PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 124 | Issue 1

Fall 2019

Death Be Not Strange. The Montreal Convention's Mislabeling of Human Remains as Cargo and Its Near Unbreakable Liability Limits

Christopher Ogolla

Death Be Not Strange. The Montreal Convention's Mislabeling of Human Remains as Cargo and Its Near Unbreakable Liability Limits.

Christopher Ogolla*

ABSTRACT

This article discusses Article 22 of the Convention for the Unification of Certain Rules for International Carriage by Air ("The Montreal Convention") and its impact on the transportation of human remains. The Convention limits carrier liability to a sum of 19 Special Drawing Rights (SDRs) per kilogram in the case of destruction, loss, damage or delay of part of the cargo or of any object contained therein. Transportation of human remains falls under Article 22 which forecloses any recovery for pain and suffering unaccompanied by physical injury. This Article finds fault with this liability limit. The Article notes that if a plaintiff were to bring a claim against a carrier for mishandling of human remains, recovery will be limited to the weight of the corpse and the casket in kilograms, multiplied by 19 SDRs. This leads to the absurd result of recovering more for a heavy corpse and/or casket versus a light one. The Article argues that by classifying human remains as ordinary cargo thus applying ordinary cargo rules, The Montreal Convention as generally applied is inhuman and absurd.

* Assistant Professor, Barry University Dwayne O. Andreas School of Law. This paper benefitted greatly from the helpful suggestions and comments from Professor William Mock, UIC John Marshall Law School, Chicago, Professor Christopher Roederer, University of Dayton Law School, and Professor Nancy Rapoport, University of Nevada Las Vegas William S. Boyd School of Law, during the South Eastern Association of Law Schools 2018 Annual Conference in Fort Lauderdale, FL. Additionally, I would like to thank my research assistant, Marlan Eller for doing an outstanding job as always. Finally, I would like to thank the editors of *Dickinson Law Review* for their excellent work in getting this paper ready for publication.

TABLE OF CONTENTS

INTRODUCTION

On May 12, 2017, a southern California man buried the body of an individual he thought was his late son. Eighty-two-year-old Frank J. Kerrigan is father to fifty-seven-year-old Frank M. Kerrigan, who has mental problems and was homeless at the time he was declared deceased. Father Frank J. Kerrigan received a call from the Orange County Coroner's office that indicated his son's dead body had been found behind a Verizon Wireless store. The office told him the body had been identified and confirmed through fingerprint analysis. In actuality, the police merely corroborated a statement that the body looked like Kerrigan's son by reviewing an old driver's license photo. But Kerrigan and his family were not privy to this identification process. The family collected the body, which had a full head of wavy-brown-gray hair and looked about the right age, and they held a burial ceremony. Dozens of people attended the funeral.[1]

One night in late May, Frank J. received a call from a family friend who told him that his son was in fact alive. The county coroner officials misidentified the body.[2] It later turned out the body the Kerrigan family buried was that of John Dean Dickens, a man

1. Avik Selk, *A Grieving Father Buried a Man He Thought Was His Son—Who Turned Up Alive a Week Later*, WASH. POST, June 25, 2017, https://wapo.st/30zg9QT [https://perma.cc/GG4Y-VB2S].

2. *Id.*

who disappeared from Kansas nearly 30 years earlier, and who, like Kerrigan's son, had mental health problems and was homeless.[3]

Reasonable people may agree that the Kerrigan family has a strong case against the Orange County Coroner's office, most likely for a violation of Frank M. Kerrigan's civil rights,[4] negligence, and emotional distress. Now consider the following unreported case. Mr. Obi,[5] a naturalized U.S. citizen who was born in Africa, died in the United States after a long illness. His body was embalmed at a funeral home. His family decided to inter his remains in his country of birth.[6] The family paid the funeral home for embalming and air transportation services.

The funeral home contracted with a freight company, which in turn contracted with an international airline to fly Mr. Obi's remains to Africa. Mr. Obi's body was flown from the United States to an international airport in Europe en route to Africa. Mr. Obi's family members arrived at the local airport expecting to pick up Obi's body, which was to be buried later during the week. All burial arrangements had been made, including funeral services, flowers, food, and final rites befitting a man of his status.[7]

The family waited for Mr. Obi's remains at the airport terminal for several hours, but when the flight arrived, his body was nowhere to be found. As family members began to panic, they called the funeral home in the United States to find out what happened. The funeral home manager called the freight company, which in turn contacted the airline. An airline representative stated that because of an international health pandemic, there were travel restrictions on flying human remains to Mr. Obi's country of origin without a special waiver issued from that country's Ministry of Health. After a couple days, the family received a call from an airline representative who told them Mr. Obi's casket had arrived and was ready for

3. *See Lives of Families Intertwined After Orange County Coroner's Office Burial Mix-Up*, CNN WIRE (July, 23, 2017, 4:14 PM), https://bit.ly/2LHYX7r [https://perma.cc/7ESU-KRKM].

4. Kerrigan's lawyer filed a notice of claim—a precursor to a lawsuit—against Orange County. This notice stated "[t]he lawsuit will argue that [Kerrigan's son's] civil rights were violated because the Coroner's Office did not make adequate efforts to determine if the body was in fact his because he is homeless." Scott Schwebke, *Man Believed Dead Is Alive: Family Buries Wrong Person After Mix-up By Coroner's Office*, ORANGE CTY. REG. (July 13, 2017, 9:04 PM), https://bit.ly/2S4W9Cj [https://perma.cc/SN96-TW36].

5. The name of the deceased in this case has been changed to protect the family's privacy.

6. For privacy purposes, Africa here refers to both the Continent and Mr. Obi's country of birth. No substantive change is made by this designation.

7. Obi was a well-known and respected member of his tribe, despite his many years of living in the United States.

pick up. The family hired a hearse and drove to the airport to pick up Mr. Obi. The casket was promptly delivered to the family members, but there was one big problem: The casket contained the wrong body. Rather than containing Mr. Obi, the casket contained the remains of a woman who died somewhere in Europe and was mistakenly flown to Africa. There was panic at the airport.

After extensive consultations, the airline finally located Mr. Obi's casket in airport storage in Europe and flew it to Africa. The casket arrived approximately five days later. Mr. Obi's body was swollen, had a foul odor of decomposition, and leaked fluid. The family members were unable to view the body in its putrid condition. Mr. Obi's widow suffered mental anguish, anxiety, worry, shock, and fright. His children, who by now had flown to Africa to bury their father, were inconsolable.[8]

Will Mr. Obi's American family have any causes of action for pain and suffering against the airline in U.S. courts? In contrast to the Kerrigan family's case,[9] and according to the Montreal Convention, the answer is surprisingly no.[10] This raises the following question: Why is U.S. law willing to provide a remedy for the emotional distress suffered by those whose loved ones' remains have been mishandled in the United States[11] but not for those whose loved ones' remains have been mishandled abroad or en route to or from the United States? One part of the problem is the Montreal Convention, specifically, its treatment of human remains as cargo.

---

8. The facts of this case are eerily similar to those in Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788, 789 (3d Cir. 1992). The case involved a suit against Pan American Airways for the mishandling of human remains that were transported from New York to Nigeria. *See infra* Part V.

9. The import of Frank Kerrigan's case to this paper is to show that the state courts would offer adequate remedy in the mishandling of human remains, where the federal courts would not under the Montreal Convention.

10. *See* McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 VAND. J. TRANSNAT'L L. 1043, 1046 (2008). The author notes:

> In 1999, representatives from 121 states convened in Montreal, Canada, not to amend Warsaw, but to replace it with a new international treaty. Recovery for "mental injury in the absence of accompanying physical injury" was a primary objective and was listed as a condition to the United States' participation. Although a clear majority of states voiced approval for mental injury recovery, the new treaty somehow retained the 1929 Warsaw limitation of "bodily injury."

Id.

11. *See generally* VICTOR SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS, 470–71 (12th ed. 2010) (collecting cases on actions for mental anguish based on negligent interference with dead bodies).

