Recovery for Emotional Distress Under
The Warsaw Convention: The Elusive
Search for the French Legal Meaning of
Lésion Corporelle

GREGORY C. SISK†

SUMMARY

I. INTRODUCTION ............................................................... 128
II. THE WARSAW CONVENTION ................................................. 129
III. AIR CARRIER LIABILITY FOR EMOTIONAL DISTRESS
    UNDER ARTICLE 17 ....................................................... 131
    A. The Debate Over Liability for Emotional Distress .......... 131
    B. The Plain Meaning of Lésion Corporelle Dictates
       That Bodily Injury Be a Condition for Air Carrier Liability . 133
    C. Analysis of the French Legal Meaning of Lésion Corporelle
       Does Not Lead to a Contrary Conclusion .................... 135
    D. In the Absence of a Clear Contrary French Legal Meaning,
       Lésion Corporelle Should Be Given Its Ordinary Meaning .. 138
IV. THE DRAFTING HISTORY OF THE WARSAW CONVENTION
    AND THE SUBSEQUENT CONDUCT OF THE PARTIES ............... 142
    A. The Drafting History of the Warsaw Convention .......... 142
    B. The Subsequent Conduct of the Parties ...................... 143
V. LIABILITY FOR EMOTIONAL DISTRESS
    AND THE WARSAW CONVENTION'S PURPOSE OF UNIFORMITY .... 147
VI. THE EXCLUSIVITY OF THE WARSAW CONVENTION'S
    REMEDIAL SCHEME ..................................................... 148
    A. Introduction to the Exclusivity Issue ......................... 148
    B. Recognition by United States Courts
       of an Exclusive Cause of Action under Article 17 ............ 149
    C. The Warsaw Convention Establishes an Exclusive Regime
       for Liability of International Air Carriers .................. 152
    D. The Warsaw Convention Intended to Establish
       Uniformity in the Regulation of International Air Travel ... 155

† B.A., Montana State University, 1981; J.D., University of Washington, 1984. The author
is engaged in appellate practice with the law firm of Karr Tuttle Campbell in Seattle. He has worked
with the firm’s aviation department in defending claims against airlines. The author would like to
thank Lisa Oman, a third-year law student at the University of Puget Sound, for her invaluable
research assistance.
E. Drawing the Jurisdictional Line for the Exclusive Warsaw Convention Cause of Action .................................. 157

VII. CONCLUSION .................................................................................................................. 161

[You shall seek all day ere you find them, and when you have them, they are not worth the search.]
William Shakespeare, The Merchant of Venice, act 1, scene 1

I. INTRODUCTION

In June 1990 the United States Supreme Court granted certiorari in Eastern Airlines, Inc. v. Floyd\(^1\) to review a decision by the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit decision permitted passengers on an international flight to recover damages for the emotional distress\(^2\) they suffered when the airplane temporarily lost power.\(^3\) The Supreme Court’s decision in Floyd is expected to resolve the long debated question whether the Convention for the Unification of Certain Rules Relating to International Transportation by Air,\(^4\) commonly known as the Warsaw Convention, permits an international air traveler to recover damages for emotional distress that is unaccompanied by physical injury.

The debate in the lower courts has focused primarily on the proper French legal meaning of the phrase lésion corporelle. Lésion corporelle appears in article 17 of the Warsaw Convention, the article which establishes a cause of action for injured air travelers.\(^5\) Because the literal English translation of this phrase is “bodily injury,” the plain meaning of the phrase indicates that damages for pure emotional distress may not be recovered under the Warsaw Convention cause of action. However, in Floyd,\(^6\) the Eleventh Circuit held that a broader meaning of lésion corporelle could be derived from an investigation of the French law of damages.\(^7\) Other courts have also diligently attempted to divine the French legal meaning of the term, and have reached varying conclusions.\(^8\)

---
2. While I use the term “emotional distress” throughout the Article, there are many other ways of referring to this type of injury. Some of the terms that are often used interchangeably with emotional distress include: psychological injury, mental distress, mental trauma, psychic injury, or psychic harm.
3. Floyd, 872 F.2d 1462.
5. Id. art. 17.
6. Floyd, 872 F.2d 1462.
7. Id. at 1470-72.
8. See, e.g., Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1155-58 (D.N.M. 1973) (finding that “the French legal meaning must govern,” that French law sharply distinguishes between physical and mental injury, and that the Warsaw Convention does not operate to include mere emotional distress); Palagonia v. Trans World Airlines, 110 Misc. 2d 478, 480-89, 442 N.Y.S.2d 670,
This Article predicts that the search for a definitive French legal meaning of the phrase *lésion corporelle* will continue to prove elusive. There is no clear evidence that this phrase is—or was intended by the Convention’s framers to be—a term of art. Instead, *lésion corporelle* is merely a combination of two French words selected by the Convention’s drafters to convey a particular linguistic meaning, one that is accurately rendered in English as “bodily injury.” Rather than striving to impart a technical connotation to the term, the ordinary meaning of the words should prevail.

This Article further concludes that the drafting history of the Warsaw Convention and the subsequent conduct of the signatory parties confirm that international air carriers were not intended to be subject to liability for a passenger’s mere emotional distress. Moreover, given the absence of any international consensus on the legitimacy of claims for emotional distress, recognition of such an action by United States courts would frustrate the uniformity of the Warsaw Convention’s liability regime. Finally, to further promote uniformity, the liability scheme established in the Warsaw Convention should be exclusive, thereby preventing any claimant from circumventing the terms of the treaty through an action for emotional distress under some other source of law, such as state law.

II. THE WARSAW CONVENTION

The Warsaw Convention is a multilateral treaty that created a uniform regime to govern the international carriage of passengers, baggage, and cargo by air, and to regulate the liability of international air carriers. The Warsaw Convention, which was concluded on October 12, 1929, resulted from the determined efforts of a number of nations to achieve an international agreement in order to both regulate and encourage the fledgling, pre-World War II aviation industry. The Convention was the product of two international conferences on private aviation law. The first conference was held in Paris in 1925, and was followed by a second conference in Warsaw in 1929. The conferences’ participants had two objectives. First, because air commerce connected many countries with different languages, legal systems, and commercial practices, the participants wished to establish uniform rules governing the rights and liabilities of parties to contracts of international air carriage. Second, the participants wished to place a limit on the liability of air carriers in exchange for limitations on the defenses available to the carriers.

---

672-76 (1978) (legal meaning of *lésion corporelle* includes emotional distress as a basis for damages).


More than 120 nations are parties to the Warsaw Convention, making it one of the most significant and widely recognized international agreements.\textsuperscript{12} The United States acceded to the Warsaw Convention in 1934.\textsuperscript{13} As a treaty, the Convention constitutes part of the supreme law of the United States and must be applied notwithstanding state law.\textsuperscript{14}

The Convention establishes comprehensive principles of liability for international air carriers.\textsuperscript{15} The Convention governs the rights of parties in any action for damages arising out of international air transportation.\textsuperscript{16} Article 1(2) defines "international transportation" as transportation in which:

\begin{quote}
according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another power, even though that power is not a party to the Convention.\textsuperscript{17}
\end{quote}

Article 17, examined at length below, establishes a cause of action and a presumption of carrier liability for bodily harm or fatal injuries sustained by passengers as a result of accidents on board or while entering or exiting an aircraft.\textsuperscript{18} Article 20 allows the carrier to rebut the presumption of liability by proving that it had "taken all necessary measures to avoid the damage or that it was impossible . . . to take such measures."\textsuperscript{19} The Convention's drafters were obliged to balance the competing interests of air carriers and passengers. Therefore, while article 17 creates a rebuttable presumption of carrier liability for passengers' injuries, article 22(1) limits the carrier's liability by capping the amount of damages that may be recovered.\textsuperscript{20} However, this limitation on liability does not apply to an air carrier guilty of wilful misconduct.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{12} Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 247 (1984); L. Goldhirsch, \textsc{The Warsaw Convention Annotated: A Legal Handbook} 285-93 (1988) (listing signatory parties to Convention); I L. Kreindler, \textsc{Aviation Accident Law} § 11.01[3], at 11-7 to 11-8 (1990).
\item \textsuperscript{13} Executive G, 73d Cong., 2d Sess., 78 CONG. REC. 11,577-82 (1934).
\item \textsuperscript{14} U.S. CONST., art. VI, cl. 2; see also Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 801 (2d Cir. 1971).
\item \textsuperscript{15} See generally Lowenfeld & Mendelsohn, \textit{supra} note 11, at 517.
\item \textsuperscript{16} Warsaw Convention, \textit{supra} note 4, art. 1(1).
\item \textsuperscript{17} \textit{Id.} art. 1(2); see generally Lowenfeld & Mendelsohn, \textit{supra} note 11, at 500-501; Sack, \textit{supra} note 10, at 348-49.
\item \textsuperscript{18} Warsaw Convention, \textit{supra} note 4, art. 17.
\item \textsuperscript{19} \textit{Id.} art. 20.
\item \textsuperscript{20} \textit{Id.} art. 22(1).
\item \textsuperscript{21} Under article 25 of the Warsaw Convention, an air carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." \textit{Id.} art. 25.
\end{itemize}
In addition to establishing the scope of international air carrier liability, the Warsaw Convention contains rules regarding jurisdiction over an action and the period of limitations within which an action must be brought.

In the United States, the Warsaw Convention’s cap on liability and provision of an affirmative defense of due care have been modified by the Montreal Agreement of 1966, a private accord among air carriers serving the United States. The Montreal Agreement was the result of a compromise between the United States government and the air carriers. The government objected to the Warsaw Convention’s low liability limit (approximately $8,300 per passenger) on claims arising from a passenger’s death or bodily injury. In return for the air carriers’ acceptance, under the Montreal Agreement, of a higher cap on liability and a stricter standard of liability, the United States cancelled its proposed denunciation of the Convention.

The Montreal Agreement requires air carriers serving the United States to enter into agreements with passengers which raise the Convention’s cap on air carrier liability to $75,000 per passenger and eliminate the air carriers’ defense of due care under article 20(1) of the Convention. While the Montreal Agreement denies air carriers a “due care” defense, it does not impose absolute liability. Air carriers “did not waive other provisions in the Convention that operate to qualify liability, such as the contributory negligence defense in Article 21 or the ‘accident’ requirement of Article 17.”

