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COMMENTS

RECOVERY OF EMOTIONAL DISTRESS DAMAGES UNDER ARTICLE 17 OF THE WARSAW CONVENTION: THE AMERICAN VERSUS THE ISRAELI APPROACH

I. INTRODUCTION

International courts have been inconsistent in their decisions as to whether, under the Warsaw Convention, plaintiffs should be allowed to recover damages for purely emotional injuries resulting from aircraft accidents. Two diametrically opposed views on recovery are exemplified by the decisions of the United States Supreme Court and the Supreme Court of Israel. The United States Supreme Court has refused to allow recovery of purely psychic damages. The Supreme Court of Israel, on the other hand, has maintained that the Warsaw Convention allows for recovery of emotional distress damages. This inconsistency on the international level has caused confusion among judges and scholars worldwide and has enabled prospective plaintiffs to shop for a forum which would better serve their purposes.

In April 1991, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Eleventh Circuit in *Eastern Airlines, Inc. v. Floyd*,¹ thereby denying passengers recovery for psychic trauma. The Supreme Court's decision in *Floyd* resolved the question, long debated among the lower courts, of whether the Convention for the Unification of Certain Rules Relating to International Transportation by Air² (commonly known as the "Warsaw Convention"), a multina-

1. 111 S. Ct. 1489 (1991).

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct 12, 1929, 137 L.N.T.S. 11 (adhered to by the U.S. on June 27, 1934) [hereinafter Warsaw Convention].

tional treaty governing air carrier liability, allows an airline passenger to collect damages for emotional distress unaccompanied by bodily injuries.³ While providing for uniformity in the approach of American courts to this question, the Supreme Court's decision has generated an inconsistency on an international level.

In 1984, the Supreme Court of Israel, the only other supreme court that has contended with the issue,⁴ asserted in *Air France v. Teichner*⁵ that the Warsaw Convention does create a cause of action for purely psychic injuries sustained during international flight accidents.⁶ Given these differing interpretations, when other parties to the Convention are confronted with this issue, some may choose to follow the precedent set by the Supreme Court of the United States, while others may prefer to adhere to the Israeli interpretation. Such opposing interpretations by the courts of different countries would encourage airline passengers who have suffered emotional distress on international flights to shop for forums which would allow for recovery. The Warsaw Convention's drafters' goal of providing international uniformity in liability for aircraft accidents would thus be frustrated.

The debate surrounding the airlines' liability for emotional damages sustained in an air carrier accident focuses on the

3. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991). The Supreme Court granted certiorari to resolve the conflict between the New York Court of Appeals' decision in *Rosman v. Trans World Airlines*, 358 N.Y.S.2d 97, 314 N.E.2d 848 (Ct. App. 1974), which held that emotional distress unaccompanied by physical injury is not compensable under Article 17, and the Eleventh Circuit's decision in this case which permitted such recovery. *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

Lower courts which have allowed recovery for purely psychic injuries under Article 17 are: *Borham v. Pan American World Airways*, 19 Aviation Cases 18, (CCH) 236 (S.D.N.Y. 1986); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Palagonia v. Trans World Airlines*, 442 N.Y.S.2d 670 (Sup. Ct. 1978).

Other lower courts have held that Article 17 does not encompass purely psychic damages: *Burnett v. Trans World Airlines*, 368 F. Supp. 1152 (D.N.M. 1973); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972).

4. Israel and the United States are both parties to the Warsaw Convention. RENE H. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER* 232-34 (1981).

5. 38 (III) P.D. 785 (Isr. 1984). This Supreme Court case is a consolidation of two district court cases — *Dadon v. Air France* and *Air France v. Teichner*. Hereinafter, the *Air France v. Teichner* cite will refer to the Supreme Court resolution of both of these cases.

6. *Id.* at 786.

proper meaning of the French phrase "lésion corporelle" that appears in Article 17 of the Warsaw Convention. Article 17 creates a cause of action for passengers injured in aircraft accidents during international flights. If translated literally as "bodily injury," the phrase "lésion corporelle" would not permit recovery for purely emotional damages. However, if interpreted more broadly as "personal injury," recovery for such damages may be available. The Supreme Court of the United States has chosen to interpret the phrase "lésion corporelle" as "bodily injury," while the Supreme Court of Israel has interpreted it more broadly as "personal injury."

This Comment will compare the approaches of the Supreme Court of the United States in *Eastern Airlines v. Floyd*⁷ and the Israeli Supreme Court in *Air France v. Teichner*.⁸ The intent of the drafters of the Warsaw Convention will be explored by examining the French legal meaning of "lésion corporelle," the negotiating history of the Convention, and the subsequent conduct of the parties to the Convention. Finally, the Comment will discuss how the goals of the drafters of the Convention relate to the two different interpretations of Article 17. This Comment will conclude that nothing in the language, negotiating history, or post-enactment interpretations of Article 17 of the Warsaw Convention clearly evinces intent by the drafters to allow airline passengers to recover damages for purely mental injuries. In support of the United States Supreme Court decision, this Comment will further conclude that Article 17 of the Warsaw Convention did not authorize the Supreme Court of Israel to maintain that recovery for emotional damages unaccompanied by physical injury is permitted in the event of an aircraft accident.

II. BACKGROUND

A. *History of the Warsaw Convention*

The Warsaw Convention is a multilateral treaty which establishes uniform standards governing international air carriage of passengers, cargo, and baggage, and regulates the liability of international air carriers.⁹ This treaty governs only international

7. 111 S. Ct. 1489 (1991).

8. 38 (III) P.D. 785 (Isr. 1984).

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

flights; it does not govern domestic flights within the United States or any other country. The 1929 Treaty was the result of a 1925 international conference held in Paris, the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) (a committee created by the Paris Conference),¹⁰ and a final conference in Warsaw in 1929. The Warsaw Convention was initially signed by twenty-three countries but, in later years, many other countries have adopted the treaty.¹¹ Today, due to the remarkable growth of civil aviation since 1929,¹² over 120 nations have chosen to become parties to the treaty, making it both a significant and widely recognized international agreement.¹³

In drafting the treaty, the participants of the Warsaw Convention attempted to fulfill three distinct objectives. First, in order to protect and encourage the growth of the infant airline industry, the drafters intended to limit the potential liability of air carriers resulting from accidents.¹⁴ Second, because air travel transversed national boundaries and necessarily involved varying legal systems, commercial practices, and languages, the parties wished to establish uniform rules to govern the rights and liabilities of air carriers.¹⁵ Third, the parties to the Convention wished to ensure that passengers, who would naturally have difficulty proving that the air carrier failed to use all the necessary precautions to avoid accidents, would nonetheless be able to recover damages from the air carriers.¹⁶

The Convention achieved these goals by establishing uniform rules on documentation, ticketing, jurisdiction, and liability. The parties agreed that air carriers would be liable for damages incurred by passengers, baggage, or cargo, but fixed a limit

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

11. Dana Stanculescu, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle*, 8 HASTINGS INT'L & COMP. L. REV. 339, 351 (1985).

12. In 1929 the larger aircrafts could carry only 15 to 20 passengers at a cruising speed of approximately 100 miles per hour for ranges no longer than 500 miles. Lowenfeld & Mendelsohn, *supra* note 10, at 498.

13. MANKIEWICZ, *supra* note 4, at 231-34. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 247 (1984); LAWRENCE B. GOLDBIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 285-93 (1988) (listing signatory parties to the Warsaw Convention).

14. Lowenfeld & Mendelsohn, *supra* note 10, at 499-500.

15. Lowenfeld & Mendelsohn, *supra* note 10, at 498-99.

16. Lowenfeld & Mendelsohn, *supra* note 10, at 500.

on the liability of air carriers at 125,000 French francs (8,300 United States dollars) per person. In Article 20, the burden of proof was shifted to the air carriers through the establishment of a rebuttable presumption of negligence. This provision, which placed the burden on the air carrier to show lack of negligence, facilitated passenger recovery by relieving passengers of the difficult burden of proving negligence by the air carrier.¹⁷ Ostensibly, the Warsaw Convention was an attempt to achieve a delicate balance between the drafters' conflicting goals.

The United States did not participate in the drafting of the Convention; however, the Senate ratified the Treaty on June 15, 1934,¹⁸ and the United States officially joined the Treaty later that year.¹⁹ Israel, which became a state in 1948, adopted the Treaty on October 8, 1949, and was first bound by it on January 6, 1950.²⁰

The Warsaw Convention was drafted in French by the French delegation, and no official English translation has ever been internationally recognized.²¹ An unofficial English translation, prepared by the United States Department of State, was presented to the Senate for ratification in 1934.²² Likewise, the Convention was translated into other languages by other parties to the convention and these translations were presented to their respective governments. These translations sometimes gave different meanings to French phrases contained within the Convention. For example, the German version adopted by Austria, Germany, and Switzerland, translates the phrase "lésion corporelle" in Article 17 of the Convention not as "bodily injury" as it appears in the English translation, but as "infringement on the health."²³ Because of the disparate phrasing contained in various

17. Warsaw Convention, *supra* note 2, art. 20.

18. Lowenfeld & Mendelsohn, *supra* note 10, at 502.

19. 78 CONG. REC. 11, 582 (1934).