This paper argues that the current state of the law is unfair for passengers alleging emotional distress unaccompanied by physical injury against international air carriers under the Montreal Convention ("the Convention"). This unfairness not only arises from the Convention's foreclosure of emotional distress recovery, but it is also exemplified by the nature of shipping contracts under the Convention. As an example, Article 22 limits carrier liability to a sum of 19 Special Drawing Rights ("SDR") per kilogram in the case of destruction, loss, damage, or delay of part of the cargo or of any object contained therein. Article 22 further states the total weight of the relevant package(s) is the only weight to be considered in determining carrier liability. Therefore, if a plaintiff were to bring a claim against a carrier for mishandling human remains, his or her recovery will be limited to the weight of the corpse and the casket in kilograms multiplied by 19 SDR. This leads to the absurd result of recovering more for a heavy corpse and casket versus a lighter corpse and casket. For example, petitioners would seemingly recover more for a dead adult than they would for a dead infant simply on the basis of weight. Also consider Judaism, which discourages ostentatious funerals and stipulates that a traditional Jewish coffin be made of plain wood.[12] Would the recovery for such a casket be less? Could this be considered religious discrimination? Surely the drafters of the Convention would not have intended such an unfair result.

Part I introduces a case of a parent in California who buried the wrong body after the county coroner misidentified the decedent as the parent's child. The import of the story is that state courts would offer an adequate remedy for the mishandling of human remains, whereas the federal courts would not under the Convention. Part II provides a brief discussion of the articles of the Convention, noting limits on liabilities for the airlines. Part III discusses the number of Americans who die outside of the United States and identifies some of the difficulties associated with shipping the remains of U.S. citizens who die abroad. Part IV describes the Convention's conceptualization of human remains as cargo, even though the Convention itself neither contains nor defines the term "human remains." Part V identifies and analyzes federal cases that have conceptualized human remains as cargo in lawsuits seeking emotional distress damages against international air carriers under both the Warsaw Convention and the Montreal Convention. This

12. WILLIAM CUTTER, THE JEWISH MOURNER'S HANDBOOK, 17 (Behrman House Inc., 1992).

part further notes that a number of federal courts of appeal, in addressing negligence complaints regarding the mishandling of human remains in international flights, have grappled with how to address such emotional distress claims; most denying any relief for pain and suffering. Part VI compares the federal scheme with state laws on the mishandling of human remains, pointing out that various states recognize emotional distress claims resulting from such mishandling without physical manifestation of injury. Part VII addresses the choice of law conflicts involved in negligence claims emanating from the mishandling of human remains. The distinction between contract law and tort law is usually blurred in such cases. As an example, Article 22 of the Convention provides that if the consignor has declared the cargo at a higher value, the carrier is liable for that higher value. But how can one declare a higher value for human remains? Part VIII provides suggested approaches to resolving recovery difficulties and disparities, including the need for federal courts to interpret the Convention in a way that avoids anomalous results and the need for carriers to apply common sense measures designed to minimize loss, delay, or destruction of human remains. To conclude, Part IX indicates the Montreal Convention's classification of human remains as cargo and application of ordinary cargo recovery rules is both inhuman and absurd.

I. THE MONTREAL CONVENTION

The Convention for the Unification of Certain Rules for International Carriage by Air was adopted in 1999 in Montreal, Canada. Also known as the Montreal Convention, it applies to all international carriage of persons, baggage, or cargo performed by an aircraft for reward.[13] It currently has 136 state signatories, including the United States.[14]

The Convention serves as the successor to the Warsaw Convention, a very similar treaty introduced in 1934.[15] "The Warsaw Convention is an international treaty designed to obtain uniformity

13. Convention for the Unification of Certain Rules for International Carriage by Air, art. 1(1), May 28, 1999, 2242 U.N.T.S. 309, https://bit.ly/2JHoDi2 [https://perma.cc/8E8B-3ULC] [hereinafter Montreal Convention].

14. INT'L CIV. AVIATION ORG. (ICAO), *Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, 1, 1 (1991), https://bit.ly/2tXkBrT [https://perma.cc/4NRR-2NGW] [hereinafter *Convention for Unification*].

15. Allison Stewart, Note, *The Montreal Convention's Statute of Limitations—A Failed Attempt at Consistency*, 80 J. AIR L. & COM. 267, 268 (2015).

among international air carriers in transportation transactions."[16] The drafters of the Convention intended for it to replace predecessor treaties governing this area, including the Warsaw Convention.[17] In fact, Article 55 of the Montreal Convention specifies that it shall prevail over any rules which apply to international carriage by air between state parties to the Convention by virtue of those states being party to one of the following: (a) Warsaw Convention, (b) Hague Protocol, (c) Guadalajara Convention, (d) Guatemala City Protocol, or (e) Montreal Protocols.[18]

The Convention is divided into 57 articles. Briefly, Article 1 states that the Convention applies to international carriage of persons, baggage, or cargo performed by an aircraft for reward. Article 2 notes that the Convention applies to carriage performed by the State or by legally constituted public bodies. Articles 3 through 13 cover passengers, baggage, cargo, and documentary requirements, as well as the enforcement of rights of consignor and consignee. Article 16 requires a consignor to furnish information and documents necessary to meet the formalities of customs, police, and any other public authorities. Article 17, one of the most litigated sections of the Convention,[19] defines conditions for airline liability for harm to passengers and baggage. It provides that "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[20] This Article further contains rules for carrier liability in the case of destruction, loss of, or damage to, checked baggage. Articles 18 and 19 lay out the rules for damage and delay to cargo, and Article 20 exonerates the carrier if it proves the damage was caused or contributed to by the negligence of the person claiming compensation.

Articles 21 and 22 set out liability limits.[21] The amounts are expressed in SDR, an international "currency" established by the International Monetary Fund. The value of the SDR is calculated

16. Onyeanusi v. Pan Am. World Airways, Inc., 767 F. Supp. 654, 654 (E.D. Penn. 1990).

17. Marty F. Elfenbein & Katherine A. Roberts, *Stranded: Navigating Aviation Delay Damages Under the Montreal Convention*, 88 FLA. BAR J. 20, 20 (2014).

18. Montreal Convention art. 55(1).

19. As of June 5, 2019, a search of the phrase "Article 17 of Montreal Convention" under the federal cases directory in Westlaw shows approximately 99 results. The same search on Lexis Nexis results in 103 federal cases. The seminal case discussing Article 17 (of the Warsaw Convention) is Air France v. Saks, 470 U.S. 392 (1985). As of the time of writing, it has been cited 2,296 times.

20. Montreal Convention art. 17(1).

21. *See Convention for Unification*, *supra* note 14, at 13.

in reference to a selection of the major currencies in the world's trading and financial systems. This selection includes the U.S. dollar (USD), Euro, Japanese Yen, Chinese Renminbi, and Pound Sterling. One SDR has an approximate value of 0.582 USD.[22] Article 22 preserves the limits of liability in relation to delay, baggage, and cargo. Paragraph 1 sets a 4,150 SDR limit on damages caused by delay in the carriage of passengers. This figure has since been adjusted to 4,694 SDR.[23] Paragraph 2 limits carrier liability for destruction, loss, damage, or delay to a sum of 19 SDR per kilogram. Additionally, in the case of destruction, loss, damage, or delay of part of the cargo or of any object contained therein, only the total weight of the relevant package(s) will be considered in determining carrier liability. Paragraph 5 denies carriers the protection of the liability limitations of paragraphs 1 (passenger delay) and 2 (baggage) if the carrier, its servants, or its agents, acting within the scope of their employment, have caused the damage intentionally or recklessly with knowledge that damage would probably result. Consistent with Article 22(5) of the Convention, this willful misconduct exception to the liability limits does not appear to apply to cargo.[24] Paragraph 6 is a settlement inducement provision that allows fees to be recovered, but if the settlement offer is greater than liability, it does not apply.[25]

Article 23 specifies conversion rates for SDR, and Article 24 provides for a five-year review of the rates based on inflation.[26] Article 25 allows the carrier to stipulate to higher limits or no limits to the Convention's liabilities. Articles 26 through 28 define contractual provisions, freedom to contract, and advance payment in the event of passenger death or injury. Articles 29 and 30 provide for the basis and aggregation of claims. Article 31 requires a timely notice of complaint to the carrier: within 14 days in the case of damage to cargo and 21 days in the case of delay. Article 32 allows for the cause of action to survive the person liable. Article 33, the jurisdictional provision, allows a plaintiff to bring a cause of action where the carrier is incorporated, where it has its principal place of

22. Special Drawing Right (SDR) Factsheet, INT'L MONETARY FUND (Mar. 8, 2019), https://bit.ly/2omUhHL [https://perma.cc/G2YA-X56W].