III. AIR CARRIER LIABILITY FOR EMOTIONAL DISTRESS UNDER ARTICLE 17

A. The Debate Over Liability For Emotional Distress

Article 17 of the Warsaw Convention establishes a cause of action for any injury sustained during international air transportation. In the original French, 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

---

22. Id. art. 28(1).
23. Id. art. 29.
25. The Warsaw Convention states the liability limit for passenger recovery in francs. Warsaw Convention, supra note 4, at 22(1). The stated amount is equivalent to approximately 8,300 American dollars. See Civil Aeronautics Board Order No. E-28680, supra note 24.
l’aéronéf ou au cours de toutes opérations d’embarquement et de débarquement.\textsuperscript{29}

The official United States translation reads:\textsuperscript{30}

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.\textsuperscript{31}

In the early years of the Warsaw Convention, there was little reason to inquire into the precise meaning of lésion corporelle or to consider whether it is properly translated into English as "bodily injury." The compensability of emotional distress under the Convention first became an issue in litigation brought by passengers in the wake of terrorist hijackings in the 1970s. Although some of these incidents resulted in the death or bodily injury of passengers, most victims suffered only the emotional trauma and extreme fright associated with a hijacking.\textsuperscript{32} More recently, passengers on international flights have sought to recover for emotional distress suffered as a result of a "close call," which did not result in bodily harm. For example, in Floyd v. Eastern Airlines, Inc.,\textsuperscript{33} the aircraft temporarily lost power and passengers were told the plane would be "ditched" in the ocean, but the crew was able to restart an engine and land the plane safely.\textsuperscript{34}

The question presented by the more recent cases is whether article 17 encompasses a claim for emotional distress that does not result from a "bodily injury." The courts are sharply divided on the issue.\textsuperscript{35} The New York Court of Appeals addressed the question in Rosman v. Trans World Airlines, Inc.,\textsuperscript{36} a case arising from a terrorist hijacking of an international flight. The New York court focused on the English translation of article 17 and held that an international air carrier is liable for a passenger's "palpable, objective bodily injuries, including those caused by the psychic trauma [of an accident], and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma."\textsuperscript{37}

\hspace{1cm} \textsuperscript{29} Warsaw Convention, supra note 4, art. 17 (emphasis added).
\hspace{1cm} \textsuperscript{30} The Supreme Court has characterized the English translation that was before the Senate when it ratified the Convention in 1934 as "the official American translation." Saks, 470 U.S. at 397.
\hspace{1cm} \textsuperscript{31} Warsaw Convention, supra note 4, art. 17 (emphasis added).
\hspace{1cm} \textsuperscript{32} See generally G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 111-12 (1977); Lowenfeld, Hijacking, Warsaw, and the Problem of Psychic Trauma, 1 SYRACUSE INT'L L.J. 345 (1973).
\hspace{1cm} \textsuperscript{33} Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), cert. granted, 110 S. Ct. 2585 (1990).
\hspace{1cm} \textsuperscript{34} Id. at 1466.
\hspace{1cm} \textsuperscript{35} See generally Comment, The Emotional Trauma of Hijacking: Who Pays, 74 KY. L.J. 599, 611-20 (1985-86) (surveying conflicting decisions).
\hspace{1cm} \textsuperscript{36} 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).
\hspace{1cm} \textsuperscript{37} Id. at 400, 314 N.E.2d at 857, 358 N.Y.S.2d at 110.
The United States District Court for the District of New Mexico, in *Burnett v. Trans World Airlines, Inc.*, 38 examined the French meaning of *lésion corporelle* and found that the French legal system made a sharp distinction between bodily injury (*lésion corporelle*) and mental injury (*lésion mentale*). 39 In fact, the court found:

The two phrases appear to be mutually exclusive and therefore, sound construction compels the court to attribute to "lésion corporelle" its normal import only, excluding mental injury. 40

In direct contrast, in *Floyd v. Eastern Airlines, Inc.*, 41 the Eleventh Circuit held that *lésion corporelle*, analyzed according to its French legal meaning, broadly covers any personal injury, including emotional distress unaccompanied by physical harm. 42 A New York state court reached the same conclusion in *Palagonia v. Trans World Airlines, Inc.* 43 Other courts also have concluded, on different grounds, that the Warsaw Convention does not preclude a state law claim for emotional distress. 44

This conflict in authority—particularly that between the New York Court of Appeals in *Rosman* and the Eleventh Circuit in *Floyd*, a conflict between the highest court of a state and a federal court of appeals—led the Supreme Court to grant certiorari in *Floyd*. 45 It remains to be seen whether the Supreme Court will continue the elusive search for the proper French legal meaning of *lésion corporelle* or will instead regard this quest as misguided and give effect to the ordinary meaning of the French words which translate into English as "bodily injury."

**B. The Plain Meaning of Lésion Corporelle Dictates That Bodily Injury Be a Condition for Air Carrier Liability**

Although the question is often framed as whether damages for emotional distress may be recovered under the Warsaw Convention, article 17 does not

39. *Id.* at 1156.
40. *Id.*
42. *Id.* at 1470-72.
45. *See Sup. Cr. R. 10.1(a)* (among the considerations favoring review on certiorari is that "a United States court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort").
specify the types of recoverable damages. Instead, it establishes the conditions under which a carrier is liable.

The specific conditions for air carrier liability, set forth in the English text of article 17, are:

(1) "the death or wounding of a passenger or any other bodily injury suffered by a passenger;" and

(2) the occurrence of an "accident which caused the damage so sustained . . . on board the aircraft or in the course of any of the operations of embarking or disembarking."

If these two conditions are met, the Convention does not impose any additional restrictions on the types of damages that may be recovered. Damages may be awarded even for emotional distress if it flows from an accident resulting in death, wounding, or other bodily injury and occurring on board the airplane or in the course of boarding or deplaning.

However, assuming the accuracy of the English translation of *lésion corporelle* as "bodily injury," a passenger who survived an airplane accident can recover damages against an air carrier only if he or she was wounded or sustained another type of "bodily injury." A passenger claiming emotional distress unaccompanied by physical harm would not have suffered a legally cognizable injury under the terms of the Warsaw Convention.

---

46. 1 L. REINDELER, supra note 12, § 11.08, at 11-94 to 11-95; G. MILLER, supra note 32, at 125; Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir. 1987). The Warsaw Convention does, however, limit the amount of damages. See Warsaw Convention, supra note 4, art. 22(1). That limit was modified for air carriers serving the United States by the Montreal Agreement. See Montreal Agreement, supra note 24.

47. G. MILLER, supra note 32, at 125.

48. Warsaw Convention, supra note 4, art. 17.

49. See 1 S. SPEISER & C. KRAUSE, supra note 11, § 11:34, at 742-43 (a decision to permit recovery for emotional distress alone can be justified under article 17 "only by mental gymnastics"). But see Hussel v. Swiss Air Transport Co., 388 F. Supp. 1238, 1250 (S.D.N.Y. 1975) (because "mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma," the phrase "bodily injury" in article 17 could be construed to encompass emotional distress).

When a passenger has suffered bodily injury, that passenger may recover for emotional distress resulting from and related to that physical harm. One commentator argues that there need not be any "causal link between the damage and the death, wounding, or other bodily injury" because article 17 "only states that the carrier is liable for damage sustained in the event of death, wounding, or other bodily injury." G. MILLER, supra note 32, at 121 (emphasis in original). Presumably, Miller means that a passenger who suffered a bodily injury could also recover for emotional distress occurring concurrently with, though unrelated to, that bodily injury. This approach would produce absurd results. For example, if two passengers sat side-by-side in an aircraft that crashed, the passenger who suffered bodily injury could recover for the emotional distress suffered before the crash, while the passenger who suffered emotional distress but no physical harm could not recover for that emotional distress. The "in the event of" language of article 17 is more naturally understood to require that any compensable damage be associated with the requisite bodily injury. In sum, emotional distress should be the subject of compensation only if the distress is precipitated by and flows from a physical injury.
Focusing upon the ordinary meaning of the terms used in the Warsaw Convention is appropriate, because the interpretation of a treaty "must begin . . . with the text of the treaty and the context in which the written words are used."50 The New York Court of Appeals followed this ordinary meaning rule of treaty interpretation in Rosman v. Trans World Airlines, Inc.,51 when it considered passenger claims for emotional distress caused by a terrorist hijacking.52 The court held that the "inclusion of the term 'bodily' to modify 'injury' cannot be ignored, and that in its ordinary usage, the term 'bodily' suggests opposition to 'mental.'"53 Moreover, "other bodily injury" must be read in light of the two types of injuries which are listed before it in article 17—"death" and "wounding." If one gives the words their ordinary meaning and views them in the context of their relation to each other, article 17 plainly contemplates death, physical wounds, or other physical injuries as a precondition to air carrier liability.54 Accordingly, "only by abandoning the ordinary and natural meaning of the language of article 17, could [the court] arrive at a reading of the terms 'wounding' or 'bodily injury' which might comprehend mental suffering in the absence of physical manifestations."55

The restrictive nature of "bodily injury" as a condition of liability under the Warsaw Convention was recognized by commentators from an early date.56 Unless some compelling basis can be found in the French text for rejecting Rosman's analysis, an international air carrier should not be liable to a passenger who claims only emotional distress.

C. Analysis of the French Legal Meaning of Lésion Corporelle Does Not Lead to A Contrary Conclusion

Because the original text of the Warsaw Convention is in French, the United States Supreme Court, in Air France v. Saks,57 found it appropriate to "look to the French legal meaning for guidance" in interpreting it.58 No one has disputed that the literal English translation of "lésion corporelle" is indeed "bodily injury." The question, then, is whether French law uses this phrase as a term of art and, if so, whether lésion corporelle would then encompass emotional

52. Id. at 396-97, 314 N.E.2d 848, 855, 358 N.Y.S.2d 97, 107 (1974).
53. Id.
56. See, e.g., Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. & Com. 1, 19 (1936) ("mere fright or mental suffering" is not covered under "bodily injury," but physical disability caused by fright is).
58. Id. at 399 (emphasis added).
distress. The courts and commentators which have engaged in this inquiry have reached different conclusions.