20. *Air France v. Teichner*, 38 (III) P.D. 785, 791 (Isr. 1984); MANKIEWICZ, *supra* note 4, at 232.

21. GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT* 5 (1977).

The unofficial English translations of the Warsaw Convention include the Schedule to the United Kingdom *Carriage by Air Act* 1932, the Canadian *Carriage by Air Act*, the Australian *Civil Aviation (Carrier's Liability) Act* 1959-1973, and the text ratified by the United States Senate on June 15, 1934. *See id.* at 5. Unless otherwise noted, the translation used in this Comment is the American version.

22. Stanculescu, *supra* note 11, at 351.

23. MANKIEWICZ, *supra* note 4, at 146.

Otto Reise, the German delegate to the Convention, translated the phrase "lésion corporelle" as follows: "und sonstige resundheitsbeschadigung eines Reisenden ent-

translations, these unofficial translations do not necessarily clarify the precise meaning of ambiguous French phrases that appear in the text of the Convention.

In the sixty-four years since the adoption of the Warsaw Convention, the Treaty has been modified by six protocols and supplemented by one other Convention.²⁴ The Warsaw Convention was first amended by the Hague Protocol²⁵ at a diplomatic conference in September of 1955. The Hague Conference was convened primarily in order to reconsider the limits on liability articulated in Article 22 that had received considerable criticism. With the growth of the industry, the low rate of accidents, and the availability of liability insurance, many observers felt that such a low limit on air carrier liability was no longer justified. In response to these concerns, the drafters of the Protocol increased the limit on liability by one hundred percent to \$16,600.²⁶ Israel adopted the Hague Protocol on November 3, 1964.²⁷ Opponents in the United States Congress, however, were not mollified by the new provision. Believing that the limit on liability was still too low, the United States refused to ratify the Protocol and on November 15, 1965, gave formal notice of denunciation of the Warsaw Convention.²⁸ A special convention of contracting states was thereupon called in Montreal in February 1966 for the purpose of finding a solution which would permit the United States to withdraw its denunciation, scheduled for May 16, 1966.²⁹

This solution came in the form of the Montreal Agreement,³⁰ a contract among all the major international air carriers, in which the air carriers agreed to raise the limit of air carrier liability to \$75,000. Moreover, the drafters of the Montreal Agreement abolished the negligence standard adhered to by the

standene Schaden zu ersetzen." *Palagonia v. Trans World Airlines*, 442 N.Y.S.2d 670, 673 (Sup. Ct. 1978).

24. MANKIEWICZ, *supra* note 4, at 6.

25. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol].

26. MANKIEWICZ, *supra* note 4, at 6.

27. MANKIEWICZ, *supra* note 4, at 232.

28. Lowenfeld & Mendelsohn, *supra* note 10, at 546-52.

29. MANKIEWICZ, *supra* note 4, at 10-11.

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

Warsaw Convention and, in its place, instituted a new policy of strict liability for damages to passengers, cargo, and baggage. These revised liability provisions were now required to appear on passenger tickets so as to provide travellers with notice of the limits of air carrier liability.³¹ However, the contractual agreement created by the notice of liability on the passenger ticket was only applicable when a passenger would make at least one stop within the United States.³² As a result of the new agreement, the United States withdrew its notice of denunciation of the Warsaw Convention on May 13, 1966.³³

Some of the parties to the Warsaw Convention met again in Guatemala City in 1971; this meeting resulted in the drafting of the Guatemala City Protocol.³⁴ The Guatemala City Protocol once again raised the fixed limits of air carrier liability — this time to \$100,000.³⁵ Moreover, it improved upon and made universal the strict liability regime established in the Montreal Agreement.³⁶ Despite their participation in the drafting of the Protocol, many countries, including the United States, have not actually ratified it. Therefore, the Protocol is not in effect in the international arena.³⁷ However, Israel ratified the Guatemala City Protocol in 1980.³⁸

B. Article 17 of the Warsaw Convention

Article 17 of the Warsaw Convention established a cause of action for passengers whose injuries are sustained as a result of accidents³⁹ which occur on board an aircraft or in the process of

31. *Id.*

32. Lowenfeld & Mendelsohn, *supra* note 10, at 597.

33. MANKIEWICZ, *supra* note 4, at 8.

34. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air as Amended by the Hague Protocol, Mar. 8, 1971, reprinted in ANDREAS F. LOWENFELD, AVIATION LAW DOCUMENTS 437 (Supp. 1972) [hereinafter Guatemala City Protocol].

35. MANKIEWICZ, *supra* note 4, at 10.

The Guatemala City Protocol entitles states that are not satisfied with the new limit of liability for death or personal injury to establish a supplementary system of compensation within their own borders. Moreover, a court may award to the claimant all or part of his costs provided that the air carrier has refused to settle within a period of six months after having received the claim. MANKIEWICZ, *supra* note 4, at 10.

36. To this end the Guatemala City Protocol deprived the carrier of the exception provided by Article 20(2) for liability for goods damaged due to error in piloting, navigation or handling of the aircraft. MANKIEWICZ, *supra* note 4, at 13.

37. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489, 1501 (1991).

38. Air France v. Teichner, 38 (III) P.D. 785, 794 (Isr. 1984).

39. The precise definition of "accidents" as it appears in Article 17 of the Warsaw

embarking or disembarking.⁴⁰ Thus, the debate about whether, under the Warsaw Convention, a passenger can recover damages for psychic injury caused by an airline accident is focused on the interpretation of Article 17. The American translation of Article 17 of the Warsaw Convention, which was before the Senate when it ratified the Convention in 1934, provided that "the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any *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."⁴¹ Since the 1970's, this translation has been repeatedly disputed by the courts in their effort to determine if the original French text allows recovery for mental distress unaccompanied by physical injuries. The debate has specifically focused on the translation of the French words "lésion corporelle." Some courts have held that the proper translation of the French phrase is "bodily injury," which would not encompass emotional damages,⁴² while

Convention has been examined in many cases. In *Air France v. Saks*, the Supreme Court held that liability under Article 17 of the Warsaw Convention arises only if the passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. *Air France v. Saks*, 470 U.S. 392, 405 (1985) (recovery denied to passenger who lost her hearing in one ear on a smooth and uneventful flight).

The Court advised that this definition of accident should be flexibly applied to encompass more events than what would traditionally have been understood to be accidents. For example, courts have interpreted Article 17 broadly enough to include torts committed by terrorists or fellow passengers. See *Air France*, 38 (III) P.D. at 745 (passenger recovers for mental injuries arising out of hijacking incident); *Evangelinos v. Trans World Airline*, 550 F.2d 152 (3d Cir. 1977) (terrorist attack); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976) (terrorist attack); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (hijacking).

Courts have also allowed for recovery under Article 17 in many other situations which have not traditionally been understood to be accidents. See *DeMarines v. KLM*, 433 F. Supp. 1047 (E.D. Pa. 1977), aff'd, 580 F.2d 1193 (3d Cir. 1978) (malfunctioning or inadequacy of aircraft pressurizing system); *Butz v. British Airways*, 421 F. Supp. 127 (E.D. Pa. 1976) (rapid descent of the aircraft combined with failure to maintain cabin pressure); *Fleming v. Delta Airlines*, 359 F. Supp. 339 (S.D.N.Y. 1974) (bad weather conditions and turbulence); *Kalish v. Trans World Airlines*, 390 N.Y.S.2d 1007, 1009 (Civ. Ct. 1977) (noise, panic, and pandemonium following a hard landing).

40. *Air France v. Saks*, 470 U.S. 392, 394 (1985).

41. *Id.* at 397 n.2 (emphasis added).

The original French text of Article 17 reads as follows: "Le transporteur est responsable du dommage servenu en cas de mort, de blessure, ou de autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit á bord de l'aéronef au cours de toutes opérations d'embarquement et de débarquement." *Id.*

42. While most courts agree that the phrase "bodily injury" in Article 17 does not encompass recovery for emotional trauma independent of physical injury, the court in

others have preferred the translation "personal injury," which could allow recovery for emotional trauma as well as physical injuries. Both the American and the Israeli Supreme Courts agree that if translated as "bodily injury," the phrase "lésion corporelle" would not encompass recovery for purely emotional damages. However, these two courts disagree as to whether such a translation is proper or accurate.

C. *The Two Cases*

The case before the Israeli Supreme Court, *Air France v. Teichner*, stemmed from an incident that had outraged people all over the world. On June 27, 1976, an Air France aircraft was hijacked en route from Tel-Aviv to Paris.⁴³ The hijackers forced the pilot to veer from his course and land at the Entebbe Airport in Uganda.⁴⁴ The passengers were subsequently held at the airport for several days until they were rescued by Israeli forces.⁴⁵ Six years later, in 1982, passengers brought actions against Air France to recover damages for the extreme emotional distress they had suffered.⁴⁶ One group of passengers filed suit in the Jerusalem District Court, while another group of passengers filed in the Tel-Aviv District Court.⁴⁷ Air France moved for summary judgment in both cases, claiming that these causes of action were barred by the statute of limitations.⁴⁸

Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238 (S.D.N.Y. 1975), held that the term "bodily injury" could include mental damages 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." *Id.* at 1250.