23. Inflation Adjustments to Liability Limits Governed by Montreal Convention Effective December 30, 2009, 74 Fed. Reg. 59,017, 59,017 (Nov. 16, 2009).

24. Montreal Convention art. 22(5).

25. Montreal Convention art. 22(6).

26. *See* Inflation Adjustments to Liability limits Governed by Montreal Convention Effective Dec. 30, 2009, 74 Fed. Reg. at 59,017 ("Under Article 24 of the Convention, ICAO is to review those limits every five years in light of inflation that has occurred during that period.").

business, or where the plaintiff permanently resides (so long as the carrier provides service to that country). Article 34 concerns arbitration. Article 35 defines the statute of limitations and provides that the right to damages shall be extinguished if an action is not brought *within a period of two years.* Articles 36 and 37 define rights for actions against successive carriers and third parties. Article 38 covers parties in combined carriage. Articles 39 through 48 lay out the rights of passengers where all or part of the carriage is provided by a person other than the contracting carrier or an airline not party to the contract or mutual liabilities. Article 49 voids any clauses and agreements infringing upon the Convention. Article 50 requires carriers to maintain adequate insurance. Article 51 exempts documentation requirements when carriage is performed in extraordinary circumstances. Article 52 defines calendar days. Articles 53 through 57 deal with ratification, denunciation, relation to other Conventions, and reservations that allow states to exempt government flights (including military aircrafts) from the application of the Convention.[27]

How much does the Convention affect Americans? Since 2003, the Montreal Convention has governed flights between the United States and other signatories.[28] According to the National Travel and Tourism Office, in 2016 approximately 80,226,167 American citizens traveled to international regions.[29] Most Americans flying overseas are likely oblivious of the Montreal Convention, because most flights are relatively safe. But when one's luggage is lost or damaged in an international flight or when one is injured on the aircraft or while boarding or landing, the Convention comes into play. The Convention has perhaps its greatest impact when an American dies abroad. A brief discussion of American deaths abroad will illustrate this point.

II. AMERICAN DEATHS ABROAD

In 2001, the U.S. Census Bureau informed Congress that it did not have an accurate estimate of the total number of Americans living abroad. The U.S. Census Bureau further noted that the U.S. Department of State does not officially track either the number or

27. *Convention for Unification*, *supra* note 14.

28. WILLIAM B. BOONE & PAUL PEYRAT, CAL. TORT GUIDE § 2.22 (3d ed. 2019).

29. U.S. DEP'T COM., U.S. CITIZEN TRAVEL TO INTERNATIONAL REGIONS (2017), https://bit.ly/2SdsMy0 [https://perma.cc/FBG3-A6XF].

location of U.S. citizens living in other countries.[30] Nevertheless, the Federal Voting Assistance Program estimated there were 5.7 million U.S. citizens living abroad in 2014.[31]

With regard to American deaths abroad, the Foreign Relations Authorization Act of 2003 requires the Secretary of State to "collect, with respect to each foreign country, the following information with respect to each [U.S.] citizen who dies in that country from a non[-]natural cause[:]" (1) the date of death, (2) the locality where the death occurred (including the state or province and municipality, if available), (3) the cause of death, including information about the circumstances of the death (and if applicable, a statement indicating the death resulted from an act of terrorism), and (4) such other information as the Secretary shall prescribe.[32]

According to most recent figures, approximately 11,855 Americans died abroad between October 2002 and December 2016.[33] This does not include deaths of military members or government officials stationed in foreign countries.[34] This total is a very small number considering the number of Americans who live and/or travel abroad every year.

The relative rarity of American deaths abroad[35] offers cold comfort to those whose loved ones do die on foreign soil. Generally, the U.S. Department of State has no funding to assist the return of the remains or ashes of U.S. citizens who die overseas.[36] The next of kin is therefore responsible for the shipment of the remains or ashes.[37] Depending on the cause of death, flying a casket home from a foreign destination can be costly and mired by both

30. U.S. CENSUS BUREAU, ISSUES OF COUNTING AMERICANS OVERSEAS IN FUTURE CENSUSES (2001), https://bit.ly/2XVQrbf [https://perma.cc/Y895-NVU9].

31. Fors Marsh Group, *Federal Voting Assistance Program Overseas Citizen Population Analysis* 1, 5 (Feb. 2016), https://bit.ly/32m3mTh [https://perma.cc/K23P-F8ZT].

32. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, §§ 204(a)–(c), 116 Stat. 1363 (2002).

33. Number of U.S. Citizen Deaths Overseas, U.S. DEP'T OF STATE, https://bit.ly/2FqQNe1 [https://perma.cc/E2KW-KRWA] (select "October" and "2002" in the 'from' category and "December" and "2016" in the 'to' category, and then click search; for a more comprehensive view, download the corresponding file).

34. John Tozzi & Dorothy Gambrell, *How Americans Die Abroad*, BLOOMBERG, (July 27, 2015, 11:43 AM), https://bloom.bg/32g8qJ7 [https://perma.cc/T3EM-63K4].

35. *See generally* Jane E. Boon, *How Americans Die Abroad*, TIME, Mar. 8, 2016, https://bit.ly/2LIvk5M [https://perma.cc/5DPP-6GKY] (noting that when considering the number of Americans who travel overseas, the yearly death toll is relatively low).

36. U.S. DEP'T OF STATE, DEATH ABROAD, https://bit.ly/2khqDEY [https://perma.cc/YY73-EALE] (last visited Jan. 20, 2019).

37. *See id.*

airline and government regulations.[38] For example, despite the Convention's attempt at uniformity, the process of handling claims resulting from international carriage by air is unnecessarily complex. "[A]n individual flight between any origin and destination can have passengers and cargo shipments that are subject to the provisions of different liability regimes."[39] For example, *In re Air Crash at Little Rock Arkansas, June 1, 1999*,[40] the court wrote:

> On June 1, 1999, American Airlines Flight 1420 crashed upon landing at the Little Rock Airport. There were 132 passengers on board the MD-82 jet aircraft. The pilot and ten passengers sustained fatal injuries, and most other passengers sustained some injuries, varying from minor to severe. Approximately one-third of the passengers were international and, thus, covered by the Warsaw Convention. Most of the litigation arising from this disaster has been filed in the Eastern District of Arkansas. However, suits also have been filed in Texas, Illinois, California, and Hawaii by some passengers.[41]

Here, passengers in the same aircraft were governed by different legal regimes: The international passengers were covered by the Warsaw Convention, whereas the other non-international passengers were covered by domestic laws (presumably federal common law and state laws).[42] As a result, similarly situated passengers (i.e., passengers who suffered the same kind of injury) are treated differently from one another on the basis of whether they are domestic or international passengers. This is absurd.

---

38. *See* Centers for Disease Control and Prevention, *Guidance for Importation of Human Remains into the United States for Interment or Subsequent Cremation*, (Apr. 9, 2019), https://bit.ly/2YKR04V [https://perma.cc/JH49-WB3]

> Human remains intended for interment or cremation after entry into the United States must be accompanied by a death certificate stating the cause of death . . . If the cause of death was a quarantinable communicable disease [(i.e., cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, SARS, or pandemic influenza)], the remains must meet the standards for importation found in 42 CFR Part 71.55 and may be cleared, released, and authorized for entry into the United States only under [certain] conditions.

Id.

39. INT'L CIV. AVIATION ORG. (ICAO), *Promotion of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention of 1999)* 1, 3 (2016), https://bit.ly/2G7rakB [https://perma.cc/JY65-ML6R].

40. *In re Air Crash at Little Rock Ark.*, 109 F. Supp. 2d 1022 (E.D. Ark., 2000).

41. *Id.* at 1024.

42. For example, in the same case, the district court ruled that punitive damages would not be permitted in the cases involving international passengers, whereas for the domestic passengers, the punitive damages can be obtained if permitted by applicable state law and justified by the evidence. *Id.* at 1025.

