

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

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THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EASTERN AIRLINES, INC., Petitioners v.

ROSE MARIE FLOYD, ET VIR., ET AL.

CASE NO: 89-1598

PLACE: Washington, D.C.

DATE: October 29, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EASTERN AIRLINES, INC., :

4 Petitioners :

5 v. : No. 89-1598

6 ROSE MARIE FLOYD, ET VIR. :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, October 29, 1990

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:59 a.m.

14 APPEARANCES:

15 JOHN MICHAEL MURRAY, ESQ., Miami, Florida; on behalf
16 of the Petitioner.

17 JOEL D. EATON, ESQ., Miami, Florida; on behalf of the
18 Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

JOHN MICHAEL MURRAY, ESQ.

On behalf of the Petitioner

3

JOEL D. EATON, ESQ.

On behalf of the Respondent

21

REBUTTAL ARGUMENT OF

JOHN MICHAEL MURRAY, ESQ.

On behalf of the Petitioner

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CHIEF JUSTICE REHNQUIST: We'll hear next in No. 89-1598, Eastern Airlines v. Rose Marie Floyd.

MR. MURRAY: Mr. Chief Justice, and may it please the Court:

None of the passengers in these cases suffered any physical injury. Because the crew issued appropriate warnings to the passengers including ditching instructions, safety instructions, and ultimately a notice that ditching is imminent, it's undisputed that some of these passengers suffered fright.

1 Eastern received a judgment on the pleadings.

2 QUESTION: Not all of them?

3 (Laughter.)

4 MR. MURRAY: I beg your pardon, Your Honor?

5 QUESTION: Not all of the passengers?

6 MR. MURRAY: Well, there were 162 people on
7 board and there are 25 plaintiffs in this case, so I guess
8 you can draw your own conclusions from -- from that.

9 Eastern, after having received judgment on the
10 pleadings, was -- the Eleventh Circuit reversed that and
11 held that emotional injury was in fact compensable under
12 Warsaw, and that's the primary issue about which we're
13 here today.

14 Because of the tenor of the respondents' brief,
15 I think it's important that I note one thing specifically
16 here, and that is that the fault or culpability of Eastern
17 Airlines in this matter is not at issue in this case. And
18 the reason it's not is because Eastern's liability is
19 governed by the provisions of the Warsaw Convention.

20 Specifically article 17 of the Convention
21 provides that the carrier shall be liable. It's an
22 absolute liability provision when merged with the Montreal
23 Agreement. The carrier shall be liable for damages
24 sustained in the event of death, wounding, or bodily
25 injury.

1 QUESTION: Mr. Murray, if a -- if a passenger in
2 an accident covered by the Warsaw Convention did suffer
3 some physical injury such as a cut on the leg in the
4 course of whatever happened in the air, but also says that
5 there were emotional injuries suffered as well, can the
6 damages cover both the injury to the leg and the emotional
7 trauma?

8 MR. MURRAY: Our position is, Justice O'Connor,
9 that they can. We think that there is a requirement that
10 there be a manifest, palpable, physical injury, and the
11 damages suffered in any form after that are recoverable.

12 QUESTION: Well, is that because those emotional
13 injuries are incorporated under the term "lesion
14 corporelle" as a matter of law in France?

15 MR. MURRAY: No, it's not. As a matter of fact
16 we feel that the term "lesion corporelle" -- I hesitate to
17 use it as a term of law in France, but it is a French term
18 that it uniquely indicative of trauma or lesion to or
19 infringement of the body or an organ of the body.

20 QUESTION: Why do you say that the emotional
21 injury in the case I posed is recoverable?

22 MR. MURRAY: I think --

23 QUESTION: Under what language of the Warsaw
24 Convention is it covered?

25 MR. MURRAY: Well, Your Honor, the Convention

1 provides -- the original French version of the Convention
2 provides that a past -- that the carrier is responsible
3 for damage or dommage in the original French. It's given
4 very broad connotations. The briefs discuss at length the
5 definition of "dommage," "dommage materiel," "dommage
6 moral," "dommage corporel." But the fact is that in the
7 French version of article 17, the unqualified word damage,
8 "dommage," is used.

9 QUESTION: And that would include the emotional
10 injury?

11 MR. MURRAY: We believe it includes the
12 emotional injury --

13 QUESTION: But you take the position that the
14 term "lesion corporelle" requires as a condition precedent
15 some physical injury to the body?

16 MR. MURRAY: Exactly, Your Honor. And we
17 believe that that "lesion corporelle," the occurrence of a
18 physical injury, is a condition preceded to recovering
19 whatever damages a passenger suffers.

20 QUESTION: And the emotional injury can be
21 compensable even though it results from causes unrelated
22 to the cut?

23 MR. MURRAY: I believe that is a fair result,
24 Your Honor. I think the reason -- the reason that we feel
25 that it's important to have the physical manifestation of

1 some sort is, as the briefs have pointed out, is to sort
2 the meritorious from the unmeritorious claims. I think
3 that was an intent of the Convention.

4 QUESTION: You, you rely on the language I
5 presume, which does, does not say damages caused by death,
6 wounding, or other bodily injury, but damage sustained in
7 the event of. There is no causal connection required in
8 that text, nor in the French which says "en cas de mort,"
9 in the event of death. Not, not as we -- I'm helping --
10 I'm trying to help you here.

11 MR. MURRAY: Yes, I --

12 (Laughter.)

13 MR. MURRAY: I understand, Your Honor. I think
14 that that is a literal, correct interpretation of the
15 French and the English translation of article 17, and I
16 think that that is the -- frankly was the intent of the
17 framers of the Convention to, to do exactly what they did
18 there.

19 As, as you pointed out, Justice Scalia, it --
20 the damage which is unqualified, the word damage, dommage,
21 is unqualified, and it arises only in the event of the
22 occurrence of death -- "mort," wounding -- "blessure," or
23 bodily injury, "lesion corporelle."

24 QUESTION: The problem I have, Mr. Murray, is
25 that I cannot imagine a bodily injury that is not a

1 wounding -- I mean, wounding is a very -- I'm not sure
2 that's a good -- "a lesion corporelle" that is not a
3 "blessure." Can you tell me an example of --

4 MR. MURRAY: Yes, Your Honor, the, the research
5 that we've done into the French meaning of these terms
6 indicates that a "blessure" indicates a trauma of such
7 force that it is in fact a wounding and the example that
8 the text used is if there's a simply compound fracture of
9 a bone and there is no breaking of the skin, then that is
10 not a "blessure." On the other hand, it would deemed a
11 "lesion corporelle," a infringement of the body or its
12 organs. So there are differences in the French meaning
13 between the two terms, and that's the reason that they
14 were I believe used, the three in the alternative.

15 QUESTION: Very, very elegant, but I'm not --
16 I'm not sure it's right.

17 (Laughter.)

18 QUESTION: Did -- neither brief, although
19 correct me if I'm wrong, makes any point out of the phrase
20 "de tout autre," of any other -- does that just not help
21 either party?