The search for the French legal meaning of *lésion corporelle* has not produced a definitive result. The reason for this inconclusiveness may be that courts have asked the wrong question and have undertaken the wrong investigation. Underlying any effort to look beyond the linguistic accuracy of the translation of *lésion corporelle* as "bodily injury" for a different French legal meaning is the unstated assumption that *lésion corporelle* is a term of art susceptible to precise legal analysis. This does not appear to be the case, and, consequently, the search for a French legal meaning will continue to be elusive.

In *Burnett v. Trans World Airlines, Inc.*,[59] a case involving a terrorist hijacking of an international flight, the United States District Court for the District of New Mexico examined the French legal meaning of *lésion corporelle* and concluded that it did not include emotional distress.[60] Based upon what it characterized as an analysis of French law, but what apparently was a linguistic examination of the French words,[61] the court concluded that French law distinguishes sharply between bodily injury (*lésion corporelle*) and mental injury (*lésion mentale*).[62] The court also referred to the conclusion of Professor Juglarl, of the Law Faculty of the University of Paris, that article 17 of the Warsaw Convention "does not permit recovery for mental injuries."[63]

Two other courts, relying on other sources of French law, arrived at a contrary conclusion. A New York trial court, in *Palagonia v. Trans World Airlines, Inc.*, accepted the opinion of a French legal expert that *lésion corporelle* would not be understood to exclude emotional distress.[64] In *Floyd*,[65] the Eleventh Circuit, by analogizing to the French concept of *dommage corporel* and observing that French law does not expressly prohibit recovery of any particular class of damages, ruled that *lésion corporelle* includes emotional distress.[66]

The basic forms of damages in French law are *dommage matériel* (pecuniary losses) and *dommage moral* (non-pecuniary losses, including emotional dis-
tress). Although the term corporelle is not routinely used in a discussion of damages, sometimes “damage for physical pain and mutilation is identified separately as ‘corporal damage.’” When so used, dommage corporel does not demark a true class of damages but rather serves as a loose composite of dommage matériel and dommage moral. Thus, while the word corporelle is occasionally used alone to describe a type of damages in French law, there is no indication that the compound phrase lésion corporelle is a legal term of art.

Those courts seeking to divine a French legal meaning at odds with the English translation have focused on the word corporelle while largely ignoring the modifier, lésion. This omission leaves the question only half-answered and leads to a misleading conclusion.

In addition to its ordinary connotation of physical injury, lésion does have an abstract legal meaning. In French contract law, a lésion—a pecuniary loss—may be grounds for rescission of the contract when there is a disparity between the parties' contractual obligations. For example, under the French Civil Code, the lésion concept applies when an immovable item is sold for an inadequate price; it is essentially a “just price” requirement. Thus, while lésion is a term of art in French contract law, its application in contract law sheds no light on its distinctly different usage in the Warsaw Convention's air carrier liability provision.

Instead, article 17's use of lésion more closely corresponds to the classical definition of lésion as an injury to an “organ.” So defined, the physical connotation of lésion is unmistakable. When lésion and corporelle are read...
together, it becomes manifest that the phrase is not intended to be a legal term of art. Rather, it is simply a plain description, using ordinary French words, of an injury to a physical organ, i.e., a "bodily injury." Indeed, while not a legal term of art, lésion corporelle is recognized in a French medical context as unambiguously comprehending physical or bodily injury.\textsuperscript{79}

Even if \textit{lésion corporelle} could be viewed as having some special meaning in French law, the proper reference would be French law as it existed in 1929, when the Warsaw Convention was opened for signature. French law does not directly distinguish between types of injury or damages for purposes of allowing or denying recovery.\textsuperscript{80} Nevertheless, recovery of damages, particularly for emotional distress, has been restricted by the requirement that injuries be direct, immediate, and certain in order to be compensable.\textsuperscript{81} The French courts "have wrestled with the psychic injury case just as much as [United States] courts have," and the French view of claims for emotional distress "is rather different today from what it was in 1929."\textsuperscript{82} Even today, a claim for substantial "moral" damages is regarded as improper in France, and often only nominal amounts are awarded to compensate for emotional distress.\textsuperscript{83}

Accordingly, whatever the French rule for recovery for emotional distress may be, it sheds no light on the meaning of \textit{lésion corporelle} in a 1929 treaty intended for an international audience. Even if exhaustive research uncovered the use of this phrase from time to time in French legal literature, this would not compel the conclusion that the expression has evolved into a true term of art with a specialized legal meaning, or that such a meaning is at odds with the English translation. For purposes of the Warsaw Convention, \textit{lésion corporelle} should be recognized as nothing more than two ordinary French words selected to convey their ordinary meanings. The search for a precise legal meaning at variance with the English translation is fundamentally misguided.

\textbf{D. In the Absence of a Clear Contrary French Legal Meaning, Lésion Corporelle Should Be Given Its Ordinary Meaning}

Although the governing text of the Warsaw Convention is in French, this does not mean that French\textit{} law was intended to control the meaning of the international treaty.\textsuperscript{84} The minutes of the Convention do not reveal any intent on the

\begin{itemize}
  \item \textsuperscript{80} R. David, \textit{English Law and French Law} 161 (1980); G. Miller, supra note 32, at 112.
  \item \textsuperscript{81} B. Nicholas, supra note 68, at 220, 223-26; G. Miller, supra note 32, at 114.
  \item \textsuperscript{82} Lowenfeld, supra note 32, at 348; see also R. David, supra note 80, at 161 (discussing debate in France concerning compensation for moral damage or suffering).
  \item \textsuperscript{83} R. David, supra note 80, at 165-66.
  \item \textsuperscript{84} See Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 394-95, 314 N.E.2d 848, 853-54, 358 N.Y.S.2d 97, 104-05 (1974); Lowenfeld, supra note 32, at 348.
\end{itemize}
part of the many participating governments for the French legal system to be the touchstone for the interpretation of the treaty. The French language was selected merely in order to convey the common understanding of the drafters in a single language.85 In addition, the participants were conscious of the importance of using French terms that could be translated easily into other languages, including English.86 For example, the British delegate to the Convention remarked that French delegates must explain the exact meaning of expressions used in the Convention "in order that we can translate it because, in order to codify it, to give life to this Convention, it will be necessary to translate it in English and in all other languages."87 It is a basic presumption of treaty interpretation that these international agreements "are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes" of the contracting parties.88

While "French legal usage" of a phrase—assuming that the phrase is susceptible to technical French legal usage—"must be considered in arriving at an accurate English translation of the French,"89 the French legal meaning is relevant only as one indication of the meaning intended by the delegates to the Convention. In Air France v. Saks,90 the United States Supreme Court said that the court must "look to the French legal meaning for guidance" on the interpretation of the Warsaw Convention.91 However, the Court also stated, citing Rosman, that this did not mean that the interpretation of the Warsaw Convention was to be "forever chained to French law."92 After all, the task at hand is treaty interpretation, not comparative law.93

86. Cf. Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) ("Given the gulf of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters."); De Geoffroy v. Riggis, 133 U.S. 258, 271 (1890) ("As [treaties] are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.")

87. International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12 1929, Warsaw, 1929, at 59 (R. Horner & D. Legrez trans. 1975) (British delegate Sir Alfred Dennis) [hereinafter Warsaw Minutes].
91. Id. at 399 (emphasis added).
92. Id. (quoting Rosman, 34 N.Y.2d at 394, 314 N.E.2d at 853, 358 N.Y.S.2d at 105).
93. But see Comment, Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle, 8 Hastings Int’l & Comp. L. Rev. 339, 342 (1985) (stating that the translation of a foreign legal text is "an exercise in comparative law" and that, in translating international treaties, "the legal meaning of each term must be ascertained through study of cases, commentaries, and other embodiments of the law in the target language").
Moreover, courts should be wary of relying on specialized meanings for treaty phrases that also have ordinary, nontechnical meanings.94 Both the Vienna Convention on the Law of Treaties95 and the Restatement (Third) of the Law of Foreign Relations96 state as the first principle of treaty interpretation that an international agreement should “be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”97 In adopting this “ordinary meaning” rule, the International Court of Justice has held that “[w]hen the Court can give effect to a provision of a treaty by giving to the words . . . their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.”98

To give effect to this primary canon of construction, courts should not deviate from an ordinary or common meaning of words used in a treaty unless there is a clear and well-accepted term of art with a varying meaning and the context plainly demonstrates that the drafters of the treaty intentionally incorporated that term of art.99 As Judge Lauterbach stated with respect to treaty interpretation,

---

94. See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (“[a]s with any written document, there is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion”).


97. Id. Both the United States Supreme Court and the International Court of Justice have long recognized the textual or “ordinary meaning” rule of treaty interpretation. See, e.g., Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (“as treaties are contracts between independent nations, their words are to be taken in their ordinary meaning “as understood in the public law of nations””) (citation omitted); Competence of Assembly Regarding Admission to the United Nations, 1950 I.C.J. 4, 8 (advisory opinion).


99. Article 31(4) of the Vienna Convention, supra note 95, provides that “a special meaning shall be given to a term if it is established that the parties so intended.” The International Law Commission, which drafted this provision, explained this provision was intended to specify that “the burden of proof lies on the party invoking the special meaning of the term.” [1966] 2 Y.B. Int’l Comm’n 222, U.N. Doc. A/Cn.4/Ser.A/1966/Add.1.
“[i]t is . . . legitimate to insist, in the interest of good faith and of a requisite minimum of certainty in legal transactions, that the burden of proof rest upon the party asserting that the term in question is used not in its common but in its technical or in an unusual connotation or that the ‘clear meaning’ is not what on the face of it it appears to be.”

French law does not directly address the meaning of the common phrase \textit{lésion corporelle}, and there is sharp disagreement about what this phrase might mean under French law. Under these circumstances, the courts should remember that the treaty was intended for an international audience. The French text of the treaty conveys no unequivocal contrary meaning, and thus there is no reason to depart from the plain meaning of the language.