In addition to this complexity of the Convention, another question remains vexing to the courts: Should human remains be classified as goods? Under the Warsaw Convention, the consensus was that human remains are goods.[43] This is not as clear under the Montreal Convention.

III. THE MONTREAL CONVENTION AND HUMAN REMAINS

"If a person dies in a country other than his own, there are no global rules or guidance that dictates the manner in which his [or her] remains could be transported back to his [or her] country, with dignity and care."[44] Generally, each country has different requirements regarding the arrangement of transportation for a body either embalmed or cremated. In the United States, the Centers for Disease Control and Prevention (CDC) has issued guidance for shipping human remains intended for interment (e.g., burial or placement in a tomb) or cremation after entry into the United States.[45] Some airlines additionally have specific requirements regarding the shipping of human remains.

For example, American Airlines' policy on shipping human remains indicates the following:

> "Caskets and alternative containers must be enclosed in an outer container (air[ ]tray) made of wood, particle board, corrugated fiberboard, plastic, or other water repellent material, and must have at least six handles and sufficient rigidity and padding to protect the inner container and contents from damage by ordinary care and handling."[46]

Delta Airlines allows remains to be tendered either embalmed or unembalmed, a combination thereof, or casketed.[47]

Finally, Southwest Airlines provides the following:

> "[H]uman remains, other than cremated remains, must be adequately secured in a casket, approved metal container, or combination unit to prevent shifting and escape of offensive odors. If

43. *See* Johnson v. Am. Airlines, Inc., 834 F.2d 721 (9th Cir. 1987); Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788 (3d Cir. 1992).

44. Ruwantissa Abeyratne, *Acceptance of Human Remains for Carriage by Air—Some Concerns in Security and Safety*, 5 J. TRANSP. SECURITY, 305, 305 (2012).

45. *Guidance for Importation of Human Remains into the United States for Interment or Subsequent Cremation*, *supra* note 38.

46. *Specialty Shipments/Human Remains*, AMERICAN AIRLINES, https://bit.ly/2FFFrnb [https://perma.cc/FS6H-LU4M] (last visited Sept. 25, 2018).

47. *See generally Delta Cares—Funeral Shipments*, DELTA AIRLINES, https://bit.ly/2lLz1ga [https://perma.cc/7CEZ-95JL] (last visited Jan. 20, 2019).

> the remains are in a casket, the casket must be enclosed in an outside shipping container of wood, canvas, plastic, or paperboard construction which has at least six (6) handles and sufficient rigidity and padding to protect the casket from damage with ordinary care in handling."[48]

The Convention neither contains nor defines the term "human remains." Rather, this term is found in the International Air Transport Association ("IATA")[49] Airport Handling Manual, which describes how human remains must be packed for air transport.[50] The term is also found in the International Civil Aviation Organization's ("ICAO")[51] proposed adoption of standards for the documentation and packaging of human remains (created to provide some clear requirements for the international air transport of human remains).[52]

The Convention also does not define the term "cargo." As mentioned in Part II, Articles 4, 5, and 6 (that deal with cargo) discuss the airway bill and the contents. Articles 12 and 13 provide for disposition and delivery of cargo. Article 18 applies to damages, and Article 22 applies to limits of liability in relation to delay, baggage, and cargo. But none of these articles define cargo.

The conceptualization of human remains as cargo has its origin in Annexes 9 and 18 of the ICAO's Chicago Convention of 1944.

---

48. *Shipping Human Remains*, SOUTHWEST AIRLINES, https://bit.ly/2kgZlP0 [https://perma.cc/SJ58-YFDM] (last visited Jan. 20, 2019).

49. The International Air Transport Association is the trade association for world's airlines. It issues guidelines that are followed by the industry. *See About Us*, IATA, https://bit.ly/20UON1O [https://perma.cc/A2FB-345R] (last visited Sept. 25, 2018).

50. *See* INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA), AIRPORT HANDLING MANUAL 333, *Handling of Human Remains* 155 (31st ed. Jan. 2011). This section provides:

> Human remains (HUM), except cremated, must be packed in a hermetically sealed inner containment, which may be constructed of a flexible material or may be a rigid coffin of lead or zinc. The inner containment must then be packed inside a wooden or metal coffin. The wooden or metal coffin may be protected from damage by an outer packing and covered by canvas or tarpaulin so that the nature of its contents is not apparent. Cremated remains must be shipped in funeral urns which are efficiently cushioned by suitable packing, against breakage.

Id.

51. The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation. *About ICAO*, INT'L CIV. AVIATION ORG., https://bit.ly/2raCnYr [https://perma.cc/YLH9-ZUS3] (last visited Jan. 20, 2019).

52. *See* INT'L CIV. AVIATION ORG., *Standards Related to the Repatriation of Human Remains*, 1, 1–4 (Oct. 2012), https://bit.ly/2XLCNZn [https://perma.cc/B4P2-JBVS].

Annex 9 of the Chicago Convention requires the civil aviation community to comply with laws governing the inspection of aircraft, cargo, and passengers by authorities concerned with customs, immigration, agriculture, and public health.[53] Annex 18 specifies the broad standards and recommends following practices to enable the safe transport of dangerous goods.[54] The Annex 9 definition of cargo implies that human remains could be categorized as such where cargo is "any property[55] carried on an aircraft other than mail, stores and accompanied[,] or mishandled baggage."[56] Annex 18 does not define the word cargo *per se* but rather defines a cargo aircraft as "[a]ny aircraft, other than a passenger aircraft, which is carrying goods or property." Annex 18 also defines dangerous goods as "[a]rticles or substances which are capable of posing a risk to health, safety, property[,] or the environment and which are shown in the list of dangerous goods in the Technical Instructions or which are classified according to those Instructions."[57] Neither Annex 9 nor 18 contains the term "human remains."

Yet, despite the fact that neither the Convention nor the ICAO defines human remains as cargo, some federal courts in the United States have treated human remains as cargo, particularly under the Warsaw Convention.[58] The following cases illustrate this.

IV. FEDERAL CASES

The U.S. Supreme Court has neither been presented with nor addressed the issue of whether human remains should be treated as cargo, *vel non*, under the Montreal Convention.[59] Rather, the

53. *See* ICAO, *Facilitation*, ANNEX 9 (15th ed. Feb. 2018) https://bit.ly/32Cj1xV [https://perma.cc/UX58-U48J].

54. ICAO, *The Safe Transport of Dangerous Goods by Air*, ANNEX 18 (4th ed. July 2011) https://bit.ly/2M0HMOn [https://perma.cc/FN2D-TDVP].

55. One commentator has noted:

> In terms of property rights pertaining to a cadaver or other remains, such rights do not exist at common law. However, for purposes of transportation [—] whether be it for embalming, cremation or internment [—] the corpse or cremated remains of a human being is considered to be property or quasi-property, the rights to which are held by the surviving spouse or next of kin.

Abeyratne, *supra* note 44, at 307.

56. *Facilitation*, *supra* note 53, ch. 1 at 2.

57. *The Safe Transport of Dangerous Goods by Air*, *supra* note 54, ch. 1 at 1.

58. *See e.g.*, Onyeanusi v. Pan. Am. World Airways, Inc., 952 F.2d 788, 791 (3d. Cir. 1992); Simo Noboa v. Iberia Lineas Aereas de Espana, 383 F. Supp. 2d 323, 325–26 (D. Puerto Rico 2005).

59. *See, e.g.*, Doe v. Etihad Airways P.J.S.C., 870 F.3d 406, 411 (6th Cir. 2017) (noting that "[n]either our court nor the Supreme Court has yet interpreted any provision of the Montreal Convention").