22 MR. MURRAY: Justice Kennedy --

23 QUESTION: Because it, it seems to me that "any
24 other" might relate "lesion corporelle" to wounding or
25 death.

1 MR. MURRAY: Justice Kennedy, it appears that --
2 and our analysis is that "mort" and "blessure" are not
3 totally inclusive, as I just explained, of any bodily
4 injury, any trauma, any impact, any infringement on the
5 body, and the terms "de tout autre," "lesion corporelle"
6 were included to expand.

7 QUESTION: I'm just referring to the words "de
8 tout autre." Would your case be just as strong or just as
9 weak without those words?

10 MR. MURRAY: I believe that, that other words
11 could be used to include --

12 QUESTION: Well, it could have eliminated those.
13 It just could have said "au lesion corporelle."

14 MR. MURRAY: Yes, I think they could have.

15 QUESTION: So that has no effect on your case?

16 MR. MURRAY: No, not -- not to my understanding.

17 QUESTION: Well, it may harm your case a little
18 bit, because if you -- as you've just described the
19 difference between "blessure" and "lesion corporelle,"
20 "lesion corporelle" is not another -- I mean a "blessure"
21 is one kind of "lesion corporelle," I assume.

22 MR. MURRAY: That's correct. All right --

23 QUESTION: You've told me -- you've told me that
24 they're two different things.

25 MR. MURRAY: I'm not saying that they're two

1 different things. I'm saying that a "blessure" would be
2 included within the broad term of "lesion corporelle," but
3 not necessarily vice versa. You can have a bodily injury
4 that is not necessary a wounding.

5 QUESTION: I see. I see.

6 QUESTION: So the addition of "tout autre lesion
7 corporelle" broadens the liability of the carrier over
8 what it would be with just "cas de mort, de blessure"?

9 MR. MURRAY: Yes, yes, Mr. Chief Justice, that's
10 the way we read and understand the phrase.

11 The French and the English translation of
12 article 17 we believe as we have just now discussed are
13 quite clear and that the damage recoverable is recoverable
14 in the event of the death, wounding, or bodily injury.
15 And we feel that the wording of article 17 is quite clear,
16 that it's not necessary to go any further than that. But
17 looking at the drafters' intent in the 1929 Convention, it
18 is clear that there was vast silence on the issue of what
19 article 17 was meant to include.

20 The subsequent drafting history, as review by
21 the Eleventh Circuit, is somewhat more helpful in
22 determining what the drafters of the original Convention
23 meant. In 1951 in Madrid, the -- at a subsequent drafting
24 convention, the French delegate, as a matter of fact,
25 introduced an amendment which would have changed and

1 broadened the term "lesion corporelle" to have included
2 mental injury. That was rejected in the 1951 Madrid
3 Convention.

4 Similarly, in 1955 at The Hague, the Greek
5 delegate asked for a change to broaden the terms of
6 article 17 and that was sounded defeated.

7 QUESTION: Now at the so-called Guatemala
8 Accords, which have not yet been approved I gather in this
9 country --

10 MR. MURRAY: Correct.

11 QUESTION: -- would the meaning change under the
12 Convention?

13 MR. MURRAY: Justice O'Connor, we don't feel
14 that the -- number one, the original French translation of
15 article 17, the original French version rather of article
16 17 remains unchanged from the 1929 Convention to the
17 present time. There have been changes that deal with
18 notification that incorporate the term "personal injury."
19 We don't feel that they have any significance at all with
20 respect to the Guatemala City protocol and, as was pointed
21 out in Saks, the Guatemala City protocol, not having been
22 ratified by the Senate, does not thereby govern this case.

23 The line of demarcation that we're asking to --
24 the Court to impose in the interpretation of the
25 Convention is we believe one that is extremely fair. The

1 respondents have raised in their brief the concern that
2 people would in fact be injured, be frightened, be
3 entitled to recover damages in these cases and not be able
4 to effect that recovery. But the use of the bodily injury
5 requirement we feel is consistent with policies that are
6 in place in this country today. These type -- this line
7 of demarcation would allow claims that are real, that are
8 significant to be -- to have a recovery effected and yet
9 be able to sort out the unreal, the more trivial claims,
10 or the more --

11 QUESTION: But you certainly would get some
12 presumably legitimate claims of emotional distress, not
13 feigned, that would be thrown out under this line of
14 reasoning.

15 MR. MURRAY: Unquestionably, Mr. Chief Justice,
16 there will be. But I think that there needs to be a
17 determination made as to where a fair and equitable
18 demarcation line is, and I believe that the physical,
19 palpable, objective-type manifestation of any injury meets
20 that test.

21 QUESTION: Mr. Murray, they, they argue in
22 response that the requirement of an accident imposes some
23 kind of a limit on the danger that every time you get in a
24 rainstorm, you have a lot of claims. Would you comment on
25 the force of that argument?

1 MR. MURRAY: Justice Stevens, I think that that
2 is a concern that Eastern has and that other carriers have
3 in this -- in this issue. It's very clear that, number
4 one, under the Warsaw scheme, if there is an accident, the
5 carrier is absolutely liable because the Montreal
6 Agreement has waived any ability of the carrier to raise
7 the due care defense. Number two, if a passenger having
8 experienced an accident during travel on the aircraft or
9 during in any of the processes of embarkation or
10 disembarkation, presents a compensable injury, he's
11 automatically entitled to recover.

12 Accident has been held to be a very broad,
13 broadly defined term. It's very inclusive. It includes
14 anything that is uninspected or unintended from the
15 standpoint of the carrier. A turbulence encounter that is
16 unexpected, for example, is an accident.

17 QUESTION: I thought so and although the
18 respondents' brief in this case suggests that a turbulence
19 encounter is not an accident as I recall it.

20 MR. MURRAY: Justice Scalia, there are a number
21 of cases that we have dealt with that have -- we've
22 treated as accidents and there certainly are cases that
23 hold that a turbulence encounter, an unexpected turbulence
24 encounter, is an accident, as would be, for example, a
25 four-engine aircraft that has a problem with one engine

1 and a precautionary shutdown is made. And if that is
2 announced to the passenger, that is unexpected from the
3 standpoint of the carrier. That is an accident under
4 Warsaw and it would be compensable. And under that
5 scenario, any passenger could then present an absolute
6 liability claim to the carrier saying, by the way, when
7 you shut the engine down and you told us about it, it sure
8 scared me.

9 QUESTION: Of course the absolute liability came
10 into effect with the Montreal Treaty --

11 MR. MURRAY: That's --

12 QUESTION: -- and it seems to me that that's
13 irrelevant. We're interpreting the Warsaw Convention as
14 it was intended and drafted when there was I take it some
15 showing of fault.

16 MR. MURRAY: That's -- well, that's correct,
17 Your Honor. The Montreal Agreement is in fact the
18 agreement that is in place now. But the strict liability
19 provisions were intended under the original 1929
20 Convention and what was added in addition to the strict
21 liability provisions was a provision where the carrier
22 could show that it should be exonerated of liability if it
23 used all due care and that simply has been waived with
24 respect to the Montreal Agreement. And under the scenario
25 that the carriers operate now, any presentation of a claim

1 after a compensable accident gives rise to absolute
2 liability.