When psychological trauma stems from a physical injury sustained by a passenger, however, it is widely accepted that recovery for both types of injuries is permissible under Article 17. Sisk, *supra* note 9, at 134 n.49. One commentator argues that there need not be any causal link between the emotional distress and the physical injury as long as they are both present, and both stem out of the same incident. MILLER, *supra* note 21, at 121. This approach, however, could produce absurd results. If, for example, two passengers sitting side by side on an aircraft suffer emotional trauma during an accident, and one of them breaks an arm, that passenger could recover damages for emotional trauma, while the other one could not.

43. *Air France v. Teichner*, 38 (III) P.D. 785, 788 (Isr. 1984).

44. *Id.* at 788-89.

45. *Id.* An American court has dealt with claims arising out of the same set of events as *Teichner*. *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 977 (S.D.N.Y. 1977) (purely mental injuries covered by Article 17).

46. *Air France*, 38 (III) P.D. at 789.

47. *Id.*

48. *Id.*

The Tel-Aviv District Court denied the motion, while the Jerusalem District Court granted the motion.⁴⁹ Air France and the Jerusalem plaintiffs appealed these judgments.⁵⁰ On appeal, Air France argued that Article 17 of the Warsaw Convention does not create a cause of action for purely psychic injuries and, alternatively, that the cause of action was barred by the statute of limitations in Article 29.⁵¹ The Israeli Supreme Court consolidated the two appeals and held that Article 17 permits recovery for emotional distress damages, but that the actions were barred by the statute of limitations.⁵² Nonetheless, in the last paragraph of its opinion, the Court encouraged Air France to compensate the passengers.⁵³

The case before the Supreme Court of the United States, *Eastern Airlines v. Floyd*, was based on an entirely different set of facts. On May 5, 1983, during a flight from Miami to Nassau, Bahamas, all three of the airplane's engines failed. The plane began to lose altitude quickly, and the passengers were informed that the plane was about to crash into the ocean.⁵⁴ After this announcement, the pilot was able to restart one of the engines

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 806, 808. The Israeli Supreme Court decided the issue of recovery of damages for emotional distress unaccompanied by physical injury before embarking upon its discussion of the limitations on recovery set forth by Article 29. The Court held that under Article 29, the plaintiffs are barred from pursuing the cause of action available to them under Article 17. *Id.* at 808.

Article 29 of the Warsaw Convention provides:

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

The Israeli Court dealt with the issue of whether the two year limit set forth in Article 29(1) is determinative or whether, under Article 29(2), courts can use local statutes of limitations to extend that two year limit. In deciding this issue, the Court examined the negotiating history and goals of the Convention, as well as the treatment of this issue in French, American and British courts. The Court concluded that Article 29(2) was not intended to allow for an extension of the two year period set forth in Article 29(1), but only to allow courts to utilize local laws in resolving technical questions about the calculation of the two year period. Therefore, the two year statute of limitations set forth in Article 29(1) was found to be applicable to the plaintiffs at bar and prevented their recovery. *Air France*, 38 (III) P.D. at 802-08; for an extensive discussion of the interpretation of Article 29 see MILLER, *supra* note 21, at 310-29.

53. *Air France*, 38 (III) P.D. at 808.

54. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1492 (1991).

and land the aircraft safely in Miami.⁵⁵ Several of the passengers on this flight brought suit against Eastern Airlines in the Southern District Court of Florida to recover damages for the emotional trauma they had experienced. The District Court dismissed the complaint on the grounds that emotional distress unaccompanied by physical injury is not compensable under Article 17.⁵⁶ After examining the history of the Warsaw Convention and the French legal meaning of the phrase "lésion corporelle," the Eleventh Circuit reversed the District Court's dismissal.⁵⁷ The Supreme Court granted certiorari to resolve the conflict among lower courts and reversed the judgment of the Eleventh Circuit, holding that Article 17 does not provide recovery for purely psychic injuries.⁵⁸

III. THE U.S. VERSUS THE ISRAELI APPROACH: INTERPRETATION OF ARTICLE 17 OF THE WARSAW CONVENTION

A. *The Interpretation of Treaties*

In applying Article 17 of the Warsaw Convention to similar causes of action, the Israeli Supreme Court and the United States Supreme Court took completely different approaches to the role of the courts in the interpretation of treaties. The Israeli Supreme Court contended that the plain meaning of the treaty must be adaptable to the current conditions of both the aircraft industry and international law.⁵⁹ Thus, the Israeli Court maintained that a new examination of the goals of the Convention is necessary in light of the practical exigencies of air travel today and the development of the law in most countries towards acceptance of emotional damages independent of physical injury.⁶⁰ If the Convention was not interpreted in this way, the Israeli Court contended that the Convention would become stagnant and useless in the face of modern reality.⁶¹ The Israeli Supreme Court did not explain, however, how recovery for purely psychic injuries under Article 17 is better suited to the current legal and

55. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1466 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

56. *Floyd v. Eastern Airlines, Inc.*, 629 F. Supp. 307, 314 (S.D. Fla. 1986), *rev'd*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

57. *Floyd*, 872 F.2d at 1480.

58. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1493 (1991).

59. *Air France v. Teichner*, 38 (III) P.D. 785, 800 (Isr. 1984).

60. *Id.*

61. *Id.*

economic climate.

The United States Supreme Court overtly rejected the Israeli approach and followed the accepted approach that the evolution of the law must be left up to the parties to the Convention and not to the individual courts.⁶² According to this approach, a court has an obligation to keep a treaty's interpretation as close as possible to the intent of its framers.⁶³ The court's obligation stems from the fact that a treaty is an agreement between states which is binding on the parties to the treaty until they deliberately modify it multilaterally.⁶⁴ Indeed, treaties are not even altered by subsequent inconsistent custom of the parties unless there is evidence that by their actions the parties intended to alter the meaning of the treaty.⁶⁵ It is, therefore, the intention of the parties that is paramount. Thus, judicial interpretation of a treaty is limited to decisions which are not inconsistent with the intent of the parties to the treaty.⁶⁶ Indeed, if the courts of the different parties to the Convention deliberately choose to ignore the intent of the Convention's drafters and instead interpret the Convention according to their own policy considerations, the entire *raison d'être* of the Convention as a binding agreement creating uniformity among its parties would be frustrated. Accordingly, a court must interpret the Warsaw Convention in light of the intentions of the parties.

Several principles of treaty interpretation that provide guidance as to how the intent of the parties can be surmised by the courts have been codified in Articles 31, 32, and 33 of the Vienna Convention⁶⁷ and are now internationally accepted. Articles 31 and 32 instruct courts interpreting ambiguous treaty clauses to examine the negotiating history of a treaty and the subsequent agreements of the parties.⁶⁸ Article 33 specifically addresses the

62. *Eastern Airlines, Inc.*, 111 S. Ct. at 1502.

63. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 338 (5th Cir. 1967), *cert. denied*, 329 U.S. 905 (1968).

64. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 69 (1987).

65. *Id.*

66. *Jesse Lewis Case*, (U.S. v. Gr. Brit.), 6 R.I.A.A. 85, 90 (1921) (claims arbitration under special agreement).

67. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

68. Article 31 provides that, wherever possible, treaties should be interpreted considering only the text of the treaty, any supplementary agreements and instruments, subsequent agreements or practices, and the applicable rules of international law. If the interpretation still leaves the meaning of the treaty ambiguous or obscure, Article 32 allows for supplementary means of interpretation such as preparatory work on the treaty

problem of language in treaty interpretation. Article 33 provides that the original language text is authoritative and that any translations of the treaty into other languages will be considered authentic only if the treaty so provides or the parties so agree.⁶⁹ Therefore, when a treaty is drafted in only one language, that language is controlling in the resolution of any disputes that arise out of the treaty.⁷⁰ There are two important justifications for relying primarily on the original language of the treaty. First, since the treaty was negotiated only in the official language, if there are any discrepancies in the translations, it is only this official language that accurately reflects the intent of the parties.⁷¹ Second, if different countries rely on the translation of the treaty into their own languages, the uniformity of the interpretation might be compromised. A danger exists that a country relying only upon its translation of a multilingual treaty would inadvertently be violating some of the terms of the treaty and the reasonable expectations of the other parties.⁷² Therefore, it is important to defer to the official French text of the Warsaw Convention, and not to the English, German or any other translation, in order to determine if Article 17 allows for recovery of purely psychic injuries.

