreal Convention, liability regime are regulated under Art 17(1), which strengthened the previous Art. 17 Warsaw Convention.

These regulations were obviously aimed to provide some form of responsibility of the airline to the people that suffer from an unpleasant event occurred during the flight. However, there are some cases of plane crashes where all the passengers survive. Even though this doesn’t lead to death, it surely can lead to psychological suffering of the passenger or traumatic experience. Even though it is not apparent, it is real and could change people who experienced it. It is obvious that apparent injury or death should be compensated under Warsaw and Montreal regimes, but the question whether mental distress should also be considered as an injury which should be compensated remains unclear, there are divided opinions regarding compensation for mental distress.

Under Warsaw Convention, the problem concerned the ambiguity of the term, “*lesion corporelle*” (bodily injury) in the official French text, resulting in conflicting English language interpretation. In the *Floyd* case, the court did not consider mental injuries as worthy for compensation without being accompanied by physical injuries. One of the problems is that the mental distress is not apparent thus quite hard to prove. Mental distress was for many years amongst the excluded kind of injuries. But once the circumstances of the case indicated that the claim was not counterfeit, this objection fell. For instance, the risk of fraud was greatly lessened each time a physical impact accompanied mental distress. If it is accompanied by physical injuries, courts sometimes allowed recovery for mental distress, or when mental distress was caused by the physical injuries. How to assess an award for the compensation to the air passenger in regards of mental distress also important to know.

The main purpose of this article is to analyze the compensation for immaterial loss for the passenger carriage by air transportation, and also analyzing this issue based on the current applicable international legal regime which is Warsaw Convention and Montreal Convention. This article will answer several of these questions: (a) whether the air carrier shall be held liable to compensate the passenger who suffered mental distress during the flight, (b) which regimes shall govern the liability of the parties in that matter, (c) does that matter could also be seen from national law, and (d) could mental distress still be considered as an injury which may be compensated. Those questions can be answered by analyzing the Warsaw Convention, the Montreal Convention, other related national laws (will be briefly analyzed), case laws, and other related literatures.

METHODS

The method used will be the legal dogmatic method. Legal dogmatic method aims to analyze the current legal position in different fields and explain the structure of it. It also describes the laws in force in different areas and the structure. The materials used for this

⁷ *El Al Israel v. Tseng*, 525 U.S. 155 (1999).

⁸ *Eastern Airlines v. Floyd* (n 4).

thesis are books, journal articles, case law, and also supplementary source such as Internet articles.

RESULTS AND DISCUSSION

1. Liability Regimes Under the Air Transportation Conventions

1.1 Liability Regime Under the Warsaw Convention

Liability for passenger injury vests in Chapter III of the Warsaw Convention. This chapter comprises Articles 17-30. Article 17 is the prime focus of this chapter. The purpose of the Warsaw Convention was twofold.⁹ First of all, recognizing that air travel traverses national boundaries and involves varying languages, customs and legal systems, the participants believed that uniform rules governing parties to international air carriage contracts would be beneficial.¹⁰ Secondly, limiting the liability of air carriers and thus help promote the growth of the aviation industry.¹¹ The purpose of the Warsaw Convention and the limitations of liability contained in Article 17 and Article 22 were “designed to assure that only a regulated burden be borne by the air carriers and to afford a more definite basis for passenger recovery.”¹²

With Article 22 of the Warsaw Convention regulated limits of the liability of the carrier-not to fixed levels or tariffs but limits, nonetheless, to recover against a carrier every claimant must prove the actual amount of loss suffered. The provisions apply to the kinds of liability stated in articles 17, 18, and 19. Whether the action is based in contract or in tort. They are central to the regime for carriage by air. On the one hand, every passenger can be assured that any contract term tending to relieve the carrier of liability or fix lower limits of compensation is null and void (Article 24 Warsaw Convention). On the other hand, a carrier can predict his exposure.

The limits on the amount of compensation recoverable against the carrier¹³ can be exceeded in only two situations. The first situation is when there is a special contract declaring a higher limit (Article 22.1). The second situation is when the loss has been caused intentionally or recklessly (Article 25). The monetary limit applied in practice differs from that stated in Article 22 and, moreover, it differs according to where the carriage begins and ends. Higher limits apply to carriage to, from or within the U.S. and carriage to, from or within the European Countries, than in other parts of the world where a carrier’s liability limits are still those stated in Article 22.1. Actual limits are not likely to be expressed in Special Drawing Rights (SDR). The equivalent of 250.000 Francs is 16.600 SDRs. The carrier’s liability is strict up to 100.000 SDRs. Above that figure, the carrier was presumed liable for proven accidental loss unless and to the extent that the carrier could establish the Article 20 defense.

⁹ Andreas F. Lowenfeld and Allan I. Mendelsohn, ‘The United States and the Warsaw Convention’ (1967) 80 Harvard Law Review 497, 498.

¹⁰ Dafna Yoran, ‘Recovery of Emotional Distress Damages Under Article 17 of the Warsaw Convention: The American Versus the Israeli Approach’ (1992) 18 Brooklyn Journal of International Law 811, 814.

¹¹ Andreas F. Lowenfeld and Allan I. Mendelsohn (n 9) 498.

¹² *Rosman v. Trans World Airlines*, 314 N.E.2d 385(N.Y. 1974) 396.

¹³ Elmar Giemulla, *Commentary of the Montreal Convention* (Kluwer Law 2006) Article 22, para 2.

1.2 Aspects Which Could be Considered as Injuries During the Flight

1.2.1 The Meaning of Bodily Injuries

Most personal injuries suffered during a flight pose no difficulty under Article 17. In 1991, the U.S. Supreme Court held in their judgement in *Floyd* case,¹⁴ that a passenger cannot recover for “mental or psychic injuries unaccompanied by physical injuries or physical manifestation of injury.” The court also agreed with Eastern Airlines in the judgement and held “We conclude 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.”