3 QUESTION: Well, but the point still is that as
4 of the time of the Warsaw Convention you were subject to
5 strict liability.

6 MR. MURRAY: That's correct. That's correct. I
7 -- let me retreat from that and say that the carrier was
8 liable strictly to a passenger, but it was able to avail
9 itself of the due care defense. I think it was stronger
10 -- it was intended to be stronger by the drafters of the
11 Convention than recourse to the national law at that time.

12 QUESTION: Has this issue been litigated in the
13 French courts?

14 MR. MURRAY: Not to my knowledge, Your Honor.
15 And when you say this issue, you mean whether mental
16 anguish unaccompanied by physical --

17 QUESTION: Yes.

18 MR. MURRAY: -- manifestation is compensable
19 under the Convention?

20 QUESTION: Right.

21 MR. MURRAY: We know of no cases that --

22 QUESTION: Well, is there, is there some French
23 view about this issue?

24 MR. MURRAY: The -- well, the French law in our
25 judgment does contemplate recovery in negligence cases for

1 pure mental injury and I think that that is well covered
2 in the French wording of article 17 where it talks about
3 "dommage," because "dommage," translated into damage, is
4 unmodified in article 17 and they -- we would feel that
5 they would contemplate recovery for whatever --

6 QUESTION: Well, is there a French -- is there a
7 French view about the meaning of the Warsaw Convention?

8 MR. MURRAY: Not in this context that I'm aware
9 of, Your Honor.

10 QUESTION: It struck me, Mr. Murray, that both
11 the -- your brief and the respondents' brief were quite
12 lacking in any French interpretations of what this term
13 would have meant at the time the Warsaw Convention was
14 adopted. I assume maybe that that was because there just
15 weren't any.

16 MR. MURRAY: Well, and when you say that term,
17 are you --

18 QUESTION: "Lesion corporelle."

19 MR. MURRAY: "Lesion corporelle." Your Honor, I
20 think the reason that -- we recognized in our brief that
21 the Napoleonic code at that time did in fact provide that
22 when one does wrong to another, he must compensate that
23 other for the wrong done. It's extremely broad, and it's
24 not narrow at all. But the term "lesion corporelle" in
25 our judgment, in our research is not specifically a legal

1 term. There are terms that are utilized in the French
2 law, but they modify the word damage, "dommage." There is
3 "dommage corporel," for example. There is "dommage
4 materiel." There is "dommage moral."

5 QUESTION: You can read through cases construing
6 the code Napoleon then and find no use of the term "lesion
7 corporelle"?

8 MR. MURRAY: I'm not saying we didn't find any
9 use of the term "lesion corporelle," but I think that the
10 readings that we did and the things that we cited in our
11 brief and with which there's very -- generally no
12 disagreement is the fact that the term "lesion corporelle"
13 is translated appropriately to be bodily injury.

14 QUESTION: But lesion does not mean lesion. It
15 means harm. It means prejudice. It means a lot of things
16 like that in French, doesn't it?

17 MR. MURRAY: Yes, Your Honor.

18 QUESTION: I mean we shouldn't be misled to
19 think that it means lesion.

20 MR. MURRAY: That, that there --

21 QUESTION: Your position is that when it's
22 combined with "corporelle," it means what you say.

23 MR. MURRAY: Exactly. "Lesion," for example,
24 can be the infringement of a right. It not -- it need not
25 be as you indicated a lesion or associated with a bodily

1 function, but used together with the term "corporelle,"
2 that's the clear meaning of the term.

3 And the issue that we've also asked the Court to
4 look at, the second issue, is the one dealing with
5 exclusivity. We've taken the position throughout the
6 pendency of this litigation that the Warsaw Convention was
7 intended to be the exclusive vehicle for recovery.

8 QUESTION: Do you think that question is fairly
9 presented by your question presented for certiorari, Mr.
10 Murray?

11 MR. MURRAY: Yes, Your Honor, we feel that even
12 though it wasn't in the first page of the brief as a
13 question presented, it was certainly raised. It was
14 raised in the trial court. It was raised in the Eleventh
15 Circuit, and it was raised in the petition for certiorari
16 and fully briefed therein.

17 QUESTION: Well, let, let me read you -- your
18 question presented which of course it at the first page of
19 your brief, whether in view of the presumed liability
20 under Warsaw Convention for death, wounding, or any other
21 bodily injury, an air carrier is liable for fright,
22 psychic injury, or emotional distress, absent objective
23 bodily injury or absent any physical manifestation of
24 injury. That, as I understand it, is the question
25 presented in your petition. And do you think that the

1 question you're now talking about is fairly subsumed under
2 that question?

3 MR. MURRAY: Under that question perhaps not,
4 Your Honor, but under rule 14 of the rules of the Court we
5 feel that the question as is discussed later in the brief
6 and is argued and is fully presented, does adequately
7 preserve the question of exclusivity before the Court.

8 QUESTION: But when we grant cert., I assume we
9 grant cert. on the question that's contained on the first
10 page. I -- you know, I don't know what to look to as to
11 -- you know anything -- I'm not going read every part of
12 every brief to find out what we granted cert. on. I want
13 to be able to turn to the first page and say this is the
14 issue they want us to address, and that wasn't there at
15 all.

16 MR. MURRAY: It was not, Your Honor. I must
17 candidly admit that it was not there. But I must point to
18 the last section of the brief --

19 QUESTION: It wasn't (inaudible) a separate
20 section addressing it, but it was sort of by the way, you
21 know, while you're about it, you might want to address
22 this other question.

23 MR. MURRAY: Yes.

24 QUESTION: Is how you sort of put it.

25 MR. MURRAY: That's correct, Your Honor.

1 QUESTION: And beyond that, hasn't the Florida
2 court held there's not State law cause of action here
3 anyway?

4 MR. MURRAY: They have held that there is no
5 State law cause of action for the intentional infliction
6 of emotional distress as pled in the pleadings of the case
7 that it considered, that's the --

8 QUESTION: So what do want us to preempt?

9 MR. MURRAY: Well, Your Honor, there are two
10 cases under the Floyd Eleventh Circuit decision wherein
11 the Court allows an amendment to the complaint, that is,
12 the Khoury case and the Dix case, and we feel that the
13 controversy is in fact alive. That these two plaintiffs,
14 Khoury and Dix, now have an opportunity to go back to the
15 trial court to amend their pleadings and they can fairly
16 amend the State -- to add a State cause of action. So we
17 think that within the ambit of this case, that the issue
18 is alive.

19 And they -- we think that article 24 fairly
20 speaks for itself, that it is intended to be -- the
21 Convention is intended to be the sole vehicle for
22 recovery. The minutes absolutely support that contention.
23 I would point to the comments of three delegates at the
24 1929 Convention, specifically Mr. Ambrosini from Italy,
25 who said, we wish that the Convention be applied in all

1 cases. In any case recourse to national law must be ruled
2 out." Mr. Ripert from France said, "We are absolutely
3 opposed to a formula that would lead the application of
4 national law. And Sir Alfred Dennis of Great Britain
5 said, in discussing article 24, "It is a very important
6 stipulation which touches the very substance of the
7 Convention because this excludes recourse to common law."
8 We feel that the directors of the Convention were uniform
9 in their intent that any recovery by an injured passenger
10 in international air transportation be governed
11 exclusively by the Warsaw Convention.