The rules of treaty interpretation codified by the Vienna Convention have been confirmed and developed in decisions by the Supreme Court of the United States. In interpreting Article 17, the Supreme Court in *Eastern Airlines v. Floyd* used the method of treaty interpretation developed in *Air France v. Saks*, an earlier Court decision interpreting the Warsaw Convention.⁷³ Although it did not cite the American decision, the Israeli Supreme Court followed the same method of treaty interpretation in *Air France v. Teichner*.⁷⁴ In the earlier decision, *Air France v. Saks*, the United States Supreme Court held that when interpreting a treaty, the Court must first turn to the text of the

and the circumstances of its conclusion. *Id.* arts. 31, 32.

69. *Id.* art. 33.

70. *Todok v. Union State Bank*, 281 U.S. 449, 453-54 (1930) (the term "fonds et biens" in a treaty drafted in French had been accurately translated as "goods and effects," but the Supreme Court found that the civil-law usage of "biens" included real estate, whereas "goods" under United States common law referred only to chattels).

71. Stanculescu, *supra* note 11, at 343-44.

72. Stanculescu, *supra* note 11, at 344.

73. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1493 (1991).

74. 38 (III) P.D. 785, 798-801 (Isr. 1984).

treaty and place it in the context in which the words are used.⁷⁵ In accordance with Articles 31 and 32 of the Vienna Convention, when the meaning of the treaty is still ambiguous, the Court may look beyond the written words to the history of the treaty, the negotiations, and the practical constructions adopted by the parties.⁷⁶ Moreover, the Court held that when interpreting the Warsaw Convention, which was drafted by continental jurists, the Court must consider the "French legal meaning" of the text in order to surmise the intent of the drafters.⁷⁷ The Court reasoned that only through an investigation of the French legal meaning of the text is it possible to comprehend the meaning that the French terms held for the drafters and thereby determine the shared expectations of the parties.⁷⁸ Therefore, in interpreting the phrase "lésion corporelle" as it appears in Article 17 of the Warsaw Convention, it is important to examine French tort law so as to understand the intent of the Convention drafters.

In sum, the United States Supreme Court and the Israeli Supreme Court agreed that in order to decide if plaintiffs may recover damages for purely psychic injuries under the Warsaw Convention, a court must interpret the French phrase "lésion corporelle" in the official text of Article 17. Since the meaning of the phrase is unclear, both Courts attempted to discern the intent of the parties by examining the French legal meaning of "lésion corporelle," the legislative history of Article 17, and the effect of subsequent agreements by the parties on the Article.

B. *The French Legal Meaning of "Lésion Corporelle"*

Although the Israeli Supreme Court in *Air France v. Teichner*, and the United States Supreme Court in *Eastern Airlines v. Floyd*, both agreed that the French legal meaning of the phrase "lésion corporelle" is important to the interpretation of the scope of air carrier liability under Article 17, the two courts reached opposing conclusions as to what that French legal meaning is. This discrepancy could be attributed to the different approaches each Court took in its analysis of the French legal meaning of "lésion corporelle." The Israeli Supreme Court fo-

75. 470 U.S. 392, 397 (1985).

76. *Id.* at 396.

77. *Id.* at 399.

78. *Id.*

cused on the fact that French tort law, at the time the Warsaw Convention was drafted, generally allowed recovery for mental damages unaccompanied by physical injuries. The United States Supreme Court, on the other hand, chose to focus specifically on the precise meaning of the phrase "lésion corporelle" within French tort law, rather than on the general precepts of this body of law. However, in examining the French legal meaning of the phrase "lésion corporelle," it is important to explore both Courts' approaches, as well as the independent meaning of each component of the phrase in French legal history.

The Israeli Supreme Court focused its analysis of the French legal meaning of "lésion corporelle" on the fact that recovery for purely psychic damages was allowed in French tort law at the time the Warsaw Convention was drafted. While admitting that the French legal meaning of "lésion corporelle" is inconclusive, the Court concluded that given the broad scope of recovery under French law in 1929, there is no reason to believe that the French drafters meant to exclude purely psychic damages from the scope of recovery allowed under Article 17.⁷⁹ As the Israeli Supreme Court asserted, French law in 1929 had recognized the right to recover solely for mental anguish. Claimants were allowed to recover for such damages as injury to honor arising from adultery and emotional distress resulting from the death of a stepmother.⁸⁰ All that was required in French law for the recovery of mental damages was that the damage sustained was immediate, certain and direct.⁸¹ Accordingly, it has been argued that inclusion of mental damages in Article 17 would be consistent with the French drafters' expectations based on their domestic civil law.⁸²

However, as the Supreme Court of the United States points out, the domestic law of most of the other parties to the Warsaw Convention did not recognize recovery based on purely psychic damages until many years after the Convention was drafted.⁸³ Indeed, many states in the United States still do not recognize such recovery today.⁸⁴ The United States Supreme Court argued

79. *Air France v. Teichner*, 38 (III) P.D. 785 (Isr. 1984).

80. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1472 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

81. MILLER, *supra* note 21, at 112.

82. MILLER, *supra* note 21, at 126.

83. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1498 (1991).

84. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 54 (Wade

that because of this fact, if the drafters intended to include purely mental injuries in their recovery scheme, they would have felt compelled to do so unequivocally.⁸⁵ At the very least, given that the French drafters' expectations under French law squarely conflicted with the expectations of drafters from other countries, one would assume that had the parties considered psychic injury to be a possibility in aircraft accidents, they would have engaged in significant negotiations on the issue of recovery for emotional damages. However, the issue of recovery for purely psychic injuries was not mentioned at the Warsaw Convention.⁸⁶ Thus, despite the fact that French law recognized mental injuries as compensable in certain situations, it is unlikely that the French drafters specifically intended to apply this precept to aircraft accidents under the Warsaw Convention.

In its analysis of the French legal meaning of the phrase "lésion corporelle," the United States Supreme Court focused on the precise meaning of the phrase within French tort law, rather than on the general precepts of French law. The Court found that no French legislative provision, case, treatise or scholarly writing prior to 1929 ever used the phrase "lésion corporelle." Although subsequent court decisions did use the phrase when referring to physical injuries caused by automobile accidents, such decisions do not necessarily reflect the contracting parties' understanding of the term because they were decided well after the drafting of the Warsaw Convention. Based on the absence of the term "lésion corporelle" in all French legal texts in 1929, the Supreme Court concluded that the fact that French tort law generally allowed for recovery of purely emotional damages does not mean that the phrase "lésion corporelle," as it appears in Article 17, was specifically intended to incorporate recovery for mental injuries.⁸⁷

The appellate court also examined the precise meaning of "lésion corporelle," but argued that, in the context of Article 17, the term "lésion corporelle" does not connote physical injury in the traditional sense. The Eleventh Circuit, in *Floyd v. Eastern Airlines*, proposed that the wording of Article 17 strongly suggests that the drafters did not intend to limit liability to a par-

Keeton ed., 1984).

85. *Eastern Airlines, Inc.*, 111 S. Ct. at 1498-99.

86. *Air France v. Teichner*, 38 (III) P.D. 785, 800 (Isr. 1984).

87. *Eastern Airlines, Inc.*, 111 S. Ct. at 1494-96.

ticular category of damages.⁸⁸ The court examined the phrase “[l]e transporteur est responsable du dommage servenu en cas de mort, de blessure, ou de autre lésion corporelle . . .” as it appears in Article 17. Based on this wording, the Eleventh Circuit argued that the drafters of the Convention would not have mentioned one specific physical injury such as “blessure” (wounding) if they had intended “lésion corporelle” to refer only to physical injuries.⁸⁹ The court contended that to specify “blessure” as an injury upon which recovery could be claimed would be redundant if the phrase “lésion corporelle” was meant to be restricted to physical injuries.⁹⁰ However, the Supreme Court has pointed out that, while the Eleventh Circuit’s interpretation is consistent with domestic statutory construction, it is equally plausible that by their use of the word “blessure,” the drafters of the Warsaw Convention referred to injuries where a person’s skin is actually broken and that “lésion corporelle” was meant to include all other physical injuries, such as internal bleeding, smoke inhalation, or oxygen deprivation.⁹¹ Therefore, the context of the phrase “lésion corporelle” within Article 17 is not, in itself, sufficient to allow the conclusion that the Warsaw Convention drafters intended the phrase to encompass recovery for psychic damages unaccompanied by physical injury.

In its interpretation of the language of Article 17, the Supreme Court of the United States also found it helpful to compare the language of Article 17 with the similar language of another treaty drafted in French — the Berne Convention on International Rail Transport (Berne Convention).⁹² In its original draft in 1952, the Berne Convention allowed recovery for “la mort, les blessures ou de toute autre atteinte, à l’intégrité corporelle.”⁹³ This language closely parallels the language of Article 17 of the Warsaw Convention which allows recovery for “mort, de blessure, ou de autre lésion corporelle.” The final result of the Berne Convention, however, was modified in 1966 by the addition of the words “ou mentale,” and only then did it

88. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1472 (11th Cir. 1989), *rev’d*, 111 S. Ct. 1489 (1991).

89. *Id.* at 1472-73.