Court has addressed injuries to live persons. The principal case regarding negligent recovery from a foreign airline or international flight is *Air France v. Saks*,[60] where the Court determined that Article 17 of the Warsaw Convention[61] (predecessor to Montreal Convention) established the liability of international air carriers for harm or injury caused to passengers. In that case, the plaintiff boarded an Air France flight from Paris to Los Angeles. As the aircraft descended into Los Angeles, the plaintiff felt severe pressure and pain in her left ear. Five days later, plaintiff consulted a doctor who concluded she had become permanently deaf in her left ear. The plaintiff then filed suit against Air France, alleging "her hearing loss was caused by negligent maintenance and operation of the jetliner's pressurization system."[62] The case was removed from state court to the U.S. District Court for the Central District of California. Air France moved for summary judgment on the ground that plaintiff could not prove her injury was caused by an "accident" within the meaning of the Warsaw Convention. After subsequent appeals, the Supreme Court heard the case and defined accident as "any unintended and unexpected occurrence which produces hurt or loss."[63] The Court held that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[64]

Saks was followed by *Eastern Airlines v. Floyd*,[65] where the Supreme Court held that Article 17 does not allow recovery for purely mental distress. There, an Eastern Airlines flight from Miami to the Bahamas lost power in all three of its engines. The plane, which had turned around and was headed back to Miami, began losing altitude rapidly. Crew members informed the passengers that the plane would be ditched in the Atlantic Ocean. "[A]fter a period of descending flight without power, the crew managed to restart an

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

61. Article 17 of the Warsaw Convention provides that the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 17, Oct. 29, 1934, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

62. *Saks*, 470 U.S. at 394.

63. *Id.* at 398.

64. *Id.* at 405.

65. Eastern Airlines v. Floyd, 499 U.S. 530 (1991).

engine and land the plane safely back at Miami International Airport."[66]

A group of passengers on the flight filed complaints against Eastern Airlines, Inc., each claiming damages solely for mental distress arising out of the incident. The district court concluded that mental anguish alone was not compensable under Article 17.[67] The Eleventh Circuit Court of Appeals reversed, holding that the text of Article 17 encompasses purely emotional distress.[68] In a unanimous opinion delivered by Justice Marshall, the Supreme Court reversed the Court of Appeals, concluding that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.[69] The Court left open the question of whether passengers could recover for mental injuries accompanied by physical injuries.[70]

In *Jack v. Trans World Airlines*,[71] the district court discussed four recovery approaches for emotional distress claims that were embraced by lower courts after the *Floyd* decision. The first approach does not allow recovery for any emotional distress. The second allows recovery for all distress, as long as a bodily injury occurs. The third allows recovery for emotional distress as damages for bodily injury, including distress about the accident. And the fourth allows recovery only for emotional distress flowing from the bodily injury.[72] In *Jack*, the district court endorsed the fourth—now mainstream—approach.[73]

In 2004, the Supreme Court decided *Olympic Airways v. Husain*.[74] There, plaintiff and her husband (who had a history of recurrent anaphylactic reactions) were traveling from Athens to San Francisco. The couple requested to be moved to a non-smoking section, because the husband was allergic to secondhand smoke. The flight attendant refused. As a result of the exposure, plaintiff's husband died. The issue under review was:

---

66. *Id.* at 534.
67. *Id.*
68. *Id.*
69. *Id.*
70. *See id.* at 552.
71. Jack v. Trans World Airlines, 854 F. Supp. 654 (N.D. Cal. 1994).
72. *Id.* at 665.
73. *Id.* at 668. *See also, e.g.*, Ehrlich v. Am. Airlines Inc., 360 F.3d 366, 376 (2d Cir. 2004) (collecting cases and noting that "[t]he 'mainstream view' adhered to by courts that have addressed the scope of Article 17 and considered the issue before us 'is that recovery for mental injuries is permitted only to the extent the [emotional] distress is caused by the physical injuries sustained").
74. Olympic Airways v. Husain, 540 U.S. 644 (2004).

> whether the "accident" condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin.[75]

In an opinion delivered by Justice Thomas, the Court held the refusal of the flight attendant to assist plaintiff's spouse after repeated requests constituted "an unexpected or unusual event or happening" under *Air France v. Saks*.[76]

The four cases—*Saks*, *Floyd*, *Jack*, and *Husain*—stand for the following principles. First, in order for an injured plaintiff to recover from a carrier under the Convention, there must be an "accident," that is, an unusual or unexpected event or happening external to the passenger. Second, there must be bodily injury in order for plaintiff to recover. Third, the Supreme Court left open the question of whether passengers can recover for mental injuries that are accompanied by physical injuries.[77]

These cases were decided under the Warsaw Convention. On July 31, 2003, the U.S. Senate ratified the Montreal Convention.[78] Although the Montreal Convention was meant to modernize and ultimately replace the Warsaw Convention, it still closely follows the language of the Warsaw Convention.[79] For example, in both

---

75. *Id.* at 646.

76. *Id.* at 657.

77. Three U.S. courts of appeals in *Terrafranca*, *In re Air Crash at Little Rock Ark.*, and *Carey* have held that physical manifestations of emotional harm are not recoverable under Article 17. *See* Terrafranca v. Virgin Atl. Airways, 151 F.3d 108, 111 (3d Cir. 1998) ("[B]odily injury [is] the prerequisite to recovery; mere physical manifestations of emotional injury are not sufficient."); *In re* Air Crash at Little Rock Ark., 291 F.3d 503, 512 (8th Cir. 2002), *cert. denied*, 537 U.S. 974 (2002) ("[E]motional damages are recoverable . . . to the extent that they are caused by physical injuries suffered in the accident. On the other hand, physical manifestation of mental injuries such as weight loss, sleeplessness, or physical changes in the brain resulting from chronic PTSD are not compensable . . ."). *See also* Carey v. United Airlines, 255 F.3d 1044 (9th Cir. 2001). The Ninth Circuit Court of Appeals indicated:

> However, unlike the plaintiffs in *Floyd,* Carey claims that he also suffered physical manifestations of his emotional and mental distress, including nausea, cramps, perspiration, nervousness, tension, and sleeplessness. Carey is correct that *Floyd* left open the question of whether such physical manifestations satisfy the "bodily injury" requirement in Article 17. However, we are persuaded, in accordance with the Third Circuit's decision in *Terrafranca v. Virgin Atlantic Airways Ltd.,* that they do not.

Id. at 1051–52.

78. 149 CONG. REC. S10870 (daily ed. July 31, 2003).

79. *See, e.g.*, Bridgeman United Cont'l Holdings, 552 F. App'x. 294, 297 n.1 (5th Cir. 2013) ("Courts have frequently relied on cases interpreting the Warsaw

Conventions, liability is found under Article 17. Additionally, under the Warsaw Convention, Article 22(1) limits the amount that can be recovered under Article 17 in the event of a death or bodily injury. Similarly under the Montreal Convention, Article 21(1) provides that the carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed 100,000 Special Drawing Rights for each passenger if the carrier proves: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

More pertinent, none of the Supreme Court cases discussed above involve human remains. A number of federal courts of appeals, addressing negligence complaints emanating from the mishandling of human remains during international flights, have grappled with how to address emotional distress claims. For example, in *Onyeanusi v. Pan Am. Airways*,[80] a suit for the mishandling of human remains transported from New York to Nigeria, a Nigerian of the Ibo tribe died in Philadelphia while visiting her son. The son made arrangements through a funeral home to have the airline fly his mother's body from New York to Nigeria. The following occurred:

> The body was scheduled to leave New York on October 15 and arrive in Nigeria on the morning of October 17 . . . The body, however, did not arrive until October 25 . . . When [the] remains finally arrived . . . they were damaged and decomposed. The air[ ]tray that held the body was broken, allowing the body to be exposed to weather. Authorities at the Paris airport had allowed a French funeral home to repair the casket and rewrap the body. Consequently, when the remains arrived in Nigeria, the body was wrapped in burlap, which according to the Ibo tribe's culture signifies that the decedent committed suicide. The body was also face down in the casket, which according to the tribe's culture signifies that the circumstances of the death were dishonorable. In fact, [the decedent] had died of pneumonia.[81]

Convention to interpret corresponding provisions of the Montreal Convention."); Ugaz v. Am. Airlines, Inc., 576 F. Supp. 2d 1354, 1360 (S.D. Fla. 2008) ("Because the Montreal Convention only recently came into force, it is appropriate to rely on cases interpreting the Warsaw convention where the equivalent provision of the Montreal Convention is substantively the same."); Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 411 (6th Cir. 2017) ("[I]nterpretations of the Warsaw Convention have at least some persuasive value in interpreting parallel provisions of the Montreal Convention.").

80. Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788 (3d Cir. 1992).

81. *Id.* at 789–90.

There, the court first had to determine whether the case was governed by the Warsaw Convention as applied to "international transportation of persons, baggage, or goods performed by [an] aircraft for hire."[82] Plaintiff contended the Warsaw Convention did not apply to his case, because his mother's remains did not fall under any of the three categories of "persons, baggage, or goods" set forth therein.[83] The court disagreed. Citing *Johnson v. Am. Airlines*,[84] the court noted that human remains must be treated as goods for the purposes of the Warsaw Convention,[85] observing that "to exclude human remains from the definition of 'goods' would exempt a significant number of claims from the Convention, thus exposing air carriers to inestimable liability."[86] As further justification for why human remains should be treated as goods, the court wrote:

> Human remains can have significant commercial value, although they are not typically bought and sold like other goods. Medical schools and hospitals commonly use human cadavers for training and experiments. Human tissue and organs which are taken from the recently deceased have inestimable value in transplant operations. Although remains which are used for these medical and scientific purposes are usually donated, rather than bought and sold, this does not negate their potential commercial value. Onyeanusi argues that many states prohibit commerce in human remains or organs. Notwithstanding the legality of selling some parts of the human body, most notably blood and sperm, we believe these state laws against organ and tissue sales are premised on moral and ethical, rather than economic, considerations. In fact, the very existence of these state laws indicates that there would be a market for human remains in the absence of government intervention.[87]

But the argument that human remains can have significant commercial value, and should therefore be treated as goods for purposes of the Convention, is unavailing. First, as argued by plaintiff, human remains belong to no one, cannot be bought or sold, and have a type of value not easily comprehended by the Warsaw Convention's damage provisions.[88] As Justice Lumpkin of the Georgia Supreme Court observed more than one hundred years ago:

---

82. *Id.* at 790.
83. *Id.*
84. Johnson v. Am. Airlines, Inc., 834 F.2d 721, 723 (9th Cir. 1987).
85. *Onyeanusi*, 952 F.2d at 791.
86. *Id.* at 793.
87. *Id.* at 792.
88. *Id.* at 791.

> Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law[—]that rule of action which touches all human things[—]must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding *corn, lumber and pig iron*.[89]

Second, the opinion is devoid of any evidence that excluding human remains from the definition of goods would expose carriers to inestimable liability. For example, no evidence exists to show that prior to the Warsaw Convention, airlines were inundated with lawsuits regarding human remains. Further, no cases regarding human remains have been litigated under the Montreal Convention.[90] Third, the inestimable liability assertion assumes that there will be a significant number of cases where airlines will mishandle human remains. In fact, the opposite is likely to happen if airlines know courts would not treat human remains as goods, rather applying ordinary negligence principles.[91] The *Onyeanusi* court seems to think treating human remains as non-goods would run counter to the Warsaw Convention's goal of protecting airlines. Assuming, *arguendo*, that the primary goal of the Warsaw Convention was to protect airlines,[92] it seems the Montreal Convention swings the pen-

89. Louisville & N. R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905).

90. Most of the cases labeling human remains as goods were decided under the Warsaw Convention. *See, e.g.*, Johnson v. Am. Airlines, Inc., 834 F.2d 721, 725 n.3 (9th Cir. 1987) ("We do not stand alone in classifying human remains as 'goods.' A number of cases arising from domestic flights have reached the same result.") (citing *Blair v. Delta Air Lines Inc.,* 344 F. Supp. 360, 365 (S.D. Fla. 1972), *aff'd,* 477 F.2d 564 (5th Cir. 1973) (per curiam); *Milhizer v. Riddle Airlines, Inc.,* 185 F. Supp. 110, 113 (E.D. Mich. 1960), *aff'd,* 289 F.2d 933 (6th Cir. 1961)).

91. For example, in the Montreal Convention, an exoneration provision allows a reduction in compensation for injuries caused by or contributed to by the plaintiff, in the same manner as a pure-comparative-negligence or pure-comparative-fault scheme; this exoneration provision applies to all claimed damages including those falling under the strict-liability limit. Montreal Convention art. 20; *see also* Doe v. Etihad Airways P.J.S.C., 870 F.3d 406, 423 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1548 (2018). One can argue here that negligence principles already apply in the Convention anyway.

92. *See Doe*, 870 F.3d at 420 (noting that "the original parties to the Warsaw Convention had the "primary purpose of . . . limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry"); Eastern Airlines, Inc., v. Floyd, 499 U.S. 530, 546 (1991) ("Whatever may be the current

dulum in the opposite direction. For example, in *Doe v. Etihad Airways P.J.S.C.*,[93] the court noted that "the Montreal Convention replaced a 'restrictive,' 'pro-airline industry' regime, with a treaty that favors passengers rather than airlines." But even despite this "pro-passenger" shift, the Convention still heavily favors airlines in terms of recovery for emotional distress.

In *Ehrlich v. Am. Airlines Inc.*,[94] the Ehrliches were traveling from Maryland to New York for a connecting flight to London. "On approaching John F. Kennedy International Airport in New York, their aircraft overshot the runway and was abruptly stopped by an arrestor bed[,]"[95] preventing the plane from otherwise plunging into the waters of nearby Thurston Bay. The Ehrliches suffered physical and mental injuries during this incident. They sued American Airlines to recover damages for those injuries under the Warsaw Convention. The court framed the issue as "whether passengers can hold carriers liable in accordance with the Warsaw Convention for mental injuries that accompany, but are not caused by, bodily injuries."[96] The court held that damages for mental anguish alone cannot be recovered under Article 17 of the Warsaw Convention. The court stated that "[b]y construing Article 17 in a fashion that avoids anomalous and illogical results, our interpretation also comports with the Supreme Court's decision in *Floyd.* The *Floyd* Court held that an air carrier could not be held liable for purely mental injuries."[97]

This case was based on the Warsaw Convention (the events occurred before the U.S. Senate ratified the Montreal Convention). Still, the court extensively discussed the Montreal Convention, including Montreal Conference statements made by the American delegate regarding recovery for mental injuries.[98] The American delegate indicated plaintiffs could recover for mental injury whenever they sustained a physical injury, regardless if that mental injury resulted from that physical injury. Ultimately, the court concluded the American delegate's statements did not constitute an appropriate interpretation of the Warsaw Convention; therefore, the court

---

view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry rather than providing a full recovery to injured passengers.").

93. Doe v. Etihad Airways P.J.S.C., 870 F.3d 406 (6th Cir. 2017).

94. Ehrlich v. Am. Airlines, Inc., 360 F.3d 366 (2d Cir. 2004).

95. *Id.* at 368.

96. *Id.*

97. *Id.* at 386 (quoting *Floyd*, 499 U.S. at 552).

98. *See id.* at 398.

determined a carrier may be held liable under Article 17 for mental injuries only if they are caused by bodily injuries.[99]

Bassam v. Am. Airlines[100] is another case in which the court denied recovery for emotional distress under Montreal Convention.[101] Bassam, a citizen of Lebanon, flew from Lebanon to Baton Rouge, Louisiana, with stops in France and Dallas, Texas. When she left Lebanon, Bassam checked two pieces of baggage. When she arrived in Dallas, she received her baggage before entering through U.S. Customs; at that time, her baggage was in good condition and contained all of its original contents. After inspection, customs officials returned her baggage. She then handed both over to a person in uniform at the baggage loading conveyor belt. Bassam arrived in Baton Rouge as scheduled, but one piece of her baggage did not. Nearly four months later, American Airlines notified Bassam that her baggage had been found and delivered it to the apartment complex where she was staying in Baton Rouge. She claimed that upon receipt, her most valuable items were missing.[102]

In August 2006, Bassam filed suit in Louisiana state court for lost baggage, seeking $5,434.00 in damages. After American Airlines removed the case to federal court, Bassam filed an amended complaint and added a claim for the "embarrassment and upset of not being able to dress and appear in public as was her prior practice."[103] The court first addressed her lost baggage claim under Articles 17(2), 22(2), and 22(5) of the Montreal Convention. Bassam argued "[t]he four (4) month delay in recovery of the luggage, allowing [her] personal belongings to be ransacked and stolen, compounded with [American Airlines'] refusal to take any meaningful steps to help [her] in an obvious time of need" equated to willful misconduct. The court noted this argument lacked merit, because she failed to set forth any competent summary judgment evidence that American Airlines' actions (losing her baggage) constituted willful misconduct.[104] The court next dismissed her emotional distress claims,[105] noting that "[a]s directed by the Montreal Convention, in looking to existing judicial precedent, courts have held that emotional injuries are not recoverable under Article 17 of the Mon-

99. *Id.* at 400.