Attempting to breaking down the meaning of ‘bodily injury’, courts have looked to cases interpreting ‘bodily injury’ the phrase. The court in the *Rosman* case, explained that when given its broadest legal meaning, ‘bodily’ injury is that “which can be seen, which one can touch.”¹⁵ It also includes the pain, suffering and distress associated with bodily injury,¹⁶ but not the distress alone. In Article 17 appears to have been included to restrict or limit the extent of the word ‘injury’. Thus, not every injury a passenger may sustain on board the aircraft or in the course of embarking or disembarking was intended to be covered by Article 17.¹⁷ Rather, the drafters of the convention “had in mind injuries which were manifestly physical.” The fact that the word *corporelle* appeared in the original French version of Article 17 indicated that the word *lesion* was intended to describe a physical, as opposed to a mental injury.¹⁸

Therefore, under the Article 17 of the Warsaw Convention and referring to *Floyd* judgment, it can be said that the word ‘bodily’ is simpler. It means pertaining to the body. There must be an injury to the body. Thus, ‘bodily injury’ simply and unambiguously means change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury. Though mental distress is also an injury which effects the human brain, and whether these injury could be consider as bodily injury will remain to be seen in the following chapters.

Even when Warsaw Convention allowed recovery, the damages were conservatively capped. One such limitation on passenger recovery stemmed from Article 17, which allowed recovery for death or bodily injury.¹⁹ In light of Warsaw’s pronounced protectionist policy,²⁰ courts have interpreted ‘bodily injury’ to exclude mental, emotional, and psychological injury.²¹ Outside the plain meaning of Warsaw’s text, and thus, without

¹⁴ Eastern Airlines v. Floyd (n 4).

¹⁵ Rosman v. Trans World Airlines (n 12) 848.

¹⁶ Flight Explosion, 778 F Supp 625, 637 ff (ED NY, 1991).

¹⁷ Lord Hope, House of Lord Judgement in Morris v. KLM Royal Dutch [2002] U.K.H.L. 7 (H.L.) [Morris, HL].

¹⁸ Michel J. Holland, ‘The Puzzle of Defining ‘bodily injury’ under the Warsaw Convention’ (2003) 70 Defense Counsel Journal 428.

¹⁹ Article 22 of the Warsaw Convention.

²⁰ Andreas F. Lowenfeld and Allan I. Mendelsohn (n 9) 498–499.

²¹ McKay Cunningham, ‘The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?’ (2008) 41 Vanderbilt Journal of Transnational Law 4.

guidance from the treaty itself, the decisions varied widely. Some court only allowed mental injury recovery when it flowed from, or was caused by, bodily injury. Some courts awarded mental distress recovery when it was associated with, or occurred because of bodily injury, and others allowed it without any apparent bodily injury.²²

In *Floyd*,²³ the court addressed the meaning of bodily injury, and in accordance with the court, a trend emerged that recovery was permitted only for mental injury that occurred from bodily injury. Furthermore, claim in terms of ‘bodily injury’ which result from mental or emotional injuries which in themselves could not be identified physically could not fall within Article 17.²⁴

Different from *Floyd*, in *Weaver* case,²⁵ the judges came up with another approach to identify whether any “bodily injuries” which result from mental distress could be recover. In the claim of Kathy Weaver included medical expert which stated that the “impact on Kathy Weaver of the events which occurred on that flight was extreme and included biochemical reactions which had physical impacts upon her brain and neurologic system.”²⁶ Therefore, the plaintiff must first prove that “a psychiatric illness may often be evidence of a bodily injury or the description of a condition which includes bodily injury, but not just prove a psychiatric illness without evidence of its significance for the existence of a bodily injury.”²⁷ Thus, such “mental injuries” could be “bodily injury.”

Moreover, the purpose of the Warsaw Convention and the limitations of liability contained in Article 17 and Article 22 were “designed to assure that only a regulated burden be borne by the air carriers and to afford a more definite basis for passenger recovery”.²⁸ When interpreting a treaty, courts begin with the text of the treaty and the context in which the written words are used.²⁹ Courts, however, recognize that dictionary definitions may be too general for purpose of treaty interpretation. Courts turn, in such cases, to the legal materials of the country in whose language the treaty was written to determine whether that country’s contemporary legal understanding and application of a particular term differed from the term’s translated meaning.³⁰

Additionally, the term ‘bodily injury’ is an English translation of the authentic French text of the convention where the term used was “*lesion corporelle*.” Within the jurisprudence in English speaking countries, the word ‘bodily’ has consistently been taken to refer to the physical human body, and therefore injury has been seen in terms of physically determinable and evident structural changes to the physical body.³¹

²² *Husserl v. Swiss Air Trans. Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) 1252-53; *Rosman v. Trans World Airlines, Inc.* (n 12).

²³ *Eastern Airlines v. Floyd* (n 4).

²⁴ *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001) 1053.

²⁵ *Weaver v. Delta Airlines*, 56 i. Supp. 2d 1490 (U.S. Dist. Ct. Mont. 1999).

²⁶ *Weaver v. Delta Airlines* (n 25) 1191.

²⁷ *Morris v. KLM Royal Dutch Airlines* (n 17) 158.

²⁸ *Rosman v. Trans World Airlines* (n 12) 385, 396.

²⁹ *Volkswagenwerk Aktiengesellschaft v. Schunkm* 486 U.S. 694, 699 (1988).

³⁰ *Eastern Airlines Inc. v. Floyd* (n 4).

³¹ *Eastern Airlines Inc. v. Floyd* (n 4).

In conclusion, the courts has divided opinion, and still referred to *Floyd* to identify bodily injury, and therefore, one must prove that there is a casual connection between an apparent injury one suffered which causing a mental trauma.³² These argument is simpler in term to decide whether mental injury is also an injury under Article 17 Warsaw Convention.

1.2.2 Proving Mental Distress as an Injuries

In the early years of the Warsaw Convention, there was little reason to inquire into the precise meaning of *lesion corporelle* or to consider whether it is properly translated into English as ‘bodily injury’. In view of *Alvarez v. American Airlines Inc.*,³³ the plaintiff concededly sustained a ‘bodily injury’ (bruises and scrapes to his knees, when he made an emergency evacuation from an American flight). Then later, he saw a psychiatrist who opined that Alvarez was suffering from post-traumatic stress disorder (“PTSD”). The court declared that Alvarez could recover for psychological injuries only if there was a causal link between the physical and psychological injuries. Since Alvarez unable to prove that the PTSD he suffered was cause by the bodily injury he had, therefore the court dismissed his claims.