90. *Id.*

91. *Eastern Airlines, Inc.*, 111 S. Ct. at 1496.

92. *Id.* at 1499.

93. *Id.*

allow for emotional damages.⁹⁴ Article 17, on the other hand, was never modified to achieve the same result. The Supreme Court used this analogy to conclude that when parties to a convention intend to allow for recovery for purely psychic injuries, they do so unequivocally.⁹⁵ Of course, it could be argued that the modification of the Berne Convention did not create a new cause of action, but rather clarified a cause of action that was already contained, albeit in a less than clear fashion, in the original Convention itself. This argument contends that the Berne Convention modification did not change the scope of recovery, but rather made the drafters' intentions regarding recovery less ambiguous. Under this argument, as applied to the Warsaw Convention, the cause of action for emotional damages may already be encompassed by Article 17, even though the terms of Article 17 suffer from a similar lack of clarity.

While the Supreme Court did not specifically contend with this argument, such an omission does not necessarily weaken the Court's analogy. Even if the modifications to the Berne Convention were intended to clarify pre-existing intent, the drafters of the Berne Convention evidently recognized that without this modification, their intention was unintelligible and that courts would not have necessarily allowed recovery for purely psychic injuries. Similarly, without a comparable clarification of the Warsaw Convention, courts cannot possibly discern that the drafters intended Article 17 to encompass recovery for purely psychic injuries. Therefore, if the drafters of the Warsaw Convention in fact intended Article 17 to encompass liability for purely emotional damages, they would have made their intentions as unambiguous as did the drafters of the Berne Convention.

While the United States Supreme Court did not examine the words "lésion" and "corporelle" as they separately appeared in French discussions of damages, it is nonetheless important to do so in order to understand the meaning of the phrase "lésion

94. *Burnett v. Trans World Airlines*, 368 F. Supp. 1152, 1157 (D.N.M. 1973). The relevant portion of the Berne Convention now reads: "Le Chemin de fer est responsable des dommages résultant de la mort, des blessures ou de toute autre atteinte à l'intégrité physique ou mentale d'un voyageur . . ." *Id.* at 1157-58. The English translation reads as follows: "The railroad is liable for damages resulting from the death, wounds, or any other infringement of the physical or mental integrity of a passenger . . ." *Id.* at 1158 (citing Henry P. de Vries, translation in *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE* 7173 (July 4, 1973)).

95. *Eastern Airlines, Inc.*, 111 S. Ct. at 1499.

corporelle" within the context of Article 17. The basic forms of damages in French law are "dommage matériel" (pecuniary losses) and "dommage moral" (non-pecuniary losses, including emotional distress).⁹⁶ The term "corporelle" is occasionally used in personal injury cases to encompass damages for physical pain and mutilation and appears to serve as a composite of "dommage matériel" and "dommage moral."⁹⁷ Thus, the word "corporelle" in itself does not automatically exclude mental damages.⁹⁸ The use of the term "lésion," on the other hand, connotes that a physical injury has occurred. Although the term "lésion" is used as a term of art in French contract law to mean "just price requirement," there is no indication that it is a legal term of art when used in conjunction with the word "corporelle."⁹⁹ Indeed, in the context of Article 17, where the term is used to supplement the words death and wounding, the phrase "lésion corporelle" undoubtedly corresponds to the classical definition of the term as an injury to an "organ."¹⁰⁰ Therefore, although the word "corporelle" alone could be interpreted to include psychic injury, the coupling of word "corporelle" with the word "lésion" in Article 17 suggests that the phrase was not intended to include recovery for psychic injury.¹⁰¹

Although at the time the Convention was drafted French tort law generally permitted recovery for purely psychic damages, an examination of the specific phrase "lésion corporelle" in French tort law indicates that the phrase relates most closely to a physical, rather than emotional injury. Furthermore, an analysis of the framers' application of these terms in the context of Article 17, as well as a comparison to the construction of the

96. MILLER, *supra* note 21, at 112.

97. MILLER, *supra* note 21, at 112-13.

98. MILLER, *supra* note 21, at 114.

99. Sisk, *supra* note 9, at 137.

100. MILLER, *supra* note 21, at 127-28.

101. In a dissertation written under the supervision of Georges Ripert, a leading French delegate to the Warsaw Convention, the author argues that: "The use of the expression "lésion" after the words "death" and "wounding" encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident." MANKIEWICZ, *supra* note 4, at 146 (citing YVONNE BLANC-DANNERY, LA CONVENTION DE VARSOVIE ET LES RÈGLES DU TRANSPORT AÉRIEN INTERNATIONAL 62 (1933)). But none of the cases that cite this proposition reveal any sources of French interpretation which support this view. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1472 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991); *Palagonia v. Trans World Airlines*, 442 N.Y.S.2d 670, 673 (Sup. Ct. 1978).

comparable Berne Convention, give no indication that the drafters would have intended to allow for this type of recovery under the Warsaw Convention without providing for it explicitly.

C. Legislative History

The United States Supreme Court decision in *Air France v. Saks* noted that since the text of Article 17 is ambiguous, it is important to examine the negotiations that culminated in the Convention in order to determine the intent of its drafters.¹⁰² Unfortunately, the question of air carrier liability for emotional trauma was not directly addressed at the Warsaw Convention.¹⁰³ In the Paris Conference of 1925, the delegates drafted a broad statement of liability that did not specify particular types of injuries.¹⁰⁴ The proposed article merely said that "the carrier is liable for accidents, losses, damages to goods and delays."¹⁰⁵ Thus, if an accident were to occur, it could be argued that the above language would permit recovery for both physical injuries and emotional distress.¹⁰⁶

However, at the Warsaw Convention of 1929, the drafters provided that the carrier would be liable "in the case of death, wounding, or any other 'lésion corporelle' suffered by the traveler."¹⁰⁷ In response to this revision, the Israeli Supreme Court in *Air France v. Teichner*, and the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*, took the approach that, since 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, it would be unfair to infer that the drafters intended to bar recovery for emotional distress claims.¹⁰⁸

102. 470 U.S. 392, 400 (1985).

103. *Floyd*, 872 F.2d at 1473.

104. *Air France v. Saks*, 470 U.S. 392, 401 (1985).

105. *Burnett v. Trans World Airlines*, 368 F. Supp. 1152, 1157 (D.N.M. 1973) (quoting Article 5 of the Convention Draft, Conference Internationale de Droit Privé Aérien, 1926, Ministère des Affaires Etrangères 41-42, Series C. (79)). The original French text reads as follows: "Le transporteur est responsable des accidents, pertes, avaries et retards." *Id.*

106. *Burnett*, 368 F. Supp. at 1157.

107. *Id.* (citing International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12 1929, at 59 (R. Horner & D. Legrez trans., 1975)).

The original French text reads: "en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur." *Id.*

108. *Air France v. Teichner*, 38 (III) P.D. 785, 800 (Isr. 1984); *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

The Supreme Court of the United States came to the opposite conclusion, namely that narrowing the language from unlimited types of injuries to specific injuries implies that the drafters did intend to limit the scope of air carrier liability to exclude recovery for purely mental injuries.¹⁰⁹ According to the Supreme Court's approach, the addition of new, restrictive language cannot be ignored by simply asserting that it fails to demonstrate any intention of the drafters to limit the liability of air carriers.¹¹⁰ However, the Supreme Court's reasoning on this issue directly conflicts with arguments it makes in other parts of its opinion. More specifically, the Supreme Court expressly asserted in its opinion that, unless a drafting change is accompanied by a clear statement which evinces the drafters' intent to substantively modify the Convention, no such intent should be inferred.¹¹¹ Thus, the Supreme Court's position appeared to be that any drafting changes unaccompanied by a clear expression of intent should not be interpreted as to create any substantive change in the scope of recovery. While the Court conveyed this position in relation to drafting changes that occurred *subsequent* to the Warsaw Convention, this assertion is equally applicable to any drafting changes occurred *prior* to the Convention's ratification. Applying the Court's assertion to the drafting change which occurred between the Paris Conference of 1925 and the Warsaw Convention of 1929, the Supreme Court should have concluded that, since no clear expression of intent was evinced, the revision of later drafts provides no clear evidence that the drafters intended a narrowing of the scope of recovery.

Even given such a concession by the Court, the Court would still have been free to argue that the drafting changes certainly did not suggest any intent to *allow* for such recovery either. Indeed, even if the additional language had been incorporated into the Warsaw Convention in 1929 for the purpose of clarification

109. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1497 (1991); see also *Burnett*, 368 F. Supp. at 1158.

110. Sisk, *supra* note 9, at 143. See also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700-01 (1988) (noting significance of change in negotiating history of Hague Service Convention from less precise term in draft to more precise term in final treaty provision); *Air France v. Saks*, 470 U.S. 392, 403 (1985) (finding that a change from an early draft of the Warsaw Convention suggested an intentional change of meaning).