Moreover, if the interpretation of the original French draft leaves room for doubt, and the official English translation resolves the doubt, the latter should govern in the United States. “[T]he text [of the Convention] that was read to the Senate, and to which the resolution of ratification was directed, was a text in English . . . .”

The official English translation was included in the Statutes at Large in addition to the French text. An early commentator opined that “there can be no doubt about the intention of the Senate that the English translation . . . is to be accepted by American courts as the official language.”

In addition, the other English-speaking contracting nations to the Convention have also uniformly translated \textit{lésion corporelle} as “bodily injury” in legislation implementing the Warsaw Convention.

Unless a compelling reason exists to depart from the plain meaning of the English text, it should govern. Because the English text clearly limits the liability of the international air carrier to instances in which “bodily injury” has occurred, a claim based on emotional distress not resulting from any physical injury cannot be asserted under the Warsaw Convention.

The decisions in \textit{Floyd} and \textit{Palagonia} extended article 17 to claims for emotional distress by relying heavily and unjustifiably on a “French legal mean-

---

Similarly, the United States Supreme Court, in \textit{Chan v. Korean Air Lines, Ltd.}, 109 S. Ct. 1676 (1989), held that, even when the text of a treaty is less than clear, “its most natural meaning [can] properly be contradicted only by clear drafting history.” \textit{Id.} at 1684 n.5. As demonstrated below, \textit{infra} notes 108-120 and accompanying text, the drafting history \textit{confirms}, rather than contradicts, the ordinary meaning of \textit{lésion corporelle} as “bodily injury.”

100. \textit{4 H. LAUTERPACHT, INTERNATIONAL LAW, COLLECTED PAPERS} 401 (E. Lauterpacht ed. 1978).


102. 49 Stat. 3000.


104. \textit{Carriage by Air Act}, 1961, 9 & 10 Eliz. 2, c. 27 (Great Britain); \textit{Civil Aviation Act} (Carriers’ Liability Act), 1959, No. 2 of 1959 (Australia); \textit{Carriage by Air Act}, 1939, 3 Geo. VI, c. 12 (Canada).


ing” of a phrase that was never intended as a technical legal term. Instead lésion corporelle is merely a simple French phrase appropriately translated into English as “bodily injury.” Because French law is likely inapposite here and, in any event, does not lead unambiguously to any result, the plain meaning suggested by the English translation should govern.

IV. THE DRAFTING HISTORY OF THE WARSAW CONVENTION AND THE SUBSEQUENT CONDUCT OF THE PARTIES

A. The Drafting History of the Warsaw Convention

In Air France v. Saks, the Supreme Court summarized the negotiating history of the Warsaw Convention. At the close of the 1925 Paris conference, the delegates drafted a protocol that specified: “The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . .” This expansive provision, broadly holding carriers liable in the event of an accident, would almost certainly have permitted recovery for all types of injuries, including emotional distress.

However, after the Paris conference, a committee of experts on air law met and revised the protocol. The draft submitted to the 1929 Warsaw conference, substantially the same as the present article 17, added a new condition for air carrier liability by providing for recovery of damages only “in the case of death, wounding, or any other bodily injury suffered by a traveler.”

In Burnett, the court examined the same two drafts considered by the Supreme Court in Saks. The court concluded:

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

107. Even if the French legal meaning did lead to a certain conclusion here, it would still be only one factor in the interpretation of the treaty and would not control over other significant indicia of meaning, such as the drafting history of the Convention and the subsequent conduct of the nation parties. See Air France v. Saks, 470 U.S. 392, 400-04 (1985) (finding other factors confirmed meaning of term under French law).


109. Id. at 401 (citing MINUTES, CONFÉRENCE INTERNATIONALE DU DROIT PRIVÉ AÉRIEN 87 (Paris 1925)).

110. G. MILLER, supra note 32, at 124.

111. See Saks, 470 U.S. at 401.

112. Id. (citing WARSAW MINUTES, supra note 87).


114. Id. at 1157, but see G. MILLER, supra note 32, at 124-25 (change in language was merely an improvement upon an early rough draft and was not intended to indicate a substantive change).
In *Floyd*, the Eleventh Circuit was quick to dismiss this negotiating history, observing that the minutes of the Warsaw conference contain no explicit statement that the revised protocol was intended to foreclose recovery for a certain type of injury. But the change in the language speaks for itself, and the addition of a new and restrictive condition for liability cannot be ignored by simply asserting that it fails to demonstrate any intention of the delegates to limit air carrier liability. Moreover, it is an established canon of statutory construction, equally applicable to treaty interpretation, that the adoption of amendments during the legislative process is one of the clearest indications of legislative intent. In drafting the Warsaw Convention, the committee of experts rejected language that would have provided the very relief—recovery for emotional distress—which is now in dispute.

Even a commentator who suggests expanding the Convention to allow recovery for emotional distress concedes that, “[a]t the time of the [Warsaw Convention] negotiations, recovery for mental anguish was virtually unheard of as a legal cause of action . . . .” Nothing in the Convention or its history evinces any intention to expand the class of compensable injuries. Rather, the Convention is exactly what it purports to be: a unified system of liability, providing for the surrender of some defenses by air carriers in exchange for a limitation on their liability for personal injuries. It is not surprising, then, that article 17, which defines the cause of action for damages, does not encompass emotional distress that does not result from bodily injury.

B. The Subsequent Conduct of the Parties

In *Air France* v. *Saks*, the Supreme Court stated that “[r]eference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps clarify the meaning of the [treaty] term.” Apparently,
a court of only one other signatory nation has allowed recovery under article 17 for emotional distress not flowing directly from a bodily injury. 123 More significantly, actions taken during subsequent conferences on international aviation law, discussed below, demonstrate the understanding of other nations that emotional distress is not presently compensable under article 17.

The fact that there have been several attempts to amend the Convention to provide a remedy for pure emotional distress offers strong evidence that article 17, as presently formulated, does not treat emotional distress as a lésion corporelle. 124 From an early date, commentators called for a revision of the Convention because they considered it unclear whether emotional distress was covered. 125 In 1951, the Legal Committee of the International Civil Aviation Organization, meeting at Madrid, expressly considered a proposal to permit recovery for emotional distress. 126 During the International Conference on Private Aviation Law held at the Hague in 1955, another proposal was made to amend the Warsaw Convention to allow claims for emotional distress. 127 These failed efforts to revise the Warsaw Convention plainly indicate that the signatory countries have not understood the unamended Warsaw Convention to permit recovery for emotional distress.

In Floyd, 128 the Eleventh Circuit found it significant that the English text of the Guatemala Protocol (a proposed amendment to the Warsaw Convention) 129 changed the text of article 17 from “wounding or other bodily injury” to “per-
sonal injury." However, as the Supreme Court recognized in *Air France v. Saks*, the Guatemala Protocol was a proposed revision, rather than a clarification, of article 17. The Guatemala Protocol has not been ratified by the United States Senate and has not taken effect internationally. The fact that the Guatemala Protocol was intended to expand air carrier liability under the Warsaw Convention undermines the Eleventh Circuit's view that the Guatemala Protocol's use of broader language justifies a broader view of the pre-existing Convention as well. To the contrary, this change, along with the other unsuccessful attempts to broaden article 17, indicates that article 17 does not reach emotional distress.

The Eleventh Circuit also found it instructive that the Montreal Agreement, which modified the Warsaw Convention in the United States, uses both the phrases "personal injury" and "bodily injury" in discussing the liability of air carriers. However, the Montreal Agreement was intended only to increase the monetary limit on liability and to waive the air carriers' defense of due care under article 20(1) of the Warsaw Convention. The Montreal Agreement "did not waive other provisions in the Convention that operate to qualify liability," such as article 17. The *Floyd* court also observed that the notice on the carriers' tickets about the Montreal Agreement uses the term "personal injury" rather than "bodily injury." However, the head of the United States delegation to the Montreal negotiations has declared that "no legal significance should be attached" to any change in wording on the ticket booklet; the bodily injury requirement was simply not addressed at Montreal.

Finally, the historical evolution of the analogous Berne Convention Concerning the Carriage of Passengers and Luggage by Rail is instructive on the question of recovery for emotional distress. The original 1952 Berne Convention "closely paralleled the language of Article 17 and permitted recovery for bodily

130. *Floyd*, 872 F.2d at 1475.
132. *Cf. Floyd*, 872 F.2d at 1475 (acknowledging that the Protocol has not been ratified and thus "it is important not to overestimate its importance").
133. *Id. at 1474.*
134. *Saks*, 470 U.S. at 407; see also *Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1692 (1989) (Brennan, J., concurring in the judgment) (the Montreal Agreement "cannot and does not purport to amend the Warsaw Convention"); Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 391, 314 N.E.2d 848, 851-52, 358 N.Y.S.2d 97, 102 (1974) ("the Montreal Agreement modifies the effect of the Warsaw Convention only to the extent of providing for absolute liability up to $75,000; it does not change the substance of that liability—i.e., the character of the compensable injuries—as it is provided in article 17 of the Convention").
135. *Floyd*, 872 F.2d at 1474.
injury only."\textsuperscript{137} However, the Berne Convention was later extended to cover mental injury by adding the words \textit{ou mentale}.\textsuperscript{138}

When the drafters of an international convention intend to include recovery for pure emotional distress within a liability system, they know how to unambiguously do so. The Berne Convention was modified to permit such a recovery; the Warsaw Convention has not been so amended. As Justice Story said more than 150 years ago, judges "are not at liberty to dispense with any of the conditions or requirements of the treaty, or take away any qualification or integral part of any stipulation, upon any notion of equity or general inconvenience, or substantial justice."\textsuperscript{139} The courts are not free to improve upon the liability scheme that the Warsaw Convention adopted and the Senate ratified.