While the interpretation has almost universally required physical injury, there has been a minor (but disputed) widening of scope of liability in recent years, contemplated in both *Weaver v. Delta Airlines, Inc.*³⁴ and *King v. Bristow Helicopters Ltd.*,³⁵ to allow injury manifesting psychologically when it can be shown that it occurs directly from physical changes in the body, even where not palpably obvious. Attention is drawn, however, to a certain disturbing looseness in expression and understanding of the differences between symptoms, signs, diagnoses and pathologies.³⁶ In *King*,³⁷ Lord Hobhouse given full expression of the range of injuries that might arise in a claim under Article 17, which is as follows:

1. Only a palpable physical injury inflicted during the flight by some physical impact upon the passenger would suffice (e.g. a crash injuring the passengers, a bag falling on the head of the passenger).
2. The physical infliction of some such physical injury during the flight and palpably in existence at the conclusion of the flight whether or not any actual impact was involved (e.g. anoxia and immediate brain damage caused by the failure of the pressurization system or carbon monoxide poisoning).
3. Any palpable injury physically caused during the flight (an injury caused by some direct physical cause, not being an injury caused through the senses like a fatal or non-fatal heart attack or stroke caused by observing a high jacking or experiencing a sudden loss of altitude).
4. A physical injury which does not have any mental aspect or mental manifestations (not a mental injury).

³² *Alvarez v. American Airlines Inc.*, 1999 WL 691922 (S.D.N.Y. 1999).

³³ *Alvarez v. American Airlines Inc.* (n 32).

³⁴ *Weaver v. Delta Airlines, Inc.* (n 25) 1190, 1192.

³⁵ *King v. Bristow Helicopters*, [2002] UKHL, 136.

³⁶ Christopher Andrews and Vernon Nase, ‘Psychiatric Injury in Aviation Accidents under the Warsaw and Montreal Conventions: The Interface between Medicine and Law’ (2011) 75 *Journal of Air Law and Commerce* 4.

³⁷ *King v. Bristow Helicopters* (n 35) 136.

5. The physical infliction of physical injury during the flight even though not already manifested at the conclusion of the flight (e.g. heart attack suffered after having disembarked, or a disease or illness contracted upon the plane say through the contamination of the plane's air supply or on-flight food).
6. An injury, even if it was caused through the senses, which has physical consequences or physical manifestations, even if they are not already manifest at the conclusion of the flight.
7. Any injury which could properly be described as a personal injury.
8. Any emotional upset or reaction-distress, fright, mental anguish, anxiety, grief, etc.

In *King*,³⁸ the case was an instance of point 8, there was “no attempt in either case to demonstrate that the passengers’ depressive illness had a physical cause or origin,”³⁹ and on that basis claims failed, because point 8 is not a ‘bodily injury’ within Article 17. Thus, the ordinary meaning of ‘bodily injury’ is non-fatal injury which is physical rather than anything else. There must be a physical injury or physical manifestation of injury. Moreover, in *Floyd*, Justice Marshall suggested, on the one hand, that bodily injury “might well refer to a more general category of physical injuries that includes internal injuries caused, for example by physical impact, smoke or exhaust inhalation, or oxygen deprivation, as well as decompression,”⁴⁰ and especially in the early days of flight, air sickness. On the other hand, in *Carey*,⁴¹ a claim in respect of “nausea, cramps, perspiration, sleeplessness, nervousness and tension as physical manifestation of emotional distress” failed, unless the bodily and psychic injury associated in some way.

However, all seemed to agree in *King* that the “brain is part of the body” and that injury to a passenger’s brain “is an injury to a passenger’s body just as much as an injury to any other part of his body.”⁴² That would be a bodily injury within Article 17, if it could be sufficiently and convincingly demonstrated. Lord Hobhouse said that since “the body is a complex organism depending for its functioning and survival upon the interaction of a large number of parts, the injury may be subtle and matter of inference not direct observation. The medical science of diagnosis exist to enable the appropriate inferences to be drawn from the observed evidence.” There may be a bodily injury to an internal organ such as the spleen or an optic nerve, even though there is nothing palpable, conspicuous or visible.⁴³ Therefore, Lord Hobhouse in these regards thought that PTSD might be sufficient evidence of damage to the brain. The plaintiffs who claims suffered a mental distress must prove their injury, but what was impossible in 1929 had become possible today.

Compensation for Mental Distress

Although ‘bodily injury’ can be compensated, passenger who suffered mental distress or traumatic experience which unaccompanied by physical injuries or manifestation of injury cannot be recovered.⁴⁴ Prior to the *Floyd* case,⁴⁵ courts were split as to whether a plaintiff

³⁸ *King v. Bristow Helicopters* (n 35).

³⁹ *King v. Bristow Helicopters* (n 35) para. 50, 128.

⁴⁰ *King v. Bristow Helicopters*, [2001] 1 Lloyd’s Rep. 95, para. 28; *Eastern Airlines v. Floyd* (n 4) 553.

⁴¹ *Carey v. United*, 77 F. Supp. 2d 1165, 1171 (D Or, 1999) and 255 F 3d 1044, 1052 (9 Cir, 2001).

⁴² *King v. Bristow Helicopters* (n 35) para. 3, 8, 141.

⁴³ *King v. Bristow Helicopters* (n 35) para. 141, 142.

⁴⁴ The U.S. Supreme Court Judgement, *Eastern Airlines Inc. v. Floyd* (n 4).

could recover for pure psychic injuries. In one of the earlier case, *Rosman v. Trans World Airlines*,⁴⁶ New York highest court considered the claims of passengers involved in the hijacking of a flight. The defendant airline argued that the liability scheme of the Warsaw Convention did not allow recovery because physic injury “with or without apparent physical manifestation” is not ‘bodily injury’ within the meaning of Article 17, and that “the physical injuries claimed did not result from any impact and in any case are so slight as not to amount to compensable ‘bodily injury’.”⁴⁷ Eventually, the U.S. District Court for the Northern District of California discerned four possible approaches regarding emotional distress in these case:⁴⁸

- a. No recovery allowed for emotional distress.
- b. Recovery allowed fir all distress, as long as a bodily injury occurs.
- c. Emotional distress allowed as damages for bodiliy injury, but distress must include distress about the accident.
- d. Only emotional distress flowing from the bodiliy injury is recoverable.