111. *Eastern Airlines, Inc.*, 111 S. Ct. at 1500. See also *infra* text accompanying notes 120-24.

rather than to narrow the scope of recovery,¹¹² such a drafting change would have provided the drafters with an opportunity to clarify any intent they might have had to allow for recovery of psychic damages. The fact that the drafters failed to utilize this opportunity to provide specifically for such recovery provides ample evidence that recovery for psychic injury was not a major concern of the drafters at that time. Thus, in itself, the drafting change between the Paris Conference and the Warsaw Convention provides no clear evidence of intent either to include or to exclude emotional distress damages.

Further supporting the assertion that the drafters possessed no intent whatsoever regarding recovery for psychic injury is the fact that the drafters at Warsaw never discussed the issue of emotional distress damages. This omission implies that the drafters did not consciously intend to allow for such recovery. The Israeli and the United States Supreme Courts both suggested that the reason that there was no mention of purely psychic injuries in the legislative history of the Warsaw Convention may be that the drafters did not foresee the occurrence of mental damages that did not arise out of physical injury in airplane crashes.¹¹³ Since the aviation industry was in its infancy when the Convention was drafted, it is possible that the drafters could not envision an aircraft accident that would not cause extensive physical damage. If the drafters did not foresee the occurrence of purely psychic injuries, they certainly could not have specifically intended to allow for recovery for such injuries. Moreover, as discussed above,¹¹⁴ if purely psychic injuries were contemplated, there would have been a vigorous debate on the subject of recovery between countries whose legal tradition allowed for such recovery and those countries whose tradition prohibited it. Indeed, given such disparate expectations on the part of various signatories, it is certain that these signatories would not have come to a silent agreement that psychic injury was to be a compensable damage under Article 17 of the Warsaw Convention.

112. MILLER, *supra* note 21, at 125.

113. *Eastern Airlines, Inc.*, 111 S. Ct. at 1498; *Air France v. Teichner*, 38 (III) P.D. 785, 800 (Isr. 1984).

114. *See supra* text accompanying notes 80-86.

D. *Subsequent Agreements of the Parties*

In *Air France v. Saks*, the Supreme Court of the United States advised courts interpreting the Warsaw Convention to examine the practical constructions adopted by the parties.¹¹⁵ In reaching its decision in *Air France v. Teichner*, the Israeli Supreme Court relied heavily on the subsequent agreements of the contracting parties to the Warsaw Convention.¹¹⁶ The Israeli argument focused on the fact that the authentic English translations of the Hague Protocol of 1955,¹¹⁷ the Montreal Agreement of 1966, and the Guatemala City Protocol of 1971,¹¹⁸ all referred to "lésion corporelle" as "personal injury" instead of "bodily injury."¹¹⁹ However, in *Eastern Airlines v. Floyd*, the Supreme Court of the United States contended that none of these agreements worked to redefine "lésion corporelle."¹²⁰ Despite its previous assertions to the contrary,¹²¹ the Court asserted that because of the lack of clearly articulated intent to effect a change in, or to clarify, the meaning of the phrase "lésion corporelle," it was impossible to infer an intent to do so in these protocols.¹²² Moreover, the Court argued that the changes in the translation of "lésion corporelle" in the Hague Protocol and the Guatemala City Protocol are particularly not dispositive. Both protocols, although they have been adopted by Israel, have not been ratified by the United States and have not taken effect internationally.¹²³ Therefore, the Court contended that courts are not bound to apply to the Warsaw Convention the change in the English translation of the phrase "lésion corporelle" from "bodily injury" to "personal injury" in the Hague and Guatemala City Protocols.¹²⁴

115. 470 U.S. 392, 403 (1985).

116. *Air France*, 38 (III) P.D. at 795, 801.

117. "[T]he authentic English text of Article 3(1)(c), as amended at the Hague, uses the expression 'personal injury' while the original French text retains the expression 'lésion corporelle.'" MANKIEWICZ, *supra* note 4, at 141.

118. The Guatemala City Protocol changed the English translation from "death, wounding or bodily injury" to "death or personal injury" and eliminated the French word "blessure" (wounding) from the French text. The revised French text reads: "la mort ou la lésion corporelle." MANKIEWICZ, *supra* note 4, at 141.

119. *Air France*, 38 (III) P.D. at 801; *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1474-75 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

120. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1500 (1991).

121. *Id.* at 1497. See also *supra* text accompanying notes 109-12.

122. *Eastern Airlines, Inc.*, 111 S. Ct. at 1500.

123. *Air France v. Saks*, 470 U.S. 392, 403 (1985).

124. *Eastern Airlines, Inc.*, 111 S. Ct. at 1500-01.

In specifically discussing the impact of the drafting change in the Montreal Agreement, the United States Supreme Court asserted that the Montreal Agreement was intended only to increase the monetary limit on liability and to waive the due care defense of air carriers.¹²⁵ The Montreal Agreement did not "purport to amend the Warsaw Convention."¹²⁶ As the New York Court of Appeals asserted in *Rosman v. Trans World Airlines, Inc.*, the Montreal Agreement modified the effect of the Warsaw Convention only to the extent of providing for absolute liability up to \$75,000; it did 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.¹²⁷ The United States Supreme Court also contended that the Montreal Agreement did not represent the intent of the signatories of the Warsaw Convention because it was not a treaty, but rather a contractual agreement between all major international air carriers.¹²⁸

The passenger notice requirement mandated by the Montreal Agreement, which was designed to give passengers notice of the limited liability provisions of the Convention, used the words "personal injury."¹²⁹ However, the United States delegate to Montreal has since declared that the changes made in the wordings on the ticket booklet did not have any legal significance because the scope of liability covered under Article 17 was not discussed in Montreal.¹³⁰ It could be argued that, based on principles of equity, courts should allow for recovery of emotional damages despite the fact that the language on the ticket booklet is not legally binding. Since the ticket is the only notice that passengers are likely to receive regarding the limits imposed under the Warsaw Convention, passengers will be misled to believe that they may be able to recover for psychic injuries.¹³¹ But, regardless of this inequity, the courts are not free to alter the liability scheme agreed upon by the parties to the Conven-

125. *Id.*

126. *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 150 (1989) (Brennan, J., concurring).

127. 358 N.Y.S.2d 97, 102, 314 N.E.2d 848, 851 (Ct. App. 1974).

128. *Eastern Airlines, Inc.*, 111 S. Ct. at 1501.

129. Montreal Agreement, *supra* note 30, at 972.

130. Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE J. INT'L L. & COM. 345, 347 (1973).

131. *Krystal v. British Overseas Airways*, 403 F. Supp. 1322 (C.D. Cal. 1975) (issue of notice on passenger tickets was dispositive on the finding that Article 17 encompasses liability for psychic damages).

tion. As Justice Story said, 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 the stipulation, upon any notion of equity or general inconvenience, or substantial justice."¹³² Therefore, despite possible misunderstanding by passengers, courts are not at liberty to allow recovery for purely psychic damages without a showing of intent by the drafters of the Montreal Agreement to broaden the scope of liability under Article 17.

According to the Israeli Court, the change in the translation of "lésion corporelle" in the later protocols was not instituted to alter the original meaning of the term under the Warsaw Convention, but rather to clarify the scope of liability under Article 17.¹³³ The Court asserted that this clarification was necessary in light of the disputes which had arisen over the years as to the precise interpretation of the phrase.¹³⁴ In support of this argument, the Israeli Court noted that there was no record of any reaction by the drafting committee of the Montreal Agreement when the chairman presented this change to the committee.¹³⁵ The Court concluded, therefore, that the Drafting Committee of the Conference considered "personal injury" to be the correct translation of the term "lésion corporelle." However, in light of the previous disputes as to the meaning of the phrase "lésion corporelle," the fact that no discussion ensued when the change of the English translation was presented suggests that the drafters did not consider this to be a clarification of the term "lésion corporelle."¹³⁶ Presumably, a clarification which would resolve a long disputed question would not be accepted without any debate.

Moreover, as the Supreme Court of the United States notes, while the drafters of the protocols considered only the English version of the Convention, several proposed modifications of the French text of Article 17 have been raised, but never adopted.¹³⁷

132. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 72 (1821).

133. *Air France v. Teichner*, 38 (III) P.D. 785, 795 (Isr. 1984).

134. *Id.*

135. *Id.*

136. In the years preceding the protocols to the Convention, scholars have disagreed about whether Article 17 encompasses liability for purely psychic damages. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1499 (1991). Moreover, a proposed revision to Article 17, which would definitely allow for the recovery of purely psychic damages, met with opposition in Madrid in 1951. *Id.* See also *infra* notes 138-39 and accompanying text.

137. *Eastern Airlines, Inc.*, 111 S. Ct. at 1499-1501.