\textsuperscript{137} Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1157 (D.N.M. 1973). In the original International Convention Concerning the Carriage of Passengers and Luggage by Rail, \textit{done at Berne, Oct. 25, 1952, 242 U.N.T.S. 339} [hereinafter Berne Convention of 1952], article 28, as translated into English, provided that the determination of "the liability of a railway in respect of death, injury, or other bodily harm sustained by a passenger" would be determined by the law of the nation in which the harm occurred. \textit{Id.} at 393. The French text, which was translated into English as "death, injury, or other bodily harm," read "la mort, les blessures et toute autre atteinte, à l'intégrité corporelle." \textit{Id.} at 390. (Note that, consistent with the English translation of \textit{lésion corporelle} in article 17 of the Warsaw Convention as "bodily injury," the similar term \textit{l'intégrité corporelle} has been translated into English as "bodily harm.") When the Berne Convention was revised in 1961, article 28 was not changed in this respect. International Convention Concerning the Carriage of Passengers and Luggage by Rail, art. 28, \textit{done Feb. 25, 1961, reprinted in TRANSPORT: INTERNATIONAL TRANSPORT TREATIES V-1, V-10, V-33} (Kluwer Law and Taxation Publishers 1986).


In 1966, the Berne Convention was modified to "unify[ ] the rules of liability of the railway for damage resulting from death, personal injury or any other bodily or mental harm sustained by a passenger in the course of international carriage." Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail of Feb. 25, 1961 Relating to the Liability of the Railway for Death of and Personal Injury to Passengers, \textit{done February 26, 1966, Preamble, reprinted in TRANSPORT: INTERNATIONAL TRANSPORT TREATIES V-46} (Kluwer Law and Taxation Publishers 1986) (emphasis added); \textit{see also id.} art. 2, ("[t]he railway shall be liable for damage resulting from the death or personal injury or any other bodily or mental harm to, a passenger, caused by an accident arising out of the operation of the railway, and happening while the passenger is in, entering or alighting from a train"). (Note the significant similarity in language and structure of article 2 of the Berne Convention as modified in 1966 and article 17 of the Warsaw Convention, with the notable addition of "mental harm" to the Berne Convention). The phrase translated as "mental harm" is rendered in the French text of the 1966 revision as \textit{atteinte à l'intégrité . . . ou mentale}. \textit{Id.} Preamble, art. 2 (French text).

\textsuperscript{139} The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 72 (1821) (Story, J.); \textit{see also} Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676, 1683-84 (1989) (court may not alter or amend a treaty, whatever its imperfections).
V. LIABILITY FOR EMOTIONAL DISTRESS AND THE WARSAW CONVENTION’S PURPOSE OF UNIFORMITY

The significance of the Warsaw Convention for international aviation, as well as its importance within the multilateral treaty system, is beyond dispute. With more than 120 signatory nations, the Warsaw Convention is a rare and classic example of a truly international regime.

The United States Court of Appeals for the Second Circuit has stated that “the overriding policy goal embodied in the [Warsaw] Convention is the desire to formulate a uniform and universal set of legal rules to govern international air transportation.” Yet even within the United States, there is no general agreement about liability for the negligent infliction of emotional distress. The great majority of United States courts do not recognize causes of action for negligent infliction of emotional distress unaccompanied by physical harm. To impose liability on air carriers for pure emotional distress would lead to great confusion about the nature and extent to which emotional distress could properly be the subject of damages. Because the Warsaw Convention provides no express guidelines for determining the existence of compensable emotional distress, the courts would be forced to look to various state law approaches for guidance. The primary purpose of the Warsaw Convention—uniformity—would then be destroyed by “divergent and perhaps parochial” state rules.

Moreover, it would be particularly anomalous for United States courts to construe the Warsaw Convention as allowing recovery for emotional distress in light of the modifications made to the Convention’s liability scheme by the Montreal Agreement. Under the Montreal Agreement, international air carriers serving the United States agreed not only to raise the Warsaw Convention’s damage limits, but also to waive the defense of “due care” under article 20(1) of the Convention. Thus, the carriers serving the United States became strictly liable for damages caused by accidents resulting in “death, wounding, or other bodily injury.” While it is not difficult to predict the frequency or scope of injuries arising from airplane accidents that cause death, wounding, or other bodily injuries; it is very difficult to predict the frequency and level of emotional distress that passengers will suffer when their plane hits an air pocket, experiences heavy turbulence, makes a sudden maneuver, has a rough landing, or experiences other common mishaps or incidents associated

---

140. See supra notes 12-13 and accompanying text.
142. PROSSER & KEETON ON THE LAW OF TORTS § 34, at 359-60 (W. Keeton ed. 1984).
143. Id. at 361.
146. Id. art. 20(1).
with air travel. Holding air carriers strictly liable for claims of pure emotional distress would be startlingly at odds with the Warsaw Convention’s intent to give air carriers a substantial degree of certainty by “fix[ing] at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damages.”

VI. THE EXCLUSIVITY OF THE WARSAW CONVENTION’S REMEDIAL SCHEME

A. Introduction to the Exclusivity Issue

Whether a passenger on an international flight may recover for emotional distress depends not only on whether the Warsaw Convention’s cause of action encompasses emotional distress but also on whether article 17 provides the exclusive remedy for international airline passengers. If article 17 serves merely as an additional federal basis for initiating legal action, while not simultaneously pre-empting alternative and possibly more generous state remedial schemes, then a passenger may bypass the Warsaw Convention to pursue the claim for emotional distress under a state law cause of action. Without the uniformity provided by an exclusive cause of action, two hypothetical passengers sitting side by side during an airplane accident might obtain different relief under different state laws. The Warsaw Convention should not be construed to permit such a result. To achieve the Warsaw Convention’s goal of uniformity, article 17 should be recognized as the exclusive measure of available remedies whenever an injury is incurred as a result of the hazards incident to international air transportation.

Unfortunately, the issue of whether the Warsaw Convention pre-empts state law causes of action probably will not be resolved in Floyd. While Floyd was pending in the lower federal courts, a related case, arising out of the same incident and raising the same claims for emotional distress, was litigated in Florida state courts. In Eastern Airlines, Inc. v. King, the Florida Supreme Court ruled that passengers on the aircraft (which temporarily lost power) failed to state a claim under state law for negligent or intentional infliction of emo-

148. The courts are divided over whether “wilful misconduct” under article 25 of the Warsaw Convention only deprives the air carrier of the benefits of article 22’s cap on damages, or whether it also waives article 17’s substantive conditions for liability. Compare Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1483 (11th Cir. 1989), cert. granted, 110 S. Ct. 2585 (1990) (article 25 refers only to article 22 and thus “[i]n cases of willful misconduct, article 25 strips the carrier of the liability limitation on compensatory damages”), with In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int’l Airport, Pakistan on Sept. 5, 1986, 729 F. Supp. 17, 19-20 (S.D.N.Y. 1990) (air carrier’s “wilful misconduct” bars reliance on the terms of article 17). It is, therefore, unsettled whether a passenger who suffers emotional distress as a consequence of wilful misconduct by an air carrier may bring an action against the air carrier under state law, outside of an exclusive Warsaw Convention cause of action.
149. Floyd, 872 F.2d 1462.
tional distress.\textsuperscript{151} In view of \textit{King}, the \textit{Floyd} plaintiffs should be unable to recover for emotional distress under state law; their only recourse is the Warsaw Convention. The exclusivity of the Warsaw Convention's cause of action is irrelevant for plaintiffs whose state law offers no recourse.

Although the resolution of the exclusivity question must await another case on another day, it nevertheless merits discussion here because it bears directly on the purported uniformity of the Warsaw Convention's liability regime.

\textbf{B. Recognition by United States Courts of an Exclusive Cause of Action Under Article 17}

Although a study of the Warsaw Convention makes plain that its framers intended to create a universal cause of action for injuries sustained during international flights, United States courts were late in coming to that realization. After the United States acceded to the Warsaw Convention, United States courts initially ruled, not only that the Convention did not establish an exclusive cause of action, but that it did not create a cause of action at all for losses or injuries sustained during an international flight.\textsuperscript{152} The courts initially concluded that the Warsaw Convention simply placed limits, particularly a ceiling on monetary damages, on "otherwise applicable law" such as state law.\textsuperscript{153}

Before an independent article 17 cause of action was recognized, a number of courts and commentators concluded that the question whether emotional distress was compensable had to be determined by reference to the substantive law (i.e., state law) that established the underlying cause of action.\textsuperscript{154} For example, in \textit{Husserl v. Swiss Air Transport Co.},\textsuperscript{155} a federal district court held that "mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action."\textsuperscript{156} Although \textit{Husserl}

\textsuperscript{151} Id. at 575-77. However, in accordance with the Eleventh Circuit's ruling in \textit{Floyd}, 872 F.2d at 1475, the Florida Supreme Court concluded that the Warsaw Convention encompassed claims for emotional distress unaccompanied by bodily injury, thereby providing the plaintiffs with a possible remedy. \textit{King}, 557 So.2d at 577-78.


\textsuperscript{153} See, e.g., \textit{Husserl} 388 F. Supp. at 1252.

\textsuperscript{154} Id. at 1251-52; Lowenfeld, \textit{supra} note 32, at 349-51, n.22 (suggesting, in deference to the then-prevailing rule that the Warsaw Convention did not provide an independent cause of action, that the law of the forum should determine whether emotional distress is compensable).

\textsuperscript{155} 388 F. Supp. 1238.

concluded that the Warsaw Convention imposed no obstacle to relief for emotional distress,\textsuperscript{157} that court was not called upon to consider whether article 17 expressly authorized such a recovery.

In large part, \textit{Husserl} and its progeny adopted an expansive construction of article 17 out of a concern that a narrower view would undermine the application of the Warsaw Convention's uniform rules limiting international air carrier liability.\textsuperscript{158} Because the Warsaw Convention was not understood to provide an exclusive cause of action, these courts believed that their construction of the Convention was necessary to encompass every possible state law cause of action within the ambit of the Convention's limitations.\textsuperscript{159} Otherwise, state law causes of action could arise that were "not subject to any of the conditions or limits of the Warsaw system."\textsuperscript{160} In other words, these courts believed that, if article 17 did not extend to emotional distress, then state law claims for emotional distress would fall entirely outside of the purview of the Warsaw Convention—including the limitation of liability—and the goal of uniformity would be frustrated.