Regardless of which approach is taken, a plaintiff must prove a bodily injury in order to recover any damages under the convention. When bodily injury is proved, no damages are recoverable.

Since *Floyd* case, numerous other cases have held that where a passenger alleges mental injuries such as dizziness, anxiety, sleeplessness, irritability and loss of confidence, those claimed injuries are insufficient to meet the ‘bodily injury’ requirement of Article 17 necessary to impose liability on the airline.⁴⁹ Several post-*Floyd* decisions have articulated the meaning of the term ‘bodily injury’ in the context of the Warsaw Convention and the type of ‘bodily injury’ that must be sustained by a passenger for recovery of emotional injuries arising from the bodily injury.

1.3 Liability Regime under the Montreal Convention

The Montreal Convention is the successor to the Warsaw Convention of 1929, and was “designed to replace the Warsaw Convention and all of its related instruments and to eliminate the need for the patchwork of regulation and private voluntary agreements.”⁵⁰ Accordingly, the language in most of the Montreal Convention’s articles is essentially the same as in the corresponding articles in the Warsaw Convention.⁵¹ Because of the similarities between the Conventions, the cases that have discussed the Montreal Convention have referenced its predecessor, to which over 120 countries are parties, and for which there is a well-established body of case law.⁵² In those cases that concern countries that have not yet ratified the Montreal Convention or concern events that precede

⁴⁵ *Eastern Airlines Inc. v. Floyd* (n 4).

⁴⁶ *Rosman v. Trans World Airlines* (n 12).

⁴⁷ *Rosman v. Trans World Airlines, Inc.* (n 12) 852.

⁴⁸ *Rosman v. Trans World Airlines, Inc.* (n 12) 857.

⁴⁹ *Bloom v. Alaska Airlines*, 36 Fed. Appx. 278 (9th Cir.2002); *Carey v. United Airlines Inc.* (n 24).

⁵⁰ Article 1 Montreal Convention.

⁵¹ Bartholomew J. Banino, ‘Recent Development in Air Carrier Liability Under The Montreal Convention’ (2009) 38 *The Brief* 23.

⁵² Bartholomew J. Banino (n 51) 23.

the Montreal Convention's effective date, courts have continued to apply the Warsaw Convention.

The Warsaw and Montreal Conventions establish liability for passenger injury, which has been interpreted as being strictly physical injury.⁵³ Under the Warsaw Convention, recovery for pure psychological injury has been excluded.⁵⁴ The origin of this exclusion derives from the interpretation of the convention's term *lesion corporelle*, which in its English translation requires strictly physical injury to a passenger.⁵⁵

The Montreal Convention was not altered in any significant way with regard to the criteria by which a claim can be made for death or injury. The new wording in Article 17 (1) reads as follows:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Basically Article 17 of the Montreal Convention reveals only minor and apparently insignificant changes. Thus, the damage must be caused by an 'accident', and the injury must be 'bodily' and nothing else. Furthermore, provided this prescription is met, the carrier will be liable for proven damages up to the liability limit, except in where it can establish either under 20 that it has taken "all necessary measures" to prevent the damage,⁵⁶ or under Article 21, that the passenger contributed to the death or injury.

The most apparent changes relate to the liability limits for passenger travel. The liability limits for death or bodily injury have now been abolished, and replaced with a new two tier scheme. Under the first tier, set out in Article 21(1) of the Montreal Convention, the carrier cannot exclude or limit its liability for damages not exceeding 100.000 SDRs, this is a strict liability regime which applies irrespective of the carrier's fault once the claim is established under Article 17. In addition, under the second tier, set out in Article 21 (2), any damages beyond this sum may be recovered, but subject to the carrier being able to raise defenses either that it was not negligent, or that the damage was solely due to the negligence or wrongful act of a third party.

Liability for personal injury or death under the Montreal Convention is determined by whether there was an 'accident' during the "course of the operations of embarking and disembarking" resulting in 'bodily injury'. The 'accident' requirement remains unchanged from the Warsaw Convention.

⁵³ Eastern Airlines v.Floyd (n 4) 552.

⁵⁴ Eastern Airlines v.Floyd (n 4) 544.

⁵⁵ Eastern Airlines v.Floyd (n 4) 543.

⁵⁶ Grein v. Imperial Airways (1937) 1 KB 50, 59.

2. Accident, Claims under National Law, and Damages

2.1 Determining an Accident

Under the Montreal Convention, the ‘accident’ requirement remains unchanged from the Warsaw Convention and the controlling standard continues to be the Supreme Court’s 1985 decision in *Air France v. Saks*,⁵⁷ where the claimant bears the burden to show that the injury or death resulted from an ‘accident’. An ‘accident’, in turn, is where the injury or death was “caused by an unexpected or unusual event or happening that is external to the passenger.” “When the injury indisputably results from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft”, it is not an ‘accident’. ‘Accident’ means “something more than an event which fortuitously occurs on-board the aircraft,” involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury, and that the definition should be “flexibly applied after assessment of all the circumstances surrounding a passenger’s injury.”⁵⁸

The only other Supreme Court decision addressing the ‘accident’ requirement was *Olympic Airways v. Husain*,⁵⁹ in which the Court reaffirmed the Saks definition of accident focusing more on the passenger had a history of anaphylactic reactions to smoke and had been seated near the smoking section. The passenger and his wife asked a flight attendant to be moved as a result, but the flight crew refused and the passenger died in an apparent reaction to the smoke. Courts have generally agreed that where a passenger suffers an in-flight medical event such as stroke or heart attack and makes a specific health based request for help which goes unheeded, an accident can be found.⁶⁰

Nevertheless, medical illnesses such as heart attacks during flight are otherwise not an ‘accident’. One twist to this general rule was found in *Watts v. American Airlines*.⁶¹ There, the passenger suffered a fatal heart attack in a locked lavatory. He was not found until after arrival by ground personnel. In these regards, the court decided that the medical illness was not an accident, however if there is a negligence from the carrier which led to death of the passenger, then the carrier should be held liable.