In 1951, a committee representing twenty signatories to the Convention, the Legal Committee of the International Civil Aviation Organization, met in Madrid and considered an amendment to the Convention which would expressly allow for recovery of psychic damages.¹³⁸ The Committee tentatively approved a proposal to replace the word "lésion" with the word "affection" in the French text of Article 17. The United States delegate opposed the proposed change because it would expand recovery under Article 17 to include "mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury."¹³⁹ The Committee never completed the proposed revision of Article 17, and the proposal to substitute "affection" for "lésion" was not adopted.¹⁴⁰ Likewise, during the International Conference on Private Aviation Law held in 1955, a proposal to add the word "mentale" to Article 17 of the Warsaw Convention so as to allow recovery for purely psychic injuries was also rejected.¹⁴¹

As the Supreme Court of the United States has argued, the fact that the parties to the Convention considered revising the Convention to include recovery for psychic damages suggests that they did not believe that Article 17 provided for such recovery.¹⁴² Indeed, it is unlikely that the parties were merely proposing clarification of their original intent by substituting "affection" for "lésion" because, if that was the case, the proposal would not have been rejected once the possibility of conflicting interpretations was recognized. In light of this opposition, it is improbable that, in using the English phrase "personal injury" in subsequent protocols, the drafters were attempting to clarify their original intent that the phrase "lésion corporelle" would encompass emotional distress. If the parties to the Convention believed that the language in Article 17 should not have a distinctly physical scope, they would have chosen to amend the Convention to allow for recovery for other types of injuries.

138. Sisk, *supra* note 9, at 144.

139. Sisk, *supra* note 9, at 144 n.126 (citing Excerpts from the Report of U.S. Delegation to Eighth Session of the Legal Committee of International Civil Aviation Organization held at Madrid, Spain, Sept. 1951, reprinted in 19 J. AIR L. & COM. 70, 79 (1952)).

The French delegate, who proposed the change, explained that the change was necessary because Article 17 "presupposed a rupture in the tissue, or a dissolution in continuity" while the proposed change would allow for recovery for "mental illness." *Id.*

140. Sisk, *supra* note 9, at 144 n.126.

141. Sisk, *supra* note 9, at 144.

142. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1500 (1991).

IV. THE GOALS OF THE WARSAW CONVENTION DRAFTERS

Since the prior and subsequent history of Article 17 is not dispositive on the interpretation of "lésion corporelle," it is important to examine the American and the Israeli decisions in light of the goals of the drafters of the Convention. In drafting the treaty, the participants of the Warsaw Convention attempted to balance three distinct objectives: first, to limit the potential liability of international air carriers in case of accidents; second, to establish a uniform system of rules to govern the rights and liabilities of air carriers; and third, to ensure that passengers, who would naturally have difficulty proving that the air carrier did not use all the necessary precautions to avoid accidents, would nonetheless be able to recover damages from the air carriers.¹⁴³ The delicate balance among these three objectives is disturbed by a broad interpretation of Article 17 that gives disproportional weight to the drafters' third goal.

The drafters' first goal, to limit the liability of air carriers so as to encourage the growth of the commercial aviation industry, was their most important consideration.¹⁴⁴ In denying recovery for psychic damages under Article 17, the United States Supreme Court asserted that it was conforming to this primary purpose of the Convention.¹⁴⁵ The Court supported its argument by pointing out that, in order to further this goal, the drafters of the Convention chose to limit the scope of air carrier liability to \$8,300, which was low even in 1929.¹⁴⁶ The Court contended that the parties to the Convention were more concerned with enabling airlines to attract investors who might be scared away by the potential of high liability, than with providing full recovery to passengers.¹⁴⁷ Indeed, in transmitting the Convention to the United States Senate in 1934, Secretary of State Cordell Hull wrote:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a

143. Lowenfeld & Mendelsohn, *supra* note 10, at 498-500.

144. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); Lowenfeld & Mendelsohn, *supra* note 10, at 499 ("The second goal — clearly recognized to be the more important one — was to limit the potential liability of the carrier in case of an accident.")

145. *Eastern Airlines, Inc.*, 111 S. Ct. at 1499.

146. *Id.*; Lowenfeld & Mendelsohn, *supra* note 10, at 498-99.

147. *Eastern Airlines, Inc.*, 111 S. Ct. at 1499; Lowenfeld & Mendelsohn, *supra* note 10, at 499.

more definite basis of recovery and as tending to lessen litigations, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.¹⁴⁸

The Supreme Court was correct in its assertion that the framers' intent to limit the liability of air carriers is frustrated by the expansion of the scope of liability to include emotional distress unaccompanied by physical injury.¹⁴⁹ Presumably, this expansion of liability would encourage widespread litigation by passengers who have suffered emotional trauma while travelling on an aircraft and significantly increase the workload of the courts.¹⁵⁰ In light of the court's liberal interpretation of the phrase "accidents"¹⁵¹ and the strict liability standard that air carriers are held to under the Montreal Agreement,¹⁵² passengers who suffered a terrible fright as a result of minor aircraft malfunctions might then be able to recover from the air carrier.¹⁵³ Moreover, it is almost impossible to predict the frequency or scope of emotional injuries which may afflict particularly sensitive passengers as a result of getting caught in heavy turbulence or experiencing a rough landing.¹⁵⁴ This uncertainty would undoubtedly lead to higher insurance premiums for air carriers. Therefore, under a broad interpretation of "lésion corporelle," the already high liability insurance that airlines pay today would rise significantly because of the expanded scope of liability. That cost would inevitably be passed to the passengers through higher

148. Lowenfeld & Mendelsohn, *supra* note 10, at 499-500 (quoting Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934)).

149. *Eastern Airlines, Inc.*, 111 S. Ct. at 1499.

150. James Grippando, *Warsaw Convention — Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 GEO. WASH. J. INT'L L. & ECON. 59, 96 (1985).

151. *See supra* note 39.

152. *See* Montreal Agreement, *supra* note 30 and accompanying text.

153. Plaintiffs have recovered under Article 17 for injuries resulting from hard landings as well as malfunction of aircraft pressurizing system. *See DeMarines v. KLM*, 433 F. Supp. 1047 (E.D. Pa. 1977), *aff'd*, 580 F.2d 1193 (3d Cir. 1978); *Talish v. Trans World Airlines*, 390 N.Y.S.2d 1007 (Civ. Ct. 1974). *See also supra* note 39.

154. Sisk, *supra* note 9, at 147.

ticket prices. This result would be in direct opposition to the drafters' goal of limited liability.¹⁵⁵ Although the airline industry has developed significantly since 1929, the original goal of the parties, to encourage the growth of the industry, is still applicable today. In the current economic climate, where many airlines are struggling to avoid bankruptcy, any added liability may be detrimental to the survival of the industry. Therefore, an expansive interpretation of "lésion corporelle," which allows for recovery for emotional distress unaccompanied by physical injury, would frustrate the Convention's goal of limiting the liability of air carriers.

Another important goal of the drafters of the Warsaw Convention, to establish uniform rules to govern the rights and liabilities of air carriers,¹⁵⁶ is also advanced by an interpretation of Article 17 which excludes emotional damages. Although the United States Supreme Court cited this proposition in support of its decision to deny recovery for purely psychic damages, it did not provide its reasoning for doing so.¹⁵⁷ Nonetheless, if all international courts were to adopt the Israeli interpretation of the phrase "lésion corporelle," thereby allowing recovery for emotional distress unaccompanied by physical damages under Article 17, a forum shopping problem would undoubtedly arise. Indeed, damages awarded by different countries may vary considerably even within the limits set by the Warsaw Convention. For example, states that have nationalized health care programs tend to allow less recovery for torts because injured litigants do not have to pay their medical bills and, therefore, do not need to be reimbursed. Moreover, since standards of living may vary considerably from one state to another, sizes of awards that are considered reasonable vary considerably as well. Although this problem applies to physical injuries, it is likely to be accentuated in cases of pure psychic injuries. Awards for emotional distress are likely to vary from one country to the next much more than awards for physical injuries because treatment for physical injuries is more quantifiable. Moreover, juries' attitudes towards the validity of psychic injuries are likely to vary depending on local cultural values. Consequently, if emotional distress damages were encompassed in Article 17 by all parties to the Con-

155. See Montreal Agreement, *supra* note 30.

156. Lowenfeld & Mendelsohn, *supra* note 10, at 498.

157. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489, 1499 n.11 (1991).

vention, litigants would attempt to bring their emotional distress claims in the forum which is most likely to award high damages. Therefore, one of the drafters' primary goals, to provide international uniformity in air carrier liability, would be frustrated by the determination that the phrase "lésion corporelle" encompasses emotional distress unaccompanied by physical injury.

An issue relevant to the determination of the effect of a broad interpretation of Article 17 on the drafters' goal of uniformity is whether an independent state law cause of action might exist outside the scope of the Warsaw Convention.¹⁵⁸ If the Warsaw Convention is not an exclusive remedy and plaintiffs are permitted to bring a separate state cause of action, plaintiffs' possibility of recovery, and the amount of damages they are entitled to, will depend on the laws of the different states. Therefore, if Article 17 does not encompass emotional distress damages, and if plaintiffs are allowed to bring state claims for psychic injury, then some plaintiffs will be able to recover under an independent state cause of action, while others will not; thus, the drafters' goal of uniformity will be frustrated.¹⁵⁹ The Supreme Court of the United States specifically refused to decide the question of whether the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation because this was not an issue in the case before it.¹⁶⁰ However, many American courts now agree that the Warsaw Convention provides the sole source of recovery against an international air carrier in case of accident.¹⁶¹ Moreover, other signatories to the Warsaw Convention,

158. *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 977 (S.D.N.Y. 1977); *Grippando*, *supra* note 150, at 98.