In its 1978 decision, \textit{Benjamins v. British European Airways},\textsuperscript{161} the United States Court of Appeals for the Second Circuit reversed decades of precedent and held that the Warsaw Convention is "the universal source of a right of action."\textsuperscript{162} The Second Circuit's recognition that article 17 gave international air passengers a cause of action was soon followed by that of the Ninth Circuit in \textit{In re Mexico City Air Crash of October 31, 1979},\textsuperscript{163} and by that of the Fifth Circuit in \textit{Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.}\textsuperscript{164} The Eleventh Circuit has also recognized the creation of a cause of action under the Warsaw Convention in \textit{Floyd}.\textsuperscript{165}

Recognizing the need for uniformity in international air commerce law, the Fifth Circuit held in \textit{Boehringer-Mannheim Diagnostics} both that "the Warsaw Convention creates the cause of action and is the exclusive remedy" for cargo

\textsuperscript{157} \textit{Husserl}, 388 F. Supp. at 1248-51.

\textsuperscript{158} \textit{Id.} at 1246-51; \textit{Krysal}, 403 F. Supp. at 1323-24; \textit{Karfunkel}, 427 F.Supp. at 977.

\textsuperscript{159} \textit{Husserl}, 388 F. Supp. at 1250 ("To effect the treaty's avowed purpose [of uniform regulation of liability], the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types"); \textit{accord, Krysal}, 403 F. Supp. at 1323-24.


\textsuperscript{161} 572 F.2d 913 (2d Cir. 1978), \textit{cert. denied}, 439 U.S. 1114 (1979).


\textsuperscript{163} 708 F.2d 400 (9th Cir. 1983).

\textsuperscript{164} 737 F.2d 456, 459 (5th Cir. 1984), \textit{cert. denied}, 456 U.S. 1186 (1985) (finding a cause of action under article 18 of the Warsaw Convention for lost or damaged cargo).

\textsuperscript{165} \textit{Floyd v. Eastern Airlines, Inc.}, 872 F.2d 1462, 1469-70 (11th Cir. 1989), \textit{cert. granted}, 110 S. Ct. 2585 (1990) (holding that article 17 creates a cause of action).
claims. The Third Circuit held that where the Convention is “inapplicable,” because, for example, there was no “accident” within the meaning of article 17, then common law remedies are not precluded. However, when an accident occurs on an international flight and the passenger’s claim meets the conditions of article 17, the Third Circuit agrees that the Warsaw Convention does apply and is exclusive. Other courts have reached the same conclusion, although there are a few hold-outs. Some courts have yet to address the question.

The Ninth Circuit is among those courts that have not yet conclusively determined whether the Warsaw Convention’s cause of action is exclusive. In a

166. Boehringer-Mannheim Diagnostics, 737 F.2d at 458 (emphasis added).
168. Id. at 134.
169. See, e.g., Velasquez v. Aerovias Nacionales de Colombia, No. 90-1564-Civ-Scott (S.D. Fla. Aug. 29, 1990) (WESTLAW, district court database) (“Given the progression of the case authority, as well as the overriding objective of the Convention to establish a uniform system of liability, we are compelled to hold that the Warsaw Convention provides the exclusive cause of action” in a wrongful death case); Eggink v. Trans World Airlines, Inc., No. 87 Civ. 3403 (S.D.N.Y. Jan. 22, 1990) (WESTLAW, district court database) (“to the extent that plaintiff’s damages occurred during ‘transportation by air’ as defined in...the Convention, the federal cause of action under the Warsaw Convention is the exclusive cause of action”); Stanford v. Kuwait Airlines Corp., 705 F. Supp. 142, 143 (S.D.N.Y. 1989) (“the terms of the Warsaw Convention exclusively govern the rights and liabilities of the parties”); In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982) (“the Convention was intended to act as an exclusive remedy for the recovery of damages for personal injury suffered in an international airplane accident” and “the purpose of the convention to regulate in a uniform manner the liability conditions of a carrier engaged in international transportation would be defeated” if assertion of claims based on state law was allowed), aff’d, 705 F.2d 85 (2d Cir.), cert. denied, 464 U.S. 845 (1983).
171. See, e.g., Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 620 n.5 (7th Cir. 1989) (where parties did not raise issue of application of state law to claims, the question whether the Warsaw Convention creates an exclusive cause of action was not properly before the court). The Eleventh Circuit found it unnecessary to determine whether the Warsaw Convention cause of action was exclusive. Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1482-83 (11th Cir. 1989), cert. granted, 110 S. Ct. 2585 (1990). The Eleventh Circuit will probably confront that question in the very near future. In two cases arising out of the same crash, two different judges in the same Florida federal district have reached diametrically opposite conclusions on this issue. Compare Velasquez at WESTLAW screen 13 (holding that Warsaw Convention provides the exclusive cause of action for wrongful death claim) with Calderon v. Aerovias Nacionales de Colombia, 738 F. Supp. 485, 486 (S.D. Fla. 1990) (holding that Warsaw Convention supplies the exclusive remedy, but permits a cause of action to be stated in terms of state law). The district judge in Velasquez certified his ruling for interlocutory appeal under 28 U.S.C. § 1292(b), concluding that “this decision involves controlling questions of law as to which there is ground for a difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation...” Velasquez at WESTLAW screen 14. Thus, the issue may soon be considered by the Eleventh Circuit.
footnote in *In re Mexico City Air Crash of October 31, 1979*, the court suggested that the independent cause of action created by the Warsaw Convention may not be exclusive and that plaintiffs injured in international transportation may invoke state law causes of action, subject to the Warsaw Convention’s cap on damages and limitation period. However, this comment sharply conflicts with the reasons the court gave for recognizing the Warsaw Convention as the source of a cause of action. For example, the court repeatedly affirmed that the “overriding policy goal embodied in the Convention is the desire to formulate a uniform and universal set of legal rules to govern international air transportation.” The court also favorably referred to statements of delegates to the Warsaw Convention that recourse to domestic law was intended to be precluded and, if followed, would “destroy” theConvention. Additionally, the court expressly recognized that reliance upon “some domestic law cause of action” was “inconsistent with [the] spirit” of the Convention in promoting uniformity. The question of the exclusive nature of the Warsaw Convention cause of action remains undecided in the Ninth Circuit.

Several courts have now held that the Warsaw Convention is not merely a limitation upon state law causes of action but, in fact, creates an independent and exclusive federal cause of action under the treaty. Consequently, the primary motivation for the expansive interpretation of article 17 in *Husserl* and its progeny that allowed the inclusion of emotional distress is no longer relevant. The proper question now is whether the Warsaw Convention itself permits a particular type of claim to go forward.

C. The Warsaw Convention Establishes an Exclusive Regime for Liability of International Air Carriers

The Warsaw Convention establishes an exclusive regime for assessing liability against international air carriers. It is a comprehensive regulation of the rights and responsibilities of parties to an air carriage contract. The Warsaw Convention sets forth the essential principles of liability. It establishes a cause of action, a presumption of liability, a limited number of defenses, a limitation on liability, rules governing jurisdiction, and a statute of limitations.

---

172. 708 F.2d 400, 414 n.25 (9th Cir. 1983).
173. *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983).
174. *Id.* at 411, 415-16.
175. *Id.* at 416; see also, *id.* at 413.
176. *Id.* at 411 (quoting Benjamins v. British European Airways, 572 F.2d 913, 917-18 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)).
177. See generally Lowenfeld & Mendelsohn, *supra* note 11, at 517.
179. *Id.* art. 20.
180. *Id.* art. 22.
181. *Id.* art. 28(1).
182. *Id.* art. 29.
When domestic law is intended to supply a rule of law for a particular purpose, this intention is stated expressly.\textsuperscript{183} Article 24(2) states that the Warsaw Convention’s rules are “without prejudice” as to who may sue for recovery.\textsuperscript{184} Article 21 leaves the effect of contributory fault to “provisions of [the nation’s] own law.”\textsuperscript{185} Article 28(2) provides that “[q]uestions of procedure shall be governed by the law of the court to which the case is submitted.”\textsuperscript{186} The necessary negative implication, of course, is that when the Warsaw Convention does not expressly permit the application of domestic law, it implicitly precludes recourse to such law.

Although the Warsaw Convention leaves certain details to the law of the forum state, it does not permit resort to non-uniform domestic law to define the cause of action established in article 17. Thus, for example, since the Convention “does not precisely describe how to calculate damages in a wrongful death case,” domestic law may be relied upon to fill this gap.\textsuperscript{187} However, the right to sue for wrongful death itself is created exclusively by article 17. When the nature of the cause of action is at issue, as where a claimant asserts a cause of action for emotional distress, the sole source of reference is the Warsaw Convention itself.\textsuperscript{188}

Some courts have suggested that article 24(1), which provides that “any action for damages, however founded, can only be brought subject to the conditions and limits”\textsuperscript{189} of the Convention, “contemplates the application of the convention limitations to actions founded on a basis other than that of the convention.”\textsuperscript{190} However, as the Second Circuit observed, “[t]here is no internal evidence to indicate whether ‘however founded’ was intended to refer to a number of possible domestic law sources or to a number of possible factual bases for the envisioned action.”\textsuperscript{191} Moreover, the civil law delegates to the Warsaw Convention viewed the action for personal injury as one founded on an implied contractual provision to ensure safe carriage to the passenger, while common law delegates viewed the cause of action as one arising in tort.\textsuperscript{192} The phrase

\begin{itemize}
  \item \textsuperscript{183} See generally Lowenfeld & Mendelsohn, supra note 11, at 517.
  \item \textsuperscript{184} Warsaw Convention, supra note 4, art. 24(2).
  \item \textsuperscript{185} Id. art. 21.
  \item \textsuperscript{186} Id. art. 28(2).
  \item \textsuperscript{187} See Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir. 1987).
  \item \textsuperscript{188} See Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 399 n.12, 314 N.E.2d 848, 857 n.12, 358 N.Y.S.2d 97, 109 n.12 (1974) (although the Warsaw Convention “does not cover the allowable elements of damages flowing from those injuries,” it does “govern[ ] the nature of the injuries for which the carrier is liable”).
  \item \textsuperscript{189} Warsaw Convention, supra note 4, art. 24(1).
  \item \textsuperscript{190} Rhymes v. Arrow Air, Inc., 636 F. Supp. 737, 740 (S.D. Fla. 1986); see also In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (dictum).
  \item \textsuperscript{191} Benjamins v. British European Airways, 572 F.2d 913, 918 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979).
  \item \textsuperscript{192} See Recent Decision, Article 17 of the Warsaw Convention Creates a Federal Cause of Action for Wrongful Death, 19 VA. J. INT’L L. 183, 186 (1978); Calkins, The Cause of Action Under the Warsaw Convention, Part I, 26 J. AIR L. & COM. 217, 219-20 (1959) (French law of carrier liability was premised on contract).
\end{itemize}
“however founded” was probably used to acknowledge these different perspectives on the nature of the cause of action.