In non-medical cases, a variety of events causing injury have been held to constitute an ‘accident’ for purpose of Article 17, including injuries resulting from routine procedures. These include injury caused by a hypodermic needle protruding from an airplane seat,⁶² the spilling of hot water on the passenger by a flight attendant attempting to sooth a passenger’s toothache,⁶³ the seizure and delay in delivering medication bag to passenger

⁵⁷ *Air France v. Saks*, 470 U.S. 392 (1985).

⁵⁸ *Air France v. Saks* (n 57) 404-407.

⁵⁹ *Olympic Airways v. Husain*, 540 U.S. 644 (2004).

⁶⁰ *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp.2d 651 (S.D.N.Y. 2001).

⁶¹ *Watts v. American Airlines*, No. 07CV0434, 2007 WL 3019344 (S.D. Ind., Oct 10, 2007).

⁶² *Waxman v. C.I.S. Mexicana De Aviacion, S.A.*, 13 F. Supp.2d 508, 512 (S.D.N.Y. 1998).

⁶³ *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138 (2d Cir. 1998).

after promising to do so,⁶⁴ a passenger's fall from an aircraft after attempting to get attention of baggage handlers on the ground and being touched by flight attendant,⁶⁵ passenger being hit by bottles falling out of an open overhead compartment,⁶⁶ a fall after stairs of a terminal bus gave way,⁶⁷ and a jolt from a passenger seated in front of the claimant causing his tray table to shake and tea to spill.⁶⁸

2.2 Claiming Compensation for Immaterial Loss under National Law

In 1994 through *Jack v. Trans World Airlines, Inc.*,⁶⁹ interestingly a psychiatrist's view of mental injury was determined to be inadmissible, as it was held that he did not have "legal training and (that) he did not fully grasp the meaning of the terms *lesion corporelles* and *blessure*."⁷⁰ The *Jack* court foresaw the following four approaches to the mental injury issue:⁷¹

1. No recovery allowed at all for emotional distress;
2. Recovery allowed for all distress as long as there was some bodily injury;
3. Emotional distress allowed as damages for bodily injury, but distress may include distress about the accident; and
4. Only emotional distress flowing from any bodily injury allowed.

The court felt that the first approach was the narrow approach used in *Floyd*, and was consistent with the state of law for some signatories. However, they felt this was not a desirable approach as "it (gave) so little to the passengers" and was very one sided. The second approach was considered unfair to passengers who might be "fortunate enough" to sustain a minor incidental bodily injury like a scratch, where others did not. The third approach was not accepted, and the court felt that the fourth approach was their preference requiring the existence of bodily injury and mental injury in consequence. Recovery was not allowed for distress caused by the accident itself.⁷²

In the United Kingdom, two relatively recent cases have dealt with the issue of mental injury under the Warsaw Convention. They are *King v. Bristow Helicopters Ltd.* (Scotland)⁷³ and *Morris* case.⁷⁴ Kelly Morris brought an action for sexual assault on board an aircraft and did not succeed.⁷⁵ Her appeal to the House of Lords was heard together with the appeal brought in *King*. The appeal in *King* was allowed. Mr. King had been involved in a helicopter crash where he sustained no physical injury. He did, however, sustain PTSD, and this led directly to a peptic ulcer, in exacerbation of previous peptic disease.⁷⁶

⁶⁴ *Prescod v. AMR Inc.*, 383 F.3d 861 (9th Cir 2004).

⁶⁵ *McCarthy v. Am. Airlines, Inc.*, No. 07-61016, 2008 WL 2704515 (S.D. Fla., June 27, 2008).

⁶⁶ *Maxwell v. Aer Lingus, Ltd.*, 122 F. Supp.2d 210, 212-213 (D. Mass. 2000).

⁶⁷ *Girard v. Am. Airlines, Inc.*, No. 00-V-4559, 2003 WL 21989978 (E.D.N.Y., Aug. 21, 2003).

⁶⁸ *Wipranik v. Air Canada*, No. CV 06—3763, 2007 WL 2441066 (C.D. Cal., May 15, 2007).

⁶⁹ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D. Cal. 1994).

⁷⁰ *Jack v. Trans World Airlines, Inc.* (n 69) 661.

⁷¹ *Jack v. Trans World Airlines, Inc.* (n 69) 665.

⁷² *Jack v. Trans World Airlines, Inc.* (n 69) 665-668.

⁷³ *King v. Bristow Helicopters Ltd.*, [2002] 1 Lloyd's Rep. 745, 746 (H.L.).

⁷⁴ *Morris v. KLM Royal Dutch Airlines*, [2002] 1 Lloyds Rep. 745 (H.L.).

⁷⁵ *Morris v. KLM Royal Dutch Airlines* (n 74) 635.

⁷⁶ *King v. Bristow Helicopters Ltd.* (n 73) 630.

On the basis of the physicality involved (this time physicality in consequence of a psychiatric condition) and in contrast with *Morris*, the appeal was allowed.⁷⁷

Although *King* was decided by the House of Lords under the Warsaw Convention, nevertheless, it provides substantial support for a “modern” interpretation of what bodily injury is. Although superficially advocating the position that, under the Warsaw Convention, there could be no recovery for claims of purely psychological injury in the absence of physical harm, the court indicated a preparedness to see ‘bodily injury’ through modern eyes based on contemporary medical evidence. Lord Nicholls conceded, “it may be that, in the less advanced state of medical and scientific knowledge 70 years ago, psychiatric disorders would not have been related to physical impairment of the brain or nervous system.” However, Lord Nicholls argued that “even if that is so, this cannot be a good reason for now excluding this type of bodily injury, if proved by satisfactory evidence, from the scope of Article 17.”⁷⁸

Under the *Saks* ruling,⁷⁹ the Second Circuit adjudicated a whole different set of facts, and as such the application of the definition of ‘accident’ upon them should be approached with caution. However, the malleability of the term ‘accident’ and the confusion over its exact meaning allows judges a lot of room to allocate the risks in the Conventions without resorting to policy considerations. Based on the *Saks* judgement, it is difficult to ascertain what lies behind this decision, yet arguably the aim of uniformity and the contemporary risk environment must have played a dominant role.