100. Bassam v. Am. Airlines, 287 F. App'x. 309 (5th Cir. 2008).

101. *Id.* at 318.

102. *Id.* at 311.

103. *Id.*

104. *Id.* at 313.

105. The Court first noted that she had waived the emotional distress claim for failure to brief in violation of Federal Rule of Appellate Procedure 28 but still went ahead and addressed the argument. *Id.* at 316.

treal Convention[106] or Warsaw Convention unless they were caused by physical injuries."[107] Therefore, Bassam could not recover emotional distress damages under the Convention.

The *Bassam* court followed the general trend among federal courts: plaintiffs cannot recover under either the Warsaw or the Montreal Convention for mental anguish unaccompanied by physical injury. By extension, family members bringing claims for negligent mishandling of human remains by international airlines will have no adequate remedy in federal court unless they can prove physical injury. This is a herculean task. But one federal court of appeals seems to have bucked this trend. In *Doe v. Etihad Airways, P.J.S.C.*, Jane Doe was pricked by a hypodermic needle that was hidden in the pocket of a backseat storage compartment. The next day, Doe saw a family physician who noted a small needle poke on her finger. She was prescribed medication for possible exposure to hepatitis, tetanus, and HIV, and she underwent several rounds of testing over the following year. All tests came back negative.[108]

Doe filed claims for "damages from Etihad for both her physical injury and her 'mental distress, shock, mortification, sickness and illness, outrage[,] and embarrassment from natural sequela of possible exposure to' various diseases. Her husband [claimed] loss of consortium."[109] At the trial level, Etihad moved for, and the district court granted, partial summary judgment in favor of Etihad (as to Doe's claims for mental anguish).[110] Etihad argued that "'damage sustained in case of bodily injury' means only 'damage *caused by* bodily injury,' and thus does not include Doe's fear of contagion and other emotional-distress and mental-anguish damages—damages that Etihad claims were caused *not* by Doe's *bodily injury* (the small hole in her finger) but by the *nature of the instrumentality* of that injury (the needle)."[111]

The Sixth Circuit Court of Appeals found that the district court erred in holding that Doe's mental-anguish damages were not recoverable under Article 17(1) of the Montreal Convention.[112] The

106. Article 17 (1) of the Montreal Convention provides that "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Montreal Convention art. 17(1).

107. *Bassam*, 287 F. App'x. at 317.

108. *Id.* at 409–10.

109. *Id.* at 409.

110. *Id.* at 410.

111. *Id.* at 409.

112. *See also* Montreal Convention art. 17(1); *Bassam*, 287 F. App'x. at 316.

court ruled that because an accident onboard Etihad's aircraft caused Doe to suffer a bodily injury (a fact that Etihad conceded), Doe may recover damages for her mental anguish regardless of whether that anguish was caused directly by her bodily injury or more generally by the accident that caused the injury. Specifically, the court stated:

> To prevail on a claim for damages under Article 17(1), a plaintiff must prove that (1) there was an "accident," defined as "an unexpected or unusual event or happening that is external to the passenger," (2) the accident happened either "on board the aircraft" or "during the operations of embarking or disembarking"; and (3) the accident caused "death or bodily injury of a passenger." The carrier is then liable for damage sustained, which we interpret to include emotional or mental damages, so long as they are traceable to the *accident*, regardless of whether they are caused directly by the bodily *injury*.[113]

Applying the above rule to the facts, the court found the accident was the needle pricking Doe's finger. The accident happened on board Etihad's aircraft, and the accident caused bodily injury (as Etihad conceded). Etihad was, therefore, liable for damages sustained by Doe, including both her physical injury and the mental anguish she was able to prove that she sustained. In addition, if Doe were able to prove fear of contagion or other mental anguish, Etihad would be liable for damages arising from that anguish regardless of whether the anguish was directly caused by the physical hole in Doe's finger or by the fact that Doe was pricked by a needle.[114]

This case is significant for plaintiffs in three ways. First, although the case is not about human remains, it deals with emotional distress caused by an airline's negligence, and opens the door for plaintiffs to recover for mental anguish unrelated to injury. Indeed, the court indicated:

[T]he text of Article 17(1) is still not entirely clear as to what connection must exist between the required bodily injury and the claimed mental anguish. The plain text of Article 17(1) is sufficient on its own part to reject Etihad's interpretation of it. And the plain text of Article 17(1) allows our conclusion that when a single "accident" causes both bodily injury and mental anguish, that mental anguish is sustained "in case of" the bodily injury. But the plain text on its own does not *necessarily* require that a single accident cause

113. *Doe*, 870 F.3d at 433 (citations omitted).
114. *Id.* at 434.

both the required bodily injury and the claimed mental anguish in order for that mental anguish to be 'sustained in case of' the bodily injury, as our conclusion suggests.[115]

Second, the decision creates a split from previous interpretation of the same provision in *Ehrlich v. Am. Airlines Inc.*, a case from the Second Circuit Court of Appeals. Thus, a circuit split maybe developing.[116] The Supreme Court may be called on one day to bring uniformity to this area of the law.

Third, the decision stressed that the overarching purpose of the Montreal Convention was to favor passengers. The court notes that "the Montreal Convention replaced a 'restrictive,' 'pro-airline industry' regime, with 'a treaty that favors passengers rather than airlines.' And it did so on terms that reflected decades of effort by the United States to abolish the outdated limitations of the Warsaw Convention."[117] This is ground breaking in the sense that it is the first time a federal court has declined to rely on the Warsaw Convention to interpret the Montreal Convention.[118]

Because the U.S. Supreme Court denied certiorari in *Doe v. Etihad Airways*, one can hypothesize that allowing recovery for emotional distress in some instances may not necessarily violate the letter and spirit of *Floyd.*[119] If passengers can potentially recover for mental injuries unrelated to physical injuries, then negligence claims for the mishandling of human remains would fare much better. In fact, federal common law will be in consonance with domestic state laws which have long granted remedies for emotional distress resulting from negligent interference with human remains.

V. STATE LAWS ON THE MISHANDLING OF HUMAN REMAINS

Various states recognize emotional distress claims resulting from the mishandling of human remains without physical manifes-

---

115. *Id.* at 418.

116. Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 400 (2d Cir. 2004) (noting that "mental injuries are recoverable under Article 17 only to the extent that they have been caused by bodily injuries").

117. *Doe*, 870 F.3d at 423.

118. The Sixth Circuit noted:

> In light of the great difference between the purpose of the Warsaw Convention and the purpose of the Montreal Convention, then, it hardly seems appropriate for us to look to the purpose of the *Warsaw* Convention, as Etihad would have us do in relying on *Ehrlich*, in order to arrive at a different conclusion from one compelled by the plain text of the Montreal Convention.

Id.