12 So in sum, we ask the Court to find, number 1,
13 that a mental injury unaccompanied by any physical
14 manifestation, a physical injury, should be uncompensable,
15 and number 2, that the Warsaw Convention should be the
16 exclusive vehicle for recovery in any claims in
17 international air transportation.

18 QUESTION: Thank you, Mr. Murray.

19 We'll hear now from Mr. Eaton.

20 ORAL ARGUMENT OF JOEL D. EATON

21 ON BEHALF OF THE RESPONDENT

22 MR. EATON: Mr. Chief Justice, and may it please
23 the Court:

24 The Chief Justice observed that the briefs were
25 lacking in a discussion of the French civil law

1 background, and I thought I was doing the Court a favor.
2 What I did was adopt section 3 of the court of appeals'
3 opinion as my primary argument on that point.

4 QUESTION: I felt that, I felt that was lacking,
5 too, in any discussion of contemporary French law at the
6 time of the Warsaw Convention was adopted.

7 MR. EATON: The Eleventh Circuit's analysis is
8 drawn almost entirely, maybe 75 percent, from a book
9 written by Professor or Dr. Rene Mankiewicz of McGill
10 University, who from my reading on this subject is
11 considered the single leading expert on the question of
12 the meaning of the language in the Warsaw Convention. His
13 conclusion and the Eleventh Circuit's conclusion was that
14 the phrase "lesion corporelle" is not appropriately
15 translated into the terms, the English phrase "bodily
16 injury." And the bottom line that both Dr. Mankiewicz
17 proposed and the court of appeals held was that the phrase
18 should more appropriately been translated into the phrase
19 "personal injury" in the English language.

20 QUESTION: Did Dr. Mankiewicz in his treatise
21 discuss French personal injury law --

22 MR. EATON: Yes, Your Honor.

23 QUESTION: -- as of the vintage of the Warsaw
24 Convention?

25 QUESTION: Yes, he did, Your Honor. Dr. -- many

1 of Dr. Mankiewicz's reasons for reaching this conclusion
2 are incorporated into section 3 of the court of appeals'
3 opinion. Basically, he says there is no concept in French
4 civil law which relates to the words "lesion corporelle,"
5 that to a French civil lawyer in 1929 saying "lesion
6 corporelle" to him didn't mean a whole lot, because the
7 French categories, according to Dr. Mankiewicz, were
8 "dommage personal," "dommage patrimoniel," non-economic
9 damages, economic damages.

10 QUESTION: Then why would the drafters use a
11 phrase like that? If it didn't mean anything in the
12 French legal world?

13 MR. EATON: Dr. Mankiewicz's opinion was that
14 the phrase meant something broader than either "dommage
15 personal" or "dommage patrimoniel." It meant the concept
16 that the English law has which is personal injury, a
17 broad, a broad -- any type of injury suffered by a
18 passenger in an, in an international air carrier accident.

19 QUESTION: Well, did, did he deduce that I take
20 it not from French legal authorities which you say didn't
21 even use the term, but simply from a translation from the
22 French?

23 MR. EATON: No, he deduced it from a number of
24 facts, Your Honor, one of which was that the French civil
25 law simply did not recognize the distinction that Mr.

1 Murray has asked the Court to read into or impose upon
2 article 17. There is no concept either in 1929 or today
3 in the French civil law. Dr. Mankiewicz cites five or six
4 French court decisions in his 1981 treatise. There is no
5 concept in the French civil law that you have to have a
6 physical injury or a physical impact before you're
7 entitled to recover damages for your mental distress.
8 That, Dr. Mankiewicz --

9 QUESTION: Then there are cases that say you may
10 recover for mental -- for some kind of a mental upset.

11 MR. EATON: There are cases in the French civil
12 law and in the Napoleonic Code, as Mr. Murray has
13 conceded.

14 QUESTION: But there were not any -- I mean,
15 this is a treaty we're talking. Maybe that's why they had
16 to invent a new term like "lesion corporelle" which does
17 not exist. Although there were such causes of action in
18 French law, there were none in English law, as I
19 understand it. And I doubt whether there were any in the
20 United States -- I remember when I was in law school, it
21 was considered avant-garde in those States that allowed
22 recovery for mental distress when there had been no
23 physical harm.

24 So you're asking us to believe that the English,
25 who not only had never heard of it then, don't even know

1 of it now, and the United States representatives, who also
2 didn't know of it at the time, signed on to a treaty that
3 provides -- with respect to a new technology -- this kind
4 of extraordinary relief that didn't even exist for, you
5 know, hitting somebody with a hammer or scaring somebody
6 with a hammer domestically.

7 MR. EATON: Most --

8 QUESTION: That's must not plausible, is it?

9 MR. EATON: Most respectfully, Justice Scalia,
10 the English common law recognized and has recognized for
11 centuries various tortious causes of action for the
12 recovery solely of mental injuries, the law of defamation
13 for one. There are no physical injuries involved in a
14 liable or a slander.

15 QUESTION: Unintentional? Unintentional?

16 MR. EATON: A negligent assault, negligent
17 defamation --

18 QUESTION: Negligent assault? What's a
19 negligent assault? I --

20 MR. EATON: You have -- negligence --

21 QUESTION: It's an intentional tort. The only
22 torts I'm aware of where you could recover for emotional
23 injury alone were intentional. We're talking here of
24 negligence or indeed even absolute liability, not even
25 negligence, less than negligence.

1 MR. EATON: The impact rule is in my reading of
2 it designed for a very narrow purpose. That is where the
3 interest is in the protection of physical security alone.
4 Physical security is threatened, but there has been no
5 injury. Then typically, solely as a matter of judicial
6 philosophy and to draw an arbitrary line between the
7 probably significant and the probably trivial, the impact
8 rule is imposed to prevent claims from negligent
9 infliction of mental distress, been relaxed all over this
10 country in numerous contexts in cases of aggravated
11 conduct where common carriers are involved, in cases where
12 the most likely injury, the most probable injury of the
13 conduct which is recognized as tortious is mental distress
14 where there's no physical injury threatened by the tort.
15 For example, the negligent mishandling of a dead body has
16 long been actionable in English common law. The relatives
17 are allowed to recover their mental distress -- no
18 physical injury --

19 QUESTION: Was the mental injury, the fact that
20 they were about to crash? What was the mental injury?

21 MR. EATON: The mental injury, Your Honor, is
22 the terror --

23 QUESTION: You might, you might say you won't
24 talk about it.

25 MR. EATON: -- the terror at the thought that

1 they were all going to die, which lasted for several
2 minutes during the descent.

3 QUESTION: Now, a plane is going from one coast
4 to the other coast and it falls down 10,000 feet, will
5 those people have injury?