Furthermore, in *Wallace*,⁸⁰ the Judges effectively complicates the search for an ‘accident’, and brings into its analysis policy considerations that do not necessarily fit into the text of the Warsaw Convention. What the majority in *Wallace* argued was that the judges did not make clear whether the term ‘accident’ in Article 17 contains a “risk characteristic to air travel requirement.” The judges admits that a weak link between the unusual and unexpected event that caused the injury and the operation of the aircraft should exist in order to have an ‘accident’ under Article 17.

The House of Lords on *Morris*,⁸¹ the definition of ‘accident’ under Article 17 is characterized by a flexibility not so much of the unusual and unexpected character of the event that caused the injury or death, but by a broad interpretation of the peripheral “risk characteristic to air travel” requirement. This broad interpretation is targeted to introducing tort thinking into the Conventions. The flexibility dictates of *Saks* are commonly accused of opening the floodgates to liability expansion through judicial interpretation that contradicts the spirit and intention of the Warsaw Convention. Yet in spite of the approach taken by the *Saks* judgment, this expansion was inevitable. *Saks* did nothing more than temporarily relieve the pressure exercised by contemporary social needs by providing the opportunity to interpret the term ‘accident’ in a flexible yet controlled way. By focusing on the characteristics of the event causing the injury or death, it distanced the application of the Warsaw Convention from the routine operation of the tort system, which is based upon

⁷⁷ *King v. Bristow Helicopters Ltd.* (n 73) 692.

⁷⁸ *King v. Bristow Helicopters Ltd.* (n 73) 633.

⁷⁹ *Air France v. Saks* (n 57).

⁸⁰ *Wallace v. Korean Air Lines*, 214 F.3d 293 (2nd Cir. 2000).

⁸¹ *Morris v. KLM* [2002] QB 100, 112.

the reasonable care that the defendant is required to exercise.⁸² However, in some court judgments in the aftermath of *Saks* emphasized the technical aspects of aircraft and concluded that imposing liability should be limited to them, others opined that the enlargement of the term to include behavioral and broader social elements bolsters the contemporary social feelings of justice and brings air law into line with general tort law.

Prominent in this division of opinions among courts is an intense clash between the objective and subjective notions of risk, which bring about two sets of opinion best described by Marshall Shapo.

On one side are people whose ideas about justice mix what can be almost prophetic anger at the harmful consequences of risky activities, including their emotional consequences, with an empathy for injured persons . . . In close cases, they would lean onward imposing responsibility on power holders and in favor of vulnerable parties. The thinking of the people on the other side of this cultural divide, who we might call preservationist, includes a stress on law as a social conservator . . . a strong version of that position, as applied in injury litigation, is that except in cases involving clear violation of clear standards, or behavior deemed egregious by consensus, the law should stay out of the daily encounters in which millions of people in society are bumping up against one another.

Although Marshall Shapo makes no reference to the Warsaw Convention directly, his findings describe accurately the post-*Saks* evolution of air carriers' liability. There are judges who will use any available tort law constructions, policy considerations, and ambiguity in the meaning of the Warsaw Convention to impose liability upon air carriers on the basis that the 'immunity' afforded by the Convention to them is legacy from the second World War. Whereas in the aftermath of the Second World War the focus was on how to break the liability limits of the Conventions, in the post-*Saks* era it is how to justify the limitation of passengers' rights in their civil actions against air carriers, which is imposed by the Conventions. At its extreme, they will interpret 'accident' as synonymous to event and will be inclined towards effecting a moralizing form of deterrence, which may not always be consonant with the spirit of the Conventions and the technical rationality of air carrier's operations.⁸³

With the liability system of the Conventions in confusion and the social policies demanding an increased role for tort laws, there were judges as well as the majority of academics that struggled to preserve the independent status of the Conventions and also to maintain the unique legal position of air carriers among the various means of transportation.

Based on the previous cases mentioned, the judgments demands a nexus between cause and effect and is particularly suspicious about this nexus in the case of mental or emotional claims or defenses. PTSD posits a causal relationship between traumatic events and psychiatric disorder, seemingly offering to answer the law's demand for a causal linkage. Given the perception of increased frequency of PTSD claims and defenses, as well as

⁸² George Leloudas, *Risk and Liability in Air Law* (Informa Law 2009) 113–114.

⁸³ George Leloudas (n 82) 115.

increased challenges to the expert testimony presented in support of these claims, there is heightened criticism of PTSD claims and defenses.

Concurrently, tort rules governing recovery for nonphysical harm have become more malleable. Increasingly, ‘proximate cause’, rather than physical impact or injury, has defined the limits on recovery for nonphysical harm.⁸⁴ Proximate cause is an enigmatic phrase that is most often thought to turn on foreseeability. Liability is limited to the foreseeable consequences that flow from an act.⁸⁵ The defendant is legally responsible only for the foreseeable consequences that his or her actions have caused. Although foreseeability is a prospective test to be applied from the perspective of the defendant at the time of the injury-producing conduct, its application at trial is affected by hindsight bias.⁸⁶

Although at some judgment permits recovery for mental and emotional harm suffered in the absence of physical impact or injury (only in the event of high jacking), physical harm is still a precondition for seeking damages for mental or emotional distress in some settings. With reliance on research addressing biological and neurological changes in the body linked with severe trauma,⁸⁷ PTSD has been used to satisfy the physical harm requirement for a claim for mental or emotional injury. For instance, in *Weaver v. Delta Airlines Inc.*,⁸⁸ the court concluded that an airline passenger’s PTSD, resulting from an emergency landing in which she suffered no physical injury, was nonetheless ‘bodily injury’ for the purposes of the Warsaw Convention because she experienced biochemical reactions that had physical impact on her brain and neurological system.⁸⁹

Other courts struggling with this issue have refused to disturb this dichotomy. In *Erie Ins. Co. v. Favor*,⁹⁰ the court held that the language of an automobile liability insurance limiting uninsured motorist coverage to property damage and bodily injury did not cover the insured’s claim for PTSD suffered when a car driven by an unknown person crashed into the insured’s living room. Reflecting how research has transformed this debate, a dissenting judge in *Erie* noted “believe that the traditional mind/body dichotomy is no longer tenable. The human brain is part of the human body. The human brain can be negatively affected without being physically struck. Recent studies of brain activity, using more sophisticated instrument and measuring devices than previously available, have demonstrated that traumatic events cause physical changes in the brain.”⁹¹

Therefore, in order to be a valid claim for damages under Article 17, the majority of court decisions declared, the claim must be predicated on some objective identifiable injury to the body. In addition to that, there must be some causal connection between the bodily injury and the accident.