159. "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." *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1250 (S.D.N.Y. 1975).

160. *Eastern Airlines, Inc.*, 111 S. Ct. at 1502.

161. *See, e.g.*, *Boehringer-Mannheim Diagnostics*, 737 F.2d 456, 458 (5th Cir. 1984); *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Velasquez v. Aerovias Nacionales de Colombia*, 747 F. Supp. 670, 676 (S.D. Fla. 1990); *Stanford v. Kuwait Airlines Corp.*, 705 F. Supp. 142, 143 (S.D.N.Y. 1989); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y.), *aff'd*, 705 F.2d 85 (2d Cir. 1982).

However, some courts have held that a state cause of action exists regardless of the applicability of the Warsaw Convention. *See, e.g.*, *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 414 (9th Cir. 1983); *Calderon v. Aerovias Nacionales de Colombia Avianca*, 738 F. Supp. 485, 486 (S.D. Fla. 1990); *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 740 (S.D. Fla. 1986).

such as Great Britain and Canada, have implemented the Convention as the exclusive remedy for passengers on international flights.¹⁶² Therefore, it is very possible that when the Supreme Court is directly confronted with this issue, it will agree that no separate cause of action for emotional distress can exist under state law.¹⁶³ Accordingly, the argument that emotional distress damages should be incorporated into Article 17 so as to avoid disparate state awards may not be relevant.

It may be argued that a broad reading of Article 17, which would allow for compensation for purely psychic damages, would further the drafters' third goal — the protection of passengers. The United States Supreme Court failed to address the drafters' goal of protecting passengers' interests. However, although the protection of the interest of the passenger was one of the considerations of the drafters of the Warsaw Convention, as evinced by the adoption of a rebuttable presumption of carrier negligence and the subsequent application of a strict liability standard, this interest was balanced with the drafters' desire to limit air carrier liability.¹⁶⁴ Thus, shifting the burden of proof was the trade-off for a lower limit on liability. Since the air carriers were the primary beneficiaries of the Warsaw Convention, it seems that passenger protection was a secondary consideration to the drafters' goal of limiting air carrier liability.¹⁶⁵ Therefore, it cannot be presumed that based on their interest in protecting the rights of passengers alone, the drafters would have necessarily wanted to extend the scope of liability of Article 17 to encompass emotional distress.

The Israeli Court's interpretation of Article 17, which allows for recovery of purely psychic damages, gives undue weight to the least important of the drafters' goals — the desire to protect passengers' rights of recovery. Since this interpretation frustrates the two most important goals of the drafters, to limit the liability of air carriers and to ensure international uniformity of liability in the industry, it violates the spirit of the Convention. The United States Supreme Court, despite its sketchy treatment of the drafters' goals, nonetheless reached a decision which is in conformity with those goals.

162. Sisk, *supra* note 9, at 156.

163. Sisk, *supra* note 9, at 157.

164. Lowenfeld & Mendelsohn, *supra* note 10, at 500.

165. Lowenfeld & Mendelsohn, *supra* note 10, at 500.

V. THE ROLE OF PRECEDENCE

While acknowledging the deference owed to the earlier Israeli decision, the United States Supreme Court, in *Eastern Airlines v. Floyd*, nonetheless chose to reinterpret Article 17 and reach an opposing conclusion.¹⁶⁶ The Israeli Supreme Court, in *Air France v. Teichner*, was the first Supreme Court of any party to the Warsaw Convention to interpret the phrase "lésion corporelle" in Article 17. In light of the drafters' goal of creating a uniform system of liability applicable to all countries, there is considerable pressure for the other parties to the Convention to follow the Israeli interpretation, despite the fact that the principle of *stare decisis* does not exist in international law. Indeed, inconsistent rulings would undoubtedly open the floodgate to forum shopping.¹⁶⁷ To achieve total uniformity, however, the first court confronted with the interpretation of a particular provision of a treaty would unilaterally determine the meaning of the treaty according to its own considerations and thereby bind all other parties to the Convention to this interpretation.

It is undesirable that one country, particularly one that did not participate in the drafting of the Convention, should have absolute control over the interpretation of the phrase "lésion corporelle" within Article 17. In interpreting a treaty, countries are sometimes influenced by considerations which are in no way related to the policies of the treaty that they are interpreting. It is entirely possible, for example, that in deciding *Teichner*, the Supreme Court of Israel was swayed by factors unrelated to the Warsaw Convention. As the facts of *Teichner* clearly show, the case before the Israeli Court was a political, emotionally charged, and unusual case. The Israeli community was angry and outraged at the treatment of the hostages and closely followed the outcome of the case. The emotional trauma that the hostages suffered was undisputable and it was commonly perceived that someone should be held liable for their injuries. Therefore, the Israeli Supreme Court was hard pressed to encourage Air France to compensate the sympathetic plaintiffs. Perhaps this pressure influenced the Court's decision to interpret Article 17 as encompassing recovery for emotional distress.

166. 111 S. Ct. 1489, 1502 (1991).

167. *Velasquez v. Aerovias Nacionales de Colombia*, 747 F. Supp. 670, 676 (S.D. Fla. 1990) (plaintiff who recovered for wrongful death under the Warsaw Convention is barred from bringing the same wrongful death claim under state law).

Thus, it would be unwise for courts of other countries to automatically adopt the Israeli approach in order to conform with the drafters' desire for a uniform system of rules governing air carrier liability.

Despite the fact that Israel has already decided the issue, other parties to the Convention have the authority to interpret the phrase "lésion corporelle" using their own analysis. Indeed, the unilateral interpretation of a treaty by a contracting state is not binding upon the other signatories to that agreement.¹⁶⁸ When interpreting the Warsaw Convention, the decisions of other parties to the Convention should be given considerable weight.¹⁶⁹ But a unilateral interpretation by a signatory to the Convention has only an advisory effect on the interpretation of the same provision by other parties to the Convention. Moreover, since the Israeli Supreme Court could not allow for an actual remedy because the running of the statute of limitations precluded recovery, their interpretation of Article 17 was mere dicta that carries less persuasive authority. Thus, the Supreme Court of the United States was justified in choosing to reinterpret the terms of the treaty.

VI. CONCLUSION

Two possibilities exist today concerning the recovery of emotional damages under Article 17 of the Warsaw Convention. International courts can choose to either allow or disallow recovery for emotional damages based on their own interpretation of the phrase "lésion corporelle." This Comment urges these courts to follow the American, rather than the Israeli, interpretation and thereby deny recovery for emotional distress unaccompanied by physical injury under Article 17.

The Israeli Supreme Court improperly interpreted Article 17 to allow for purely psychic damages. By interpreting the Warsaw Convention in light of current policies, the Court ignored its obligation to enforce the intent of the parties to a treaty. Nothing in the language, negotiating history, or postenactment interpretations of Article 17 clearly evinces the intent of the drafters to allow airline passengers to recover for purely mental injuries. The Israeli Court focused on the fact that in 1929, when the Warsaw Convention was drafted, French tort law allowed recov-

168. See HENKIN ET AL., *supra* note 64, at 442.

169. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

ery for purely psychic injuries, while ignoring the fact that the phrase "lésion corporelle" was never specifically used to permit such recovery. Moreover, since emotional distress injuries were not discussed before or during the drafting of the Warsaw Convention or of the subsequent protocols, it was unreasonable for the Court to surmise that the parties intended to allow for such recovery. Finally, the Israeli decision contradicts the spirit of the Warsaw Convention. The Court's broad interpretation of Article 17 gives undue weight to the drafters' least important goal—the protection of passengers, while frustrating the drafters' two other goals of limiting air carrier liability and achieving uniformity of liability within the industry. All of these factors contradict the Israeli Supreme Court's conclusion that Article 17 of the Warsaw Convention authorized recovery of emotional damages unaccompanied by physical injury in aircraft accidents.

On the other hand, the interpretation of Article 17 adopted by the United States Supreme Court, which prohibits recovery for purely psychic injuries, reflects the intent and the goals of the drafters of the Convention more accurately. The Court embraced the spirit of Article 17, despite the fact that it ignored the drafters' goal of protecting passengers and contradicted one of its own central arguments about the inferences that can be drawn from a drafting change where there is no clear showing of an intent to alter the scope of liability. The Supreme Court's interpretation of Article 17 is consistent with the French legal meaning of the phrase "lésion corporelle" as well as the prior and subsequent history of the Warsaw Convention. Moreover, restricting the scope of liability of air carriers under Article 17 to exclude liability for purely psychic injuries advances the drafters' primary goal of limiting the liability of air carriers by discouraging widespread litigation on the part of passengers who suffer emotional trauma while travelling on an aircraft.

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