In addition, it would be perverse to use a treaty provision designed for the very purpose of “exclud[ing] recourse to common law”\textsuperscript{193} as the basis for permitting recourse to non-uniform domestic law. As one district court has held, “the language of Article 24 was included specifically for the purpose of preventing the institution of independent claims outside the sphere of the Convention . . . [and] would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under . . . [state] law.”\textsuperscript{194}

One commentator, James M. Grippando, urges that article 17 not be interpreted to create a cause of action for recovery of emotional distress, and that it also not be read to preclude state-law claims for emotional distress.\textsuperscript{195} In Grippando’s view, relief for emotional distress should be permitted as a matter of fairness, but recognition of such a claim under the article 17 cause of action would unduly expand federal jurisdiction.\textsuperscript{196} He therefore argues that article 17 should be understood as non-exclusive, so that claims for emotional distress may be prosecuted under state law, yet not add to crowded federal dockets.\textsuperscript{197} However, rather than carefully examining the Warsaw Convention itself to determine whether the treaty permits this outcome, Grippando’s argument appears to be driven by his desire, as a matter of policy, to expand compensation for all types of claims without a corresponding expansion of federal jurisdiction over Warsaw Convention causes of action. Grippando offers little independent analysis of the case law on this issue. Furthermore, he does not carefully investigate whether the drafters intended the Convention to preclude recourse to local law for additional remedies. Although Grippando acknowledges that his proposal undermines the Convention’s purpose of uniformity, he justifies this deviation by noting that the Convention expressly leaves certain matters to local law.\textsuperscript{198} He fails, however, to explain the basis for referring additional matters to local law beyond those specifically delegated by the Convention. Finally, though, Grippando suggests that the Convention may well be the exclusive cause of action for those claims explicitly recognized by article 17.\textsuperscript{199}

\textsuperscript{193} \textit{Warsaw Minutes}, \textit{supra} note 87, at 213 (British delegate Sir Alfred Dennis).
\textsuperscript{195} Grippando, \textit{supra} note 152, at 97-107.
\textsuperscript{196} \textit{Id.} at 79-97, 107.
\textsuperscript{197} \textit{Id.} at 97-107.
\textsuperscript{198} \textit{Id.} at 98-100.
\textsuperscript{199} \textit{Id.} at 98.
Grippando’s commentary is a classic example of wanting to have your cake and eat it, too. Grippando sees the Warsaw Convention as exclusive when it provides the remedy he desires, but permissive when the desired result is not offered. This porous form of exclusivity serves only to expand air carrier liability at the expense of the principles of uniformity and limited liability which motivated the drafters of the Convention. It reduces the Convention to nothing more than an additional arrow in the claimant’s quiver, an alternative method of recovery if satisfaction cannot be found under state law. If this approach is followed, the Supreme Court’s recent decisions affirming the strict prerequisites to liability under the Convention “could become nullities, and the Warsaw Convention’s underlying purpose of obtaining international uniformity would be frustrated.”

When these issues are examined under traditional treaty interpretation analysis, the conclusion instead follows that article 17 is the exclusive cause of action and provides the exclusive remedy for all claims arising from the risks of international air travel.

D. The Warsaw Convention was Intended to Establish Uniformity in the Regulation of International Air Travel

The broad purpose of the Warsaw Convention was not merely to limit the liability of international air carriers under domestic law, but rather to generally and uniformly regulate international air commerce. As the New York Court of Appeals held in *Rosman v. Trans World Airlines*, “[t]he apparent purpose of the entire Convention is uniformity among its diverse adherent Nations—the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered.”

The law governing civil responsibility for accidents varied considerably in different countries participating in the Convention. The intention of the participating governments was to unify the rules under a single regime.

The minutes of the Warsaw Convention establish that the participants were striving to develop a uniform and universal law of air carriage out of the disarray of differing national approaches to civil liability. Sir Alfred Dennis, the British delegate, explained that, although the proposed Convention was “contrary, on several points, to our laws and to our customs,” his nation nevertheless had “decided to make sacrifices to obtain . . . uniformity.” He further stated that the “very substance of the Convention” was to “exclude recourse to common law” for a cause of action against the carrier.

---

204. *Warsaw Minutes*, id. at 213; *see also In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 413 (9th Cir. 1983) (quoting Sir Alfred Dennis).
confirmed that the Convention participants sought "general unification of carriage [law] . . . under a single system."\textsuperscript{205} Indeed, the delegates to the Warsaw Convention viewed with alarm the possibility of resort to and application of individual national laws. The French delegate, Mr. Ripert, opined that, if recourse to national law were allowed, "one would thus arrive in destroying the Convention."\textsuperscript{206}

As further evidence of this design, the conference eliminated from the draft of article 28(1) the place of the accident as a possible forum for bringing suit.\textsuperscript{207} This decision indicates a clear intent not to recognize the local law of the place of the accident as the source of a cause of action. Likewise, the delegates rejected a proposal that respondeat superior liability be determined according to national law.\textsuperscript{208}

Moreover, the United States Supreme Court has indicated that the subsequent interpretation of the Warsaw Convention by other signatories may clarify its meaning.\textsuperscript{209} Other signatories, such as Great Britain and Canada, have implemented the Warsaw Convention as the sole source of a cause of action against an international air carrier.\textsuperscript{210}

A leading international authority on aviation law said this about the Warsaw Convention:

[The Warsaw Convention] is significant because it is a rare example of the uniformity in international law. It is the most universal of all international treaties. It has formed the basis for the national laws on aviation liability in many countries. The United States joined in 1934. Russia is a member. It is beneficial to carriers, shippers, passengers and governments alike. Without it, airlines and plaintiffs would be perpetually involved in difficult conflicts of law. This would be a bonanza for the lawyers, but it would produce a desperate situation for those who have to bear the costs, and would assuredly keep claimants out of their rightful compensation for a very long time. And the claimants' need is greatest just after the event, when so often the breadwinner has gone up in smoke. Its real significance is its uniformity; its overriding of all systems of law.\textsuperscript{211}

\textsuperscript{205} \textit{Warsaw Minutes}, \textit{supra} note 87, at 108.

\textsuperscript{206} \textit{Id.} at 66; \textit{see also In re} Mexico City Air Crash, 708 F.2d 400 at 415-16 (quoting Ripert); Velasquez v. Aerovias Nacionales de Colombia, No. 90-1564-Civ-Scott (S.D. Fla. Aug. 29, 1990).

\textsuperscript{207} \textit{Warsaw Minutes}, \textit{supra} note 87, at 113-16.

\textsuperscript{208} \textit{Id.} at 66 ("we are absolutely opposed to a formula [for vicarious liability] that would lead to the application of national law") (quoting Ripert).


\textsuperscript{210} \textit{See Carriage by Air Act, 1932}, 22 & 23 Geo. 5, ch. 36, 1(4) (Great Britain); Carriage by Air Act, 1961, 9 & 10 Eliz. 2, ch. 27 (Great Britain); Carriage by Air Act 1939, 3 Geo. 6, ch. 12 (Canada).

\textsuperscript{211} Hildred, \textit{Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading up to the Montreal Agreement}, 33 J. Air L. \& Com. 521, 522 (1967).
This "cardinal purpose of the agreement . . . to ensure the existence of a uniform and universal system of recovery for losses incurred in the course of international air transportation" would be defeated if international air carriers were exposed to a multiplicity of state forums, state law causes of action, and state law theories of liability. When an international convention is adopted for the very purpose of avoiding inconsistent rulings of law, the importance of applying clear and uniform rules of federal law in the interpretation and enforcement of that convention cannot be gainsaid. The need for pre-emption of conflicting and varying state liability rules and for the recognition of an exclusive federal regime is especially compelling in this unique area of law.

In sum, the Warsaw Convention, with few and specifically delineated exceptions, prescribes a comprehensive regime for determining the liability of air carriers for injuries incurred on international flights. Any claim for damages falling within its scope necessarily arises as a federal cause of action under the Convention.

E. Drawing the Jurisdictional Line for the Exclusive Warsaw Convention Cause of Action

Accepting the Warsaw Convention as the exclusive regime for the liability of international air carriers does not, of course, mean that every incident giving rise to a cause of action against an international airline falls within the purview of the Warsaw Convention. The question of exclusivity of remedies is tied to the scope of the application of the Warsaw Convention's liability system. It is necessary to draw a line between those matters subject to the exclusive reach of the Convention and those which so clearly fall outside the scope of the Con-

212. In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 415-16 (9th Cir. 1983) (footnote omitted).

213. Although the Warsaw Convention is the exclusive federal cause of action for injuries incurred in international air travel, state courts might retain concurrent jurisdiction with federal courts. That, of course, would not alter the essential federal nature of the cause of action or prevent a defendant from removing the action to federal court if it so elected. See Avco v. Aero Lodge, 390 U.S. 557, 560 & n.2 (1968) (state court might have concurrent jurisdiction over uniquely federal cause of action); Velasquez v. Aerovias Nacionales De Colombia, No. 90-1564-Civ-Scott (S.D. Fla. Aug. 29, 1990) (WESTLAW, district court database) (although state court might have concurrent jurisdiction over Warsaw Convention claim, case was still removable); accord, French v. People Express Airlines, Inc., 671 F. Supp. 288, 289 (S.D.N.Y. 1987). Because its primary purpose is to establish uniformity in international law, the Warsaw Convention should be regarded as pre-empting these causes of action. Thus, any action filed in state court alleging damages caused by an accident on an international flight, even if mistakenly characterized as a state law cause of action, would be completely pre-empted and removable to federal court. Eggink v. Trans World Airlines, Inc., No. 87 Civ. 3403 (S.D.N.Y. Jan. 22, 1990) (WESTLAW, district court database, screen 3) (upholding removal to federal court of an action "artfully pleaded" under state law because it necessarily pled a federal claim under the Warsaw Convention). Moreover, if such actions are held to be removable to federal court, all actions arising from the same international air accident can be consolidated in a single federal district, see 28 U.S.C. § 1407 (1982), thereby promoting both uniformity of law and judicial economy.