⁸⁴ *Dillon v. Legg*, 68 Cal. 2d 728, Sac No. 7816, 1968.

⁸⁵ *Palsgraf v. Long Island R.R.*, 164 NE 564, 249 NY 511, 1928.

⁸⁶ Robert I. Simon, *Posttraumatic Stress Disorder in Litigation: Guidelines for Forensic Assessment* (2nd edn, British Library 2003) 8.

⁸⁷ *U.S. Claims, Inc. v. Yehuda Smolar, PC.*, 602 F. Supp. 2d 590, Dist. Court, ED Pennsylvania, 2009.

⁸⁸ *Weaver v. Delta Airlines Inc.*, 56 F. Supp. 2d 1190 – Dist. Court D. Montana, 1999.

⁸⁹ Robert I. Simon (n 86) 9.

⁹⁰ *Erie Co. v. Favor*, 304 US 64, 58 S. Ct. 817, 82 L. Ed. 1188, (1998).

⁹¹ *Erie Co. v. Favor* (n 90) 973.

2.3 Compensating PTSD

Psychological pain and suffering generally refers to the emotional changes that an individual undergoes following trauma, which is a ‘major depression’. This category can include individual symptoms (e.g. stress, change in sleep or appetite), and any changes in personality.⁹² A claim of psychological pain and suffering need not necessarily be due to a permanent condition to be compensable.⁹³ However, the claim must reflect a reasonably high degree of upset, pain, or suffering.⁹⁴

Changes in a person’s cognitive abilities as result of physical, and in some cases, emotional trauma can include, but are not limited to impairment in memory, attention, concentration, speech, processing of complex information, and mental shifting from one concept to another. These symptoms require careful assessment from a specialist such as neuropsychologist or neuropsychiatrist. These symptoms is rare, but if they do occur, they are often transient and spontaneously remit over time.⁹⁵

Also economic loss is typically conceptualized in terms of two elements: (i) wage loss and; (ii) diminished earning capacity.⁹⁶ Wage loss generally refers to any loss of income as result of an inability to return to the same or similar employment conditions that existed prior to the trauma.⁹⁷ Loss of wage earning capacity commonly refers to the inability of an individual, due to physical or psychological disability, to pursue any job in which wages may be earned.⁹⁸

As mentioned in the previous chapters, compensation for passenger who suffered unpleasant event then latter claim for compensation for mental distress often failed because there was no ‘bodily injury’ accompany the claim. Courts generally hold that “in the context of purely emotional injuries without physical manifestations, the phrase “bodily injuries” is not ambiguous. Its ordinary meaning connotes a physical problem.⁹⁹ Therefore, the overwhelming majority of courts interpret the phrase bodily injury to include claims for physical injury and to exclude claims for purely nonphysical or emotional harm.¹⁰⁰ Courts interpreting the phrase bodily injury to exclude allegations of purely emotional or nonphysical harm have based their decision upon the following grounds. First, courts simply interpret the word “bodily” in the term bodily injury to mean physical injury to the body.¹⁰¹ In addition, dictionary definitions equate the term bodily with physical or corporeal, as opposed to mental or spiritual.¹⁰² It can be said, taking the words at face

⁹² Ronald V. Miller, Jr. and Kevin M. Quinley, *Insurance Settlements*, vol 1 (James Publishing 2012) 34–18.

⁹³ *Sullivan v. Lough*, 406 S.E. 2d 691 (W.Va. 1991).

⁹⁴ *Hicks v. Ricardo*, 834 S. W.2d 587, 590

⁹⁵ Ronald V. Miller, Jr. and Kevin M. Quinley (n 92) 34–19.

⁹⁶ Ronald V. Miller, Jr. and Kevin M. Quinley (n 92) 34–19.

⁹⁷ *Williams v. Commonwealth Edison Co.*, 596 N.E.2d 759 (Ill. App, 1992).

⁹⁸ Ronald V. Miller, Jr. and Kevin M. Quinley (n 92) 34–19.

⁹⁹ *SL Indus., Inc. v. American Motorist Ins. Co.*, 607 A.2d 1266, 1275 (N.J. 1992).

¹⁰⁰ *Bituminous Fire & Marine Ins. Co. v. Izzy Rosen’s Inc.*, 493 F.2d 257, 261 (6th Cir. 1974).

¹⁰¹ *Chatton v. National Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 323 (Ct. App. 1992).

¹⁰² *AIM Ins. CO. v. Culcasi*, 280 Cal. Rptr. 772.

value, the phrase bodily injury is understood to mean hurt or harm to the human body, contemplating actual physical harm, or damage to a human body. PTSD can be considered as there is a problem with the brain, affecting the human performance in their social activities in everyday life. Therefore, a problem to the brain, which is supported by an assessment from the specialist in these areas, is also considered as an injury to the body.

Therefore, the scope of damages for which plaintiffs may seek compensation in tort cases involving seemingly serious trauma is often broad, potentially significant, and generally vexing. Nowhere is this latter quality more true than in claims involving psychological injury, especially the claim of PTSD. The issue of damages in general and psychological injuries specifically cannot and should not be ignored or minimized by either attorney or the insurance claims manager or adjuster. Despite their seemingly subjective and nebulous nature, psychological injuries represent a clinically viable and legally recognized source of compensable damages to injured litigants. Notwithstanding what they represent in terms of human suffering, which can be as catastrophic as the worst physical injury, they can contribute greatly to the amount of compensation that is awarded.¹⁰³

2.4 Compensating Mental Distress

Courts have based their judgment to decide that mental injury is not an injury under Article 17 Warsaw Convention and Montreal Convention from *Floyd*. *Floyd* case is a leading case to define the term bodily injury, the judges had done it nicely for that time. Until now, The United States Supreme Court resolved the question debated among lower federal courts of whether Article 17 Warsaw Convention allows recovery for mental or physical injuries unaccompanied by physical injury or physical manifestation of injury by holding that “an air carrier cannot be held liable under Article 17 Warsaw Convention, when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury”. Also developments in medical science likely will continue to improve our understanding of PTSD and the nature of the psychological injury that produces related physical effects. In the future, medical science also may be able to define the precise mechanisms that produce these physical effects. However, the Supreme Court in *Floyd* considered but rejected the idea that modern medicine has obliterated the distinction between physical and mental injury.¹⁰⁴