6 MR. EATON: No, Your Honor, there would be no
7 accident in that case.

8 QUESTION: Huh?

9 MR. EATON: And air planes don't do that. They
10 don't fall 10,000 feet.

11 QUESTION: I know it was no accident, but it
12 fell 10 feet and it felt like it was going to be an
13 accident.

14 MR. EATON: No, Your Honor, turbulence is an
15 expected event in aviation. Turbulence is up there
16 because the Gulf Stream -- not the Gulf Stream -- the jet
17 stream causes turbulence, the build up of cumulus clouds
18 into alta -- into --

19 QUESTION: Thunder and lightning -- does that do
20 it?

21 MR. EATON: Normal and expected happenings in
22 aviation.

23 QUESTION: What does it? What is peculiar about
24 this one?

25 MR. EATON: What is peculiar about this case?

1 QUESTION: Yes, sir.

2 MR. EATON: This case did not involve a signal
3 engine failure of an air --

4 QUESTION: Engines don't fail? That's -- that's
5 not to be expected either like --

6 MR. EATON: Of course it is. That's why you put
7 three or four engines on the airplane.

8 (Laughter.)

9 MR. EATON: In this case, all of the engines on
10 the airplane -- well, they're not expected to fail, no.
11 They're suppose to run to their overhaul time and then be
12 overhauled, put back on. No, they're not expected to fail
13 from sloppy maintenance. But the difference between this
14 case and the single engine failure that Mr. Murray talked
15 about is that all of the engines quit.

16 QUESTION: I've been on at least a half a dozen
17 planes where an engine fell out.

18 MR. EATON: Where the engine failed?

19 QUESTION: You mean I lost some money?

20 (Laughter.)

21 MR. EATON: I don't believe so, Your Honor.

22 (Laughter.)

23 MR. EATON: I don't believe, no. I don't
24 believe a jury would compensate you in that case, because
25 only one of the engines failed, which is the reason why

1 there are lots of engines on an airplane.

2 QUESTION: (Inaudible) on a four motor and three
3 of them went out.

4 MR. EATON: Well, all the engines failed, every
5 engine on this airplane failed.

6 QUESTION: Oh, well. Oh, that's what kept me
7 from getting any money? I see.

8 (Laughter.)

9 MR. EATON: Yes, Your Honor.

10 QUESTION: I'm just worried about the money I've
11 lost.

12 MR. EATON: It's not just the terror suffered by
13 the passengers during this 7- or 8-minute period when they
14 all thought they were going to die.

15 QUESTION: Suppose there's heavy turbulence and
16 a passenger falls and has a fracture. Recoverable?

17 MR. EATON: According to Mr. Murray it is.

18 QUESTION: What is your position?

19 MR. EATON: I don't believe it makes any sense
20 to read that complex distinction into these two words,
21 "lesion corporelle," and that's basically what I've
22 argued.

23 QUESTION: I'm still not sure what your answer
24 it?

25 MR. EATON: Mr. Murray says the phrase "lesion

1 corporelle" or he has now backed it up several --

2 QUESTION: I want to know your position.

3 MR. EATON: Okay, my position is --

4 QUESTION: There's turbulence and it causes a
5 fracture. Recoverable under the Warsaw Convention?

6 MR. EATON: I'm sorry. I misheard the question.
7 No. The answer is no. It may very well be recoverable
8 under some other local law that's not inconsistent with
9 the Warsaw Convention if you can prove fault in that the
10 pilot flew into an area of known turbulence, for example,
11 against the advice of the FAA.

12 QUESTION: Simple turbulence causing an --
13 causing injury is not recoverable because it's not an
14 accident?

15 MR. EATON: I don't believe it's an accident,
16 Your Honor. It's not -- it's a normal expected event in
17 flight. You cannot avoid turbulence in flight. You can't
18 see it.

19 QUESTION: Well, you, gee, you don't ordinarily
20 encountered the kind of turbulence that causes somebody to
21 get hurt. That's very rare. Just as all of the engines
22 on a plane going out is very rare, but it happens.

23 MR. EATON: It's very rare, because the
24 commercial airlines are, are very careful about skirting
25 those areas in which they can project and product

1 turbulence.

2 MR. EATON: Right. I think one's an accident,
3 just as the other one is.

4 MR. EATON: Turbulence is not rare. Turbulence
5 is up there right now.

6 QUESTION: I'm talking about bone-breaking
7 turbulence. I'm not just, you know, a few -- a little
8 bump.

9 MR. EATON: Well, it, you know, that's not
10 something that --

11 QUESTION: Seems like an accident to me.

12 MR. EATON: It may be an accident. It may be an
13 accident. I took the position that minor incidence of
14 encounters with turbulence were not, because you needed
15 something that was serious, sudden, unexpected --

16 QUESTION: Yeah, but what about unexpected
17 turbulence?

18 MR. EATON: Unexpected --

19 QUESTION: That's an accident, isn't it?
20 Unexpected turbulence.

21 MR. EATON: Unexpected turbulence?

22 QUESTION: You don't have your seatbelt on,
23 you're thrown against the ceiling, and you're killed. You
24 have no cause of action?

25 MR. EATON: I believe you would because of the

1 serious nature of the incident.

2 QUESTION: But it has to be an accident for you
3 to have a recovery, doesn't it? I thought it was
4 everybody agreed there was unexpected turbulence that
5 caused physical harm that that was (a) an accident, (b) it
6 was covered by the treaty.

7 MR. EATON: I suppose my aviation background has
8 caused me to take a position that probably I shouldn't
9 have taken. I've been flying for 25 years. Every time I
10 get in an airplane I run into turbulence. It's not a
11 serious thing to me.

12 QUESTION: You fly higher than I do.

13 (Laughter.)

14 MR. EATON: Commercial airlines spend a lot of
15 time avoiding areas in which they can predict turbulence,
16 and generally when a commercial airliner gets in a
17 situation where the turbulence is so severe and it hasn't
18 alerted people to the need to wear the seatbelt and
19 somebody gets physically hurt, that's probably an accident
20 within the lay or even jurisprudential construction of the
21 statute.

22 But there's no harm done here, because what
23 we've got is essentially like of workers' compensation
24 system. There is a cap on damages here at \$75,000, and
25 there's a tradeoff. Hey, we'll give you strict liability

1 for anytime you get hurt in an accident in an airplane,
2 you give us a cap on the damages. So I don't have any
3 problem with suggesting that turbulence can be covered
4 here.

5 QUESTION: Work -- the courts in workmen's
6 compensation cases, at least in the days when I practiced
7 law, have been very hard put to define an accident, which
8 most State statutes for workmen's compensation use, injury
9 arising out of accident. Very hard put to define the term
10 accident as having any significant limitation.

11 MR. EATON: Well, the court took a stab at that
12 in the Air France v. Saks case and did define it to
13 exclude things that happened internally to the passenger.
14 But the definition of accident that the court came up with
15 in Air France v. Saks is very broad.