214. See Johnson & Minch, supra note 200, at 95.
vention that permitting an individual to seek relief under another source of law would not undermine the Convention’s central promise of uniform and limited liability for international air carriers. In other words, a distinction must be made between those jurisdictional facts which demonstrate the applicability of the Convention and those facts which establish whether a passenger can prevail on the merits of a claim.215

One possible jurisdictional demarcation is the requirement that the incident giving rise to the claim have taken “place on board the aircraft or in the course of any of the operations of embarking or disembarking.”216 The United States District Court for the Southern District of New York adopted such a rule in Eggink v. Trans World Airlines.217 The court ruled that, “to the extent” that the incident giving rise to a plaintiff’s claim for damages “occurred during ‘transportation by air’ as defined in . . . the Convention, the federal cause of action under the Warsaw Convention is the exclusive cause of action.”218

One persuasive commentary by Stephen C. Johnson and Lawrence N. Minch urges this approach.219 Johnson and Minch observe220 that article 1 provides the basic definition of the scope of the Convention’s coverage by stating that “[t]his convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire.”221 By contrast, article 17 addresses conditions for liability rather than the extent of the Convention’s application.222 Under this analysis, well-grounded in the structure of the Warsaw Convention, any injury occurring incident to international air transportation would be covered by the Convention, which would also provide the sole and exclusive remedies.

Alternatively, the jurisdictional line could be drawn at the point at which an incident causing harm is considered an “accident” within the meaning of article 17. This is the position taken by the United States Court of Appeals for the Third Circuit in Abramson v. Japan Airlines Co.223 The court held that the Warsaw Convention is indeed exclusive when an “accident” occurs on board an international flight. However, according to the Third Circuit, common law remedies are not precluded when the Convention does not apply, either because there was no “accident” within the meaning of article 17 or because a passenger was injured after disembarkation from the aircraft.224

215. Id. at 109.
216. Warsaw Convention, supra note 4, art. 17(2).
218. Id. at WESTLAW screen 5.
220. Id. at 111.
221. Warsaw Convention, supra note 4, art. 1.
222. Johnson & Minch, supra note 200, at 113.
224. Id. at 133-34.
Johnson and Minch criticize this result:

If [common law actions for harms incurred in incidents other than "accidents"] are permitted, article 17 becomes purely a statement of jurisdictional requirements instead of the statement of a substantive liability rule which its framers intended. In the case of most serious injuries, this would produce the anomaly of a carrier arguing that an injury must have been caused by an accident in order to be able to rely on the Convention’s liability ceiling.225

The argument that the principle of uniformity is best realized by drawing the line early, at the point of embarkation upon an international flight, is strong and quite possibly correct. Permitting every claimant who asserts an injury that did not rise to the level of an “accident” to bypass the Convention and to resort to domestic law would seriously undermine the uniformity of international air carrier liability law. For example, in Air France v. Saks,226 the Supreme Court found that a passenger whose ear was injured as a result of normal changes in cabin pressurization was not the victim of an “accident” within the meaning of article 17.227 Nevertheless, it would do violence to the concept of a uniform regime of international air carrier liability to allow a passenger injured as a direct result of the risks inherent in air travel to circumvent the limited liability rules of the Warsaw Convention. If the Convention does not provide a remedy under a particular set of facts, then the passenger has simply failed to state a claim for air carrier liability. The passenger should not be permitted to supplement the exclusive remedial scheme under the Warsaw Convention by searching for an alternative and more expansive remedy under another source of law, such as state common law.

On the other hand, a case could also be made that the underlying purpose of the Warsaw Convention is not promoted by extending it to incidents on board an aircraft that are only tangentially related to the nature of air travel. The drafters of the Convention intended to address only the “unique perils” which accompany air travel.228 Thus, when a passenger pursues a claim based upon a health problem exacerbated by the negligent actions or omissions of airline flight attendants—as was the case in Abramson229—the raison d’etre of the Warsaw Convention is not implicated. It may be argued that a passenger who asserts a violation of a duty of care unrelated to air travel should not be barred

225. Johnson & Minch, supra note 200, at 114.
227. Id. at 406. In Saks, the Court left open the question whether an injury not caused by an “accident” within the meaning of article 17 would support “a state cause of action for negligence independent of the liability provisions of the Warsaw Convention.” Id. at 408.
from obtaining relief simply because the incident cannot be characterized as an aviation accident.\textsuperscript{230}

Perhaps a middle ground can be found. As a tentative proposal,\textsuperscript{231} I suggest that the crucial jurisdictional inquiry should focus on whether the incident is intimately connected to international air travel and the particular hazards incident to it. When the harm occurs during an international flight and flows from risks unique to air transportation—such as an ear injury caused by routine cabin pressure changes or emotional distress resulting from a hijacking or a sudden dive by the aircraft—the Warsaw Convention’s cause of action should be the sole source of remedy if any exists, to the exclusion of other substantive law. If, however, the harm is the result of an incident that is not unique to international air transportation—such as a flight attendant’s failure to attend to the medical needs of a passenger or a defamatory statement made by a member of the crew during the flight—the Convention should not apply and the claimant should be allowed to pursue an independent state or federal law cause of action.

Whether the line is drawn at the point of embarkation upon an international flight, at the later point at which an incident is found to constitute an “accident,” or somewhere in between as I cautiously suggest, few if any claims for emotional distress would fall outside the exclusive purview of the Warsaw Convention. As noted earlier,\textsuperscript{232} most such claims have arisen in the context of terrorist hijackings or near crashes. Even if the jurisdictional line is drawn as late as the characterization of “accident,” it is well accepted that hijackings and terrorist incidents on board an aircraft\textsuperscript{233} and aircraft performance failures while in flight\textsuperscript{234} fall comfortably within the definition of an “accident.” In \textit{Air France v. Saks},\textsuperscript{235} the Supreme Court defined an “accident” under article 17 as “an unexpected or unusual event or happening which is external to the pas-

\textsuperscript{230} Further inquiry may reveal that the drafters of the Warsaw Convention intended to bring all aspects of air carrier liability within the Convention’s regime, including the duty of care for the health and welfare of passengers owed by every common carrier. However, the fact that the Convention offers absolutely no remedy for any type of harm unrelated to the precise risks of travel by air suggests that these harms were simply not part of the Warsaw Convention scheme and were not intended to be covered. This subject certainly deserves further investigation.

\textsuperscript{231} I invite further exploration of this area and suggest that my tentative recommendation be tested by its consistency with the text and the drafting history of the Warsaw Convention.

\textsuperscript{232} \textit{See supra} notes 32-34 and accompanying text.

\textsuperscript{233} \textit{See, e.g.,} Evangelinos \textit{v. Trans World Airlines, Inc.}, 550 F.2d 152, 154 (3d Cir. 1977) (en banc) (terrorist incident was an “accident” under article 17); Day \textit{v. Trans World Airlines, Inc.}, 528 F.2d 31, 33 (2d Cir. 1976) (“a terrorist act is considered an ‘accident’ within the purview of these provisions” of the Warsaw Convention), \textit{cert. denied}, 429 U.S. 890 (1976).

\textsuperscript{234} The question whether article 17 encompasses recovery for emotional distress was hotly disputed in Floyd \textit{v. Eastern Airlines, Inc.}, 872 F.2d 1462, 1475 (11th Cir. 1989), \textit{cert. granted} 110 S. Ct. 2585 (1990). However, neither party questioned the district court’s ruling that the airplane’s loss of power and the preparation for an emergency landing was an “accident” for article 17 purposes. \textit{Id.} at 1471 (citing \textit{In re Eastern Airlines, Inc.}, Engine Failure, Miami Int’l Airport on May 5, 1983, 629 F. Supp. 307, 312 (S.D. Fla. 1986)).

\textsuperscript{235} 470 U.S. 392 (1985).
senger."236 As examples of "accidents," the Supreme Court237 cited decisions holding that terrorist attacks,238 hijackings,239 and sudden dives by an airplane240 constituted "accidents."

In sum, whether the international flight location test proposed by Johnson and Minch (as well as the Eggink decision), the Abramson "accident" test, or my tentative "nature of the incident test" is applied, claims for emotional distress arising out of international air transportation will almost invariably fall within the exclusive scope of the Warsaw Convention. Accordingly, the availability of compensation for purely emotional distress should stand or fall upon the construction of article 17 as the exclusive cause of action for this field of liability.

VII. CONCLUSION

The United State Supreme Court's decisions construing the Warsaw Convention have consistently "sent a clear message to the lower courts that the Court will not permit the Convention's provisions governing carrier liability to be amended or circumvented through judicial decisions based upon broad considerations of social policy."241 Instead, the duty of the courts is "to interpret [the treaty] and administer it according to its terms."242 The United States Constitution has committed to the executive and legislative branches the determination of whether changing social policy regarding the nature of compensable injuries warrants revising the Warsaw Convention's liability rules.243

The plain language and the historical context of the Warsaw Convention establish that its signatories did not contemplate recovery for emotional distress unaccompanied by bodily injury. That understanding of the treaty must prevail. An elusive and misguided search for the French legal meaning of a phrase not susceptible to such an analysis as a term of art should not be permitted to overide the ordinary meaning of the terms of the treaty.

A passenger who seeks to recover for harm incurred as a consequence of the inherent risks of international air transportation is limited to the uniform and exclusive cause of action provided under article 17 of the Warsaw Convention. Because a fundamental prerequisite to liability is "bodily injury," claims for

236. Id. at 405.
237. Id. at 405-06.
243. Chan v. Korean Airlines, 109 S. Ct. 1676, 1684 (1989) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.") (quoting The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J)).
emotional distress not precipitated by physical harm are not authorized. This is one area of liability law in which the still debatable concept of recovery for emotional distress cannot gain a foothold.