The current state of the law after *Saks*, *Floyd*, and *Tseng* requires that mental injuries must proximately flow from physical injuries caused by an accident. This approach is consistent with *Floyd*, yet provides full compensation for the victim within the bounds established by the Warsaw Convention. Emotional injuries unrelated to physical injuries or emotional injuries that are manifested in physical symptoms are insufficient to trigger recovery under both the letter and spirit of *Floyd*.¹⁰⁵

The bodily injury requirement for recovery of damages under the old Warsaw Convention standard is carried forward into the new treaty’s liability scheme. Article 17 of the Montreal Convention uses the same ‘bodily injury’ language as the English translation of

¹⁰³ Ronald V. Miller, Jr. and Kevin M. Quinley (n 92) 34–26.

¹⁰⁴ *Eastern Airlines, Inc. v. Floyd* (n 4) 530-534.

¹⁰⁵ *Tsen v. El Al Isr. Airlines, Ltd.*, 919 F. Supp. 155, 158 (S.D.N.Y. 1996); *Turturro v. Cont’l Airlines*, 128 F. Supp. 2d 179, 176 n.3 (S.D.N.Y. 2001).

the Warsaw Convention, and the expressed intent of the U.S. Senate in ratifying the Montreal Convention was to leave unchanged the judicial precedents interpreting Article 17 of the Warsaw Convention.

Furthermore, people who suffered PTSD due to unpleasant event occurred during the flight has rights to be compensated. With the advance development of medical technology, damage to the human brain can be detected by doctors, if there is something wrong with the human brain it can be said the brain is injured and could also be consider as bodily injury. Even though damage to the brain is not apparent, it is also real. Although a majority of jurisdictions still require some form of physical injury or illness as prerequisite to the recovery of PTSD damages, the modern judicial trend is to abolish the physical manifestation requirement and permit general negligence cause of action for the infliction of serious emotional distress without regards to whether the plaintiff suffered any physical injury or illness as a result.¹⁰⁶

Therefore, the scope of damages for which plaintiffs may seek compensation in tort cases involving seemingly serious trauma is often broad, potentially significant, and generally vexing. Nowhere is this latter quality more true than in claims involving psychological injury, especially the claim of PTSD. The issue of damages in general and psychological injuries specifically cannot and should not be ignored or minimized by either attorney or the insurance claims manager of adjuster. Despite their seemingly subjective and nebulous nature, psychological injuries represent a clinically viable and legally recognized source of compensable damages to injured litigants. Notwithstanding what they represent in terms of human suffering, which can be as catastrophic as the worst physical injury, they can contribute greatly to the amount of compensation that is awarded.¹⁰⁷

CONCLUSION

Whether under Warsaw Convention or Montreal Convention, or under national law regimes, court always encounter with the question of what constitutes a ‘bodily injury’. In the Eastern District of Louisiana, in *Searcy v. American Airlines Inc.*,¹⁰⁸ the plaintiff’s son, a quadriplegic, allegedly sustained physical injuries owing to the alleged negligence of airline employees in loading him and his wheelchair aboard the aircraft. The plaintiff, the mother of the quadriplegic son, witnessed the ‘accident’. However, since she sustained only emotional injuries unaccompanied by physical injuries, she was not permitted to recover. Yet no connection between the physical injuries and the mental injury still proved as a major factor for the judge to decide. In the absence of the link, psychological injuries are not recoverable, even if accompanied by physical injuries.¹⁰⁹

The decision of the United States Court of Appeals for the Eleventh Circuit in *Floyd*,¹¹⁰ is both plausible and problematic.¹¹¹ The court correctly employed the French legal meaning

¹⁰⁶ Scott D. Marrs, ‘Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and “Fear of Disease” Case’ (1992) 28 Tort & Ins. L.J. 5.

¹⁰⁷ Ronald V. Miller, Jr. and Kevin M. Quinley (n 92) 34–26.

¹⁰⁸ *Searcy v. American Airlines Inc.*, 28 Av.Cas. (CCH) 16,483 (E.D. La. 2002).

¹⁰⁹ *Alvarez v. American Airlines* (n 32); *Carey v. United Airlines* (n 24).

¹¹⁰ *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989).

of the term *lesion corporelle*, as the Supreme Court has held that the French legal meaning of the Convention's terms must govern all interpretations of the treaty.¹¹² The court's conclusion that *lesion corporelle* encompasses mental as well as physical injuries is supported by both case law and legal commentary.¹¹³ The court noted that permitting recovery of damages for mental injuries would support the underlying policy of the Convention of establishing a uniform system of law and liability governing international air carriers.¹¹⁴

Regardless, damages for mental injuries unaccompanied by physical trauma resulting from an 'accident' occurring while an individual is on an international flight should be compensable. Furthermore, although a majority of jurisdiction continue to adhere to the traditional rule requiring some form of physical injury in order to obtain damage for mental injury, courts so far has been trying to overcome the mindset of the physical injury requirement as a guarantee of the genuineness of claims for mental distress.¹¹⁵ Judgment from cases regarding mental distress outside the scope of Warsaw and Montreal Convention could become a stepping stone towards recovery for PTSD damages under tort law principles and also with the support from the medical profession it could provide a better understanding for the judge deciding a mental injury claim, and yet the focus to determine the physical injury requirement.

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¹¹¹ Robert J. Rivers, Jr, 'Intentional Infliction of Emotional Distress- Recovery for Mental Injuries Unaccompanied by Physical Injury Permitted Under Warsaw Convention' (1990) 14 Suffolk Transnat'l L.J. 353, 12.

¹¹² *Floyd v. Eastern Airlines, Inc.* (n 110); *Air France v. Saks* (n 57).

¹¹³ *Palagonia v. Trans World Airlines*, 442 N.Y.S.2d 670, 672 (N.Y.Sup.Ct.1978).

¹¹⁴ *Husserl v. Swiss Air Transport Company, Ltd.* (n 22).

¹¹⁵ *Scott D. Marrs* (n 106) 38.

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