16 But let me get back to the French legal meaning,
17 because that's the technical question before the Court.

18 The conclusion of Dr. Mankiewicz and a number of
19 other scholars which are not cited in my brief but are
20 collected in the Eleventh Circuit's opinion and the
21 Eleventh Circuit was that the phrase lesion corporelle
22 simply didn't translate well into bodily injury. There
23 are a number of reasons why Dr. Mankiewicz reached that
24 conclusion. One was that the French civil law did not
25 recognize the distinction which the common law impact rule

1 imposes on court actions, and therefore, who would have
2 expected in 1929 that the drafters of the Treaty could hav
3 come up with something like that.

4 QUESTION: Did the theory of Dr. Mankiewicz
5 being that the drafters had intended to come up with
6 something that was recognized in French law?

7 MR. EATON: No, his conclusion was that by using
8 a phrase "lesion corporelle," they meant something broader
9 than the narrower concepts recognized, "dommage personal,"
10 "dommage patrimoniel," "materiel," or "moral," that they
11 wanted something broader and what they were after was --

12 QUESTION: Broader than any of those?

13 MR. EATON: No. Broad as the English concept of
14 personal injury, which incidentally is the word that all
15 the subsequent revisions of the Warsaw Convention have
16 used, which is down there at the bottom of my list of
17 reasons for the Eleventh Circuit's construction.

18 Dr. Mankiewicz was also impressed by the fact
19 that the German delegate to the Convention went back and
20 translated the official German translation of the Warsaw
21 Convention, rendered the phrase "lesion corporelle" as
22 "any infringement on the health of a passenger," and the
23 German translation is now used in Germany, Austria, and
24 Switzerland -- much broader than the English bodily
25 injury. He also looked to a thesis written by a student,

1 George Ripert, who was the French -- leading French
2 delegate and the drafter of this Convention. And the
3 Blanc-Dannery thesis, written under the supervision of
4 Dean Ripert, states that article 17 is broad enough to
5 cover nervous troubles arising out of an accident.

6 QUESTION: Let me pause there if I may. You say
7 any German translates that any infringement on the health
8 of the person. Would just the period of intense fright
9 for 5 minutes with no subsequent consequences qualify
10 under that?

11 MR. EATON: Yes, Your Honor. The damages may
12 not be great, and we're not here saying each of these
13 passengers is entitled to a million dollars.

14 QUESTION: But you think that being frightened
15 for a minute with no after effects would be an
16 infringement on your health within the meaning --

17 MR. EATON: Yes, but the more important damages,
18 and I didn't get to answer that question about what the
19 damages the passenger have sustained in this case. There
20 are two passengers who suffered physical sequelae which
21 give you a recovery even under Mr. Murray's theory. There
22 are several of these passengers who will testify that this
23 event was so terrifying to them that they have never been
24 able to fly on an airplane again. That's an ongoing,
25 permanent, perhaps, mental injury. There are people who

1 have nightmares, fear of flying, the whole panoply of
2 damages that you might expect in a case like this.

3 QUESTION: May I ask this -- I don't know maybe
4 I should ask your opponent this. Supposing a person -- a
5 passenger was so frightened that he or she had a heart
6 attack -- no physical -- would that be -- would they agree
7 that would be recoverable?

8 MR. EATON: Yes, Your Honor, that is a physical
9 sequelae of a mental distress --

10 QUESTION: I see. Okay.

11 MR. EATON: -- which they say the common law
12 impact rule does not exclude.

13 In this case my understanding is that there was
14 a pregnant woman who gave birth prematurely as a result of
15 the mental stress. The baby was blind and retarded as a
16 result of the premature delivery. Eastern did not contest
17 that claim. That claim was litigated and my understanding
18 is that, that they have collected their \$75,000 in that
19 case.

20 So there is a panoply of damages which can occur
21 to people put in this situation. It may be that some of
22 these claims will be awarded zero damages. A single-
23 engine failure, minor turbulence, whatever. A jury is not
24 going to compensate you for it. But that's not a reason
25 to exclude legitimate cases of people who flew for a

1 living and can no longer fly as a result of the terror
2 that they have suffered as a result of this inexcusable
3 incident. It was just poor, sloppy maintenance, which the
4 Eleventh Circuit has held the allegations of our complaint
5 are sufficient to support a finding of willful and wanton
6 misconduct.

7 Now let me turn to the subsequent conduct of the
8 contracting parties, because this is a very important
9 aspect --

10 QUESTION: Mr. Eaton, before you leave the --
11 you know, this textual stuff to an extent, Dr. Mankiewicz,
12 did he say anything more categoric, because I didn't go
13 back and consult his treatise? What is quoted in the
14 opinion below is his statement that while bodily injury is
15 undoubtedly a grammatically correct translation of "lesion
16 corporelle," it may rightly be argued that -- it may -- it
17 may rightly be argued that the meaning of that expression
18 in French law and its equivalence in other civil laws are
19 more correctly rendered by the expression personal injury.
20 That's sort of, you know --

21 MR. EATON: Well --

22 QUESTION: Is he just saying, you know, it's a
23 nice question or does he really come down four-square for
24 the fact that that's what it means?

25 MR. EATON: He's not the Supreme Court of the

1 United States, so he did not say this is what the language
2 means.

3 QUESTION: He didn't.

4 MR. EATON: It was a scholarly opinion. It was
5 his opinion.

6 QUESTION: The usual scholarly opinion, waffling
7 and --

8 MR. EATON: Yes, waffling to some extent.

9 (Laughter.)

10 QUESTION: Yeah.

11 MR. EATON: There is no question but that the
12 question is troublesome. The phrase is ambiguous and the
13 drafting history is not very helpful. Mr. Murray says
14 it's clear and unambiguous. I think everybody here will
15 disagree with that.

16 But, no, what he says is that it is ambiguous,
17 it is not clear, but I conclude, my opinion is based on
18 all these things that the phrase "lesion corporelle" is
19 more appropriately translated into the English concept of
20 personal injury.

21 QUESTION: Is more appropriately -- he says
22 that?

23 MR. EATON: Yes, then --

24 QUESTION: Not just maybe argued that it --

25 MR. EATON: No, he said what you said.

1 QUESTION: He said what I said. Okay.

2 MR. EATON: I'm paraphrasing it.

3 But let's turn to the subsequent conduct. Mr.
4 Murray talks about a 1951 meeting in Madrid at which
5 absolutely nothing happened, nothing came out of it. It
6 was an interim meeting at which some people proposed
7 probably to cure the ambiguity that mental injury be made
8 more specific in article 17, but nothing happened. What
9 did happen in 1955 at The Hague is that article 31(c) was
10 redrafted and proposed as an amendment to the Warsaw
11 Convention. And it translated the phrase, "mort,
12 blessure, ou de toute autre lesion corporelle" into death
13 or personal injury. And that sits today as article 31(c)
14 of the amendments adopted at The Hague. Now, in the --

15 QUESTION: What, what does 31(c) deal with?

16 MR. EATON: 31(c) deals with the legend that has
17 to be put on the passenger ticket, and it says you've got
18 to tell the passenger about the limitations on his right
19 of action to recover for death or personal injury.

20 Now in 1966 in Montreal, after the United States
21 Government denounced this treaty because it had a \$8,300
22 cap on the recoverability of damages, the airlines got
23 together and they decided to raise their limits, accept
24 strict liability, which was not initially written into the
25 Warsaw Convention. It was a negligence action although

1 the burden of proof was shifted to the carrier to prove
2 non-negligence rather than the traditional. And in
3 exchange for all of those, the airlines also agreed to put
4 on the face of their ticket an advice to the passenger
5 which advised them of their limitations of liability.

6 In all the discussions and the written documents
7 produced at the Montreal Agreement, the phrase bodily
8 injury and personal injury are used interchangeably
9 without distinguishing between the two. They appear
10 almost an equal number of times in the Montreal Agreement.
11 The two phrases appear and are used interchangeably in the
12 CAB order which adopted or approved the Montreal
13 Agreement. And the passenger ticket which is now issued
14 to all passengers getting on a carrier in international
15 air transportation advises them of the limitations of the
16 carrier's liability in case of death or personal injury.

17 QUESTION: And the Montreal Convention was in
18 English?

19 MR. EATON: Yes, Your Honor.

20 QUESTION: Well, what --

21 MR. EATON: I hesitated only because I'm not
22 absolutely certain, but I'm pretty sure it is.

23 QUESTION: (Inaudible).

24 MR. EATON: Say that again, sir.

25 QUESTION: Opinion of the Second Circuit

1 requires that that be posted, that the limitations must be
2 put on the counter of the airline.

3 MR. EATON: On the ticket itself. Yes, Your
4 Honor.

5 QUESTION: That wasn't voluntary. That was
6 required.

7 MR. EATON: Well, the airlines agreed to do that
8 in the Montreal Agreement, and now the Agreement itself
9 requires that that --

10 QUESTION: It needed a court case to do it.

11 MR. EATON: In any event it is now required for
12 whatever reason --

13 QUESTION: If you ever read the opinion, just
14 read who wrote it.

15 MR. EATON: Okay. I had to --

16 QUESTION: What actual advice do they give them?

17 MR. EATON: The limitation on the passenger
18 tickets is described as a limitation on the damages, and I
19 can't quote it, because I don't have it handy, for any
20 cause of action you may have for death or personal injury.

21 QUESTION: Well, does it say that you get
22 nothing if the personal injury is unaccompanied by a
23 physical manifestation?

24 MR. EATON: No.

25 QUESTION: It just says -- what does it say?

1 There's a \$75,000 limit?

2 MR. EATON: It says you have a \$75,000 limit on
3 any action you have for death or personal injury arising
4 out of international air -- an accident in international
5 air transportation. I wish I could quote it. I don't
6 have it. The tickets for some of these passengers are in
7 the record before the Court.

8 QUESTION: Of course, that's still literally
9 consistent with the position that Eastern is taking.

10 MR. EATON: No, because death or personal --
11 personal injury is a much broader concept than bodily
12 injury.

13 QUESTION: Yeah, but to say there's a \$75,000
14 limit on all personal injury is not inconsistent with the
15 position that there is a zero limit on personal injury
16 unaccompanied by a physical manifestation.

17 MR. EATON: That's not inconsistent, but the
18 point I'm trying to make is that the English translation
19 of "lesion corporelle" into bodily injury is not
20 necessarily the correct translation of the phrase, and the
21 subsequent conduct of the parties recognizes that it is
22 more appropriately translated into the broader concept of
23 personal --

24 QUESTION: But wouldn't it have been misleading
25 to put on the tickets that there's a \$75,000 limit for,

1 for bodily injury, leaving -- leaving the implication that
2 if you had mental distress besides the bodily injury, you
3 could recover something more. I mean if, you know, if I
4 were writing it as a limitation provision, I might well
5 want to say for personal injury to avoid implying to the
6 passenger that the \$75,000 limit applied only to bodily
7 injury but you could get more money for mental distress,
8 whereas in fact what they're saying is you can't get
9 anything for mental distress unless it accompanies bodily
10 injury. Wouldn't that have been a good reason for
11 translating it that way?

12 MR. EATON: The whole problem I have with
13 Eastern's position is that this very complex distinction
14 represented by the common law's impact rule can't be
15 spelled out of the language in article 17. It takes a
16 whole paragraph to explain the distinction between you get
17 mental damages if you have a physical injury but you don't
18 get mental damages if you don't have a physical impact
19 unless you have some physical sequelae arising out -- you
20 can't read all of that into there and, therefore, to draft
21 the ticket provision the way Eastern wants this article 17
22 read, you're going to need another page.

23 The point is --

24 QUESTION: Mr. --

25 MR. EATON: -- that although the State

1 Department translated "lesion corporelle" into bodily
2 injury, it has routinely been translated into the broader
3 phrase, personal injury, by the subsequent conduct of the
4 parties.

5 QUESTION: Mr. Eaton, I thought in 1955 that the
6 delegates did not change the language of article 17.

7 MR. EATON: They did not in 1955.

8 QUESTION: And I thought also that in 1955,
9 there actually was an amendment proposed to article 17 to
10 make it say any other mental or bodily injury and that was
11 rejected by the delegates.

12 MR. EATON: My understanding of those two early
13 discussions of the problem was that the people -- the
14 delegates thought that there was some ambiguity here and
15 they wanted to make sure that they removed the ambiguity.
16 But there was not --

17 QUESTION: Well, the decision was not to amend
18 it to include mental or --

19 MR. EATON: Perhaps the history --

20 QUESTION: -- bodily injury in 1955.

21 MR. EATON: The history is not particularly
22 specific about the reason why the amendments were voted
23 down. It may very well -

24 QUESTION: It's because the Greek delegation
25 didn't want to make that change.

1 MR. EATON: Well, there is also some discussion
2 in the materials that I read to the effect that it was not
3 necessary to specify it any further because it was
4 included within the concept of "lesion corporelle."

5 Let's go to 1971 and 1975, because in the
6 Guatemala City protocol and the in the Montreal protocols
7 3 and 4, neither of which had been adopted by the United
8 States. Article 17 of the French was not changed, but for
9 the first time the Warsaw signatories, delegates, drafted
10 an authentic English version of article 17. This is not
11 the State Department's translation in 1934 now, but an
12 authentic English version of article 17 which translates
13 the phrase "lesion corporelle," which remains in the
14 French version as personal injury -- death or personal
15 injury.

16 QUESTION: And we haven't agreed to that?

17 MR. EATON: The Senate has never adopted --

18 QUESTION: Right.

19 MR. EATON: -- any of these subsequent
20 amendments because --

21 QUESTION: But you think it's binding on us
22 somehow?

23 MR. EATON: It's absolutely not binding, Your
24 Honor, but it is evidence of the subsequent construction
25 of the intent of the framers in 1929 that the delegates

1 keep coming to these conventions and assume that "lesion
2 corporelle" means what Dr. Mankiewicz opines that it means
3 and that is personal injury and the Court in the Air
4 France v. Saks case is looking to the death -- for finding
5 the definition of accident, looked at the Guatemala City
6 protocol and the Montreal protocols 3 and 4 for that kind
7 of evidence.

8 Let me also suggest to the Court that the common
9 laws impact rule at this point in our history leads to
10 some rather strange and silly torturing of the facts in
11 order to get cases into court. I sent up some
12 supplemental material on the United 811 flight, the 747
13 which lost the cargo door and sucked 9 people out. The
14 plaintiffs in that case in order to get around Mr.
15 Murray's impact rule and his construction of article 17,
16 alleged and I imagine they can prove that they all inhaled
17 some insulation fibers that were circulating about the
18 cabin, that they got struck with small pieces of debris,
19 and that they were scared to death. Now, if the impact
20 rule applies, those plaintiffs get a recovery for their
21 mental distress because they inhaled some insulation
22 fibers because there was a physical impact. But the
23 clients in my case, who were just as scared as those
24 people, do not.

25 And Justice O'Connor mentioned the fact that if

1 somebody cut their finger here or I would add bumped their
2 head during the getting ready for the ditching process,
3 they have a physical impact or a physical injury which
4 will support a recovery of their mental distress damages.
5 But the person sitting next to them who was more careful
6 in putting on his life vest and getting his head between
7 his knees, does not. And I don't think that makes a whole
8 lot of sense.

9 I've also suggested in the brief, most
10 respectfully, that a mental injury is a bodily injury, an
11 injury to the brain. We now understand an awful lot more
12 about the brain than we did 60 years ago. It is a
13 biochemical organ like other organs and when you suffer
14 anxiety, freight, neuroses that arise out of these things,
15 those are biochemical disorders to a bodily organ. And I
16 would submit that a mental injury in our present
17 understanding is in fact a physical injury.

18 QUESTION: Well, is that accepted -- I mean,
19 that may be a, it may be a pathological kind of
20 functioning, but it's not an injury to the brain in the
21 sense that there would be a tissue injury if a bullet went
22 through it or a blunt object penetrated it. I mean --

23 MR. EATON: That seems --

24 QUESTION: That's, that's kind of the brain's
25 equivalent of my manifestation of high blood when I get

1 scared. That's something other than a physical injury,
2 isn't it?

3 MR. EATON: Well, that's not an injury, high
4 blood pressure.

5 QUESTION: That's right. It's a response.

6 MR. EATON: That would be a normal injury aging
7 process. Sure.

8 QUESTION: It's a response to something that I
9 perceive. And what you're describing as a brain injury is
10 just a response to something perceived, isn't it?

11 MR. EATON: Well, post-traumatic disorder
12 suffered by Vietnam veterans is recognized mental injury
13 as I understand it because the body chemistry --

14 QUESTION: Well, it's a mental injury, but it's
15 not a brain injury, is it?

16 MR. EATON: The brain's chemistry has been --
17 gone out of whack. It's been adjusted or readjusted or
18 whatever so that people have neuroses that are treatable
19 by chemicals. Paranoia, psychoses, things like that are
20 all created by chemicals. I don't mean --

21 QUESTION: And you think that's bodily injury?

22 MR. EATON: If it --

23 QUESTION: As we normally use that term?

24 MR. EATON: If it is caused by the stress of a
25 terrifying incident and you have medical expert testimony

1 that will relate the permanent mental injury, the stress,
2 the psychoses, the neuroses, or whatever to this incident,
3 yes, I think it is caused by the incident.

4 QUESTION: Thank you, Mr. Eaton.

5 MR. EATON: Thank you.

6 QUESTION: Mr. Murray, do you have rebuttal?

7 MR. MURRAY: Yes, Your Honor.

8 REBUTTAL ARGUMENT OF JOHN MICHAEL MURRAY

9 ON BEHALF OF THE PETITIONER

10 MR. MURRAY: Mr. Chief Justice, and may it
11 please the Court:

12 I would like to point very briefly to two things
13 that Mr. Eaton said. Mr. Eaton fell into the trap in
14 which the Eleventh Circuit fell in discussing the French
15 meaning of the term "lesion corporelle."

16 QUESTION: He didn't fall into it. He jumped in
17 and invited the Eleventh Circuit to follow him, I think.

18 (Laughter.)

19 MR. MURRAY: That might well be, Your Honor.

20 But he skipped from a determination -- a
21 discussion of "lesion corporelle" immediately to a
22 discussion of "dommage," "dommage personal," "dommage
23 patrimoniel." Our brief discusses "dommage materiel,"
24 "dommage moral." Those type concepts are understood in
25 the French law. They were understood in 1929 when the

1 Convention was drafted. But "lesion corporelle" is a
2 term, not necessarily a French legal term. It's no more a
3 French legal term than a cut on the arm is a legal term in
4 this country. And "lesion corporelle" means an injury to
5 a bodily part or bodily organ, and we simply ask that it
6 be interpreted as such.

7 With regard to the subsequent conduct of the
8 parties, I wanted to point out, number 1, that article 17
9 in its original French text as it was adopted in 1929 is
10 what governs this Convention today. There's been no
11 change in it. There has been a change in the notification
12 to passengers as required by the Montreal Agreement. The
13 term "personal injury" was substituted. As Justice Souter
14 pointed out, the use of personal injury is not
15 inconsistent --

16 QUESTION: No, it's not inconsistent, but
17 there's a question I think as to whether it's an adequate
18 disclosure if it doesn't tell the passenger that there's
19 one category of personal injuries as to which there's no
20 recovery.

21 MR. MURRAY: Well --

22 QUESTION: That's the question, whether it's an
23 adequate disclosure.

24 MR. MURRAY: Justice Stevens, if you remove
25 Warsaw from the consideration and you put this in a simple

1 negligence context, the term "personal injury" is bandied
2 about by lawyers and judges and it has the connotation
3 legally of being no recovery in simple negligence cases
4 where there is mental injury unaccompanied by physical
5 manifestation. And that's all we're asking that this term
6 -- that this Convention be interpreted as and we think
7 that the use of the term "personal injury" in a notice
8 context is consistent with that.

9 And Professor Lowenfeld, who was the attendee of
10 the United States at the Montreal Agreement said, and this
11 is quoted in Floyd at page 1474, that no significance
12 should be attached to the use of the word "personal
13 injury." So it was not the framers' intention in 1929, it
14 was not the delegates' intention in Montreal in 1966 to
15 change the meaning of article 17.

16 In sum, we feel that compensable injuries under
17 the Warsaw Convention should very clearly include only
18 injuries where there is a -- an objective, palpable,
19 physical injury and that the Warsaw Convention should be
20 the exclusive vehicle for recovery for passengers in
21 international air transportation.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Murray.

24 The case is submitted.

25 (Whereupon, at 11:55 a.m., the case in the

1 above-entitled matter was submitted.)

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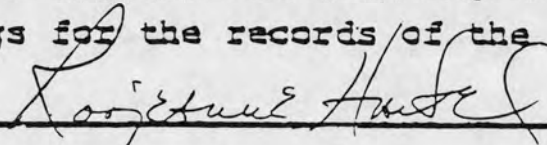
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#89-1598 - EASTERN AIRLINES, INC., Petitioners v. ROSE MARIE FLOYD,

ET VIR., ET AL.

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