119. Eastern Airlines v. Floyd, 499 U.S. 530, 552–53 (1991).

tation of injury.[120] For example, in *Whitehair v. Highland Memory Gardens*,[121] the Supreme Court of Appeals of West Virginia held that "[a] cause of action for negligent or intentional mishandling of a dead body does not require a showing of physical injury or pecuniary loss. Mental anguish is a sufficient basis for recovery of damages."[122] The defendant, Highland Memory Gardens, entered into a contract with the West Virginia Department of Highways to relocate bodies buried in the Old Baptist Cemetery in Buckhannon, West Virginia. The plaintiff alleged that the removal was done in an incredibly careless manner; the defendant lost or misplaced the remains of her sister and two aunts after removal and failed to remove all of her cousin's remains.[123] The trial court granted the defendant's motion to dismiss on the ground that the plaintiff failed to state a claim upon which relief could be granted. In reversing the trial court, the West Virginia Court of Appeals noted:

> [C]ases involving loss of bodies prior to burial support the proposition that a cause of action exists for negligently or intentionally mishandling or losing a dead body, even when its disinterment and reinterment are authorized. This is compatible with law from other jurisdictions as well as our holding that an unlawful disinterment can give rise to damages.[124]

Similarly, the Alabama Court of Civil Appeals indicated "the award for emotional distress is justified in cases involving the mishandling of a dead body, and the jury is authorized to look to the circumstances conducive to such suffering."[125] In that case, the decedent's children sued the defendant for burying their father when they wanted his remains cremated. The children alleged emotional distress caused by the defendant's refusal to honor their dispositional wishes.[126] The defendant argued that the children had no out-of-pocket expenses and that they could not have suffered mental distress because they had not seen their father for approximately 16 years.[127] The appellate court rejected the funeral home's contentions, noting:

---

120. *See* SCHWARTZ ET AL., *supra* note 11, at 476 (compiling cases for negligent interference with dead bodies).

121. Whitehair v. Highland Memory Gardens, 327 S.E.2d 438 (W. Va. 1985).

122. *Id.* at 462–63.

123. *Id.* at 459.

124. *Id.* at 462–63.

125. SCI Ala. Funeral Servs., Inc. v. Brown, 770 So. 2d 97, 101 (Ala. Civ. App. 1999).

126. *Id.*

127. *Id.* at 102.

> The children testified extensively as to the mental distress that they suffered as a proximate cause of [the defendant's] breach of duty to act in accordance with their wishes. The fact that the children had no contact with their father is of no significance in this instance, particularly in view of the fact that the children testified that they were abandoned by their father.[128]

Illinois common law recognizes the tort of negligent or intentional mishandling of human remains. In *Cochran v. Securitas Sec. Servs. USA, Inc.*,[129] the Appellate Court of Illinois held that "a cause of action exists for negligent interference with the right to possession of a decedent's body by the next of kin, without circumstances of aggravation, [i.e.], allegations establishing willful and wanton conduct by the defendant."[130] The decedent died in his home in Moultrie County, Illinois. His body was transported to the Moultrie County morgue and then to Memorial Medical Center in Springfield, Illinois for an autopsy. A couple days later, representatives of a funeral home arrived at the medical center's morgue to obtain the remains of an individual named William Carroll. However, the medical center mistakenly provided the funeral home with the decedent's (not Carroll's) remains. The decedent's body was then cremated by the funeral home. His mother sued the medical center, the funeral home, and the defendant, alleging, among other claims, interference with the right to possess the decedent's body.[131] The trial court dismissed the case on the grounds that there is no set of facts by which the could demonstrate a duty owed by the defendant to her.[132] On appeal, the Illinois Appellate Court reversed, finding that plaintiff had alleged sufficient facts in her amended complaint to state a cause of action against defendant for interference with her right to possess her deceased son's remains.[133] In particular, the court noted that while courts are traditionally "reluctant to allow negligence actions where only emotional damages are claimed, the more modern view supports the position taken by plaintiff in the instant case and recognizes an ordinary negligence cause of action arising out of the next of kin's right to possession of a decedent's remains."[134] To bolster its holding, the Illinois court cited many other states that permit recovery in cases involving the

128. *Id.*
129. Cochran v. Securitas Sec. Servs. USA, Inc., 59 N.E.3d 234 (Ill. App. Ct. 2016).
130. *Id. at* 249.
131. *Id.* at 237.
132. *Id.* at 239–40.
133. *Id.* at 250.
134. *Id.* at 249.

alleged negligent mishandling of a decedent's remains without circumstances of aggravation.[135]

To be fair, some states do not permit recovery for emotional distress arising from the negligent mishandling of human remains absent physical injury. These states tend to reject the position of the Restatement (Second) of Torts Section 868.[136] For example the Kansas Court of Appeals in *Ely v. Hitchcock*[137] noted that the Kansas Supreme Court declined to adopt the position of Section 868.[138] The same applies in the District of Columbia. In *Wash. v. John T. Rhines Co*.,[139] the D.C. District Court of Appeals held the jurisdiction did not recognize the tort of negligent infliction of emotional distress arising from the alleged mishandling of human remains.[140] Florida has a narrower exception. The State first recognized the tort of tortious interference with human remains in *Kirksey v. Jennigan*.[141] In that case, a five-year-old child was accidentally shot and killed at her home. The defendant, an undertaker, took the body of the child to his establishment without the mother's authority. When the mother demanded the return of her child's body, the defendant refused. The defendant also embalmed the body and refused to deliver it to the mother or anyone else until a $50 fee was paid.[142] The mother sued for the wrongful withholding of the body, the unauthorized embalming, and the holding of the body as security for the payment of the $50 fee. Because plaintiff did not allege physical injury, the trial court dismissed her claims. The Florida Supreme Court stated odq;there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved."[143] However, the court allowed plaintiff to recover, because defendant's actions constituted malice. Florida law currently makes a distinction between physical injury and physical impact for

135. *Id.* at 248–49 (citing cases from Arizona, California, Connecticut, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Montana, Nevada, New Jersey, New York, Ohio, Tennessee, Texas and West Virginia).

136. RESTATEMENT (SECOND) OF TORTS § 868 (1977) ("One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.").

137. Ely v. Hitchcock, 58 P.3d 116 (Kan. Ct. App. 2002).

138. *Id.* at 122.

139. Wash. v. John T. Rhines Co., 646 A.2d 345 (D.C. 1994).

140. *Id.* at 346.

141. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950).

142. *Id.* at 189.

143. *Id.* at 190.

claims based on mental distress for the negligent mishandling of human remains. Generally, "[t]he absence of physical impact does not bar a claim for the negligent mishandling of a dead body under Florida law."[144] Based on the above, one can deduce that a plaintiff in Florida must prove either physical impact, physical injury, or malicious conduct in order to recover for emotional distress relating to mishandling of human remains.[145]

In sum, claims for mental anguish damages based on the mishandling of human remains are well established in a majority of states. Whether through the quasi property rights doctrine, negligence, or a subspecies of the tort of intentional infliction of emotional distress, state courts allow plaintiffs to recover for emotional injuries without a showing of physical injury.[146] This is a major incongruence between the Convention and U.S. domestic law. Another area of conflict in the Convention is the overlap of tort and contract principles regarding human remains.

VI. HUMAN REMAINS AS A MATTER OF TORT AND CONTRACT LAW

The Montreal Convention was intended to establish uniformity within international transportation by air. To this end, the Convention places limits on liabilities for damages, including passenger injury (Article 17) and on destruction, loss, damage, or delay of cargo (Article 22). But the Convention's limits on liabilities lead to an overlap and thus a conflict between tort and contract law. First, Article 22 limits carrier liability for destruction, loss, damage, or delay of cargo to 17[147] SDR per kilogram (approximately $10.43 per pound) unless the consignor declared the cargo had a higher value.[148] From this provision, it is clear the weight of the human remains would be the sole basis for the monetary amount of liability. Consider the following possible recovery limits for destruction, loss, damage, or delay to human remains:

144. Gonzalez v. Metro. Dade Cty. Pub. Health Tr., 651 So. 2d 673, 675 (Fla. 1995).

145. *See id.*

146. *See* Cochran v. Securitas Sec. Servs. USA, Inc, 59 N.E.3d 234, 248–49 (Ill. App. Ct. 2016).

147. Montreal Convention art. 22. The limit is currently 19 SDR. Press Release, IATA, News Brief: Cargo Liability Limits Standardized— Major Step Forward to Simplify Air Cargo (July 14, 2010) https://bit.ly/32fuund [https://perma.cc/ZK2R-7CUX].

148. Montreal Convention art. 22.

11 lb infant (4.9kgs) 93 SDR = $54
110 lb teenager (49.9 kgs) 948 SDR = $550
220 lb adult (99.8 kgs) 1895 SDR = $1,099
440 lb adult (199.6 kgs) 3792 SDR = $2,199

It is patently unfair to afford more damages to an overweight decedent's relatives than to a newborn decedent's relatives. It can also be argued that because men tend to be heavier than women and children, the liability limits based on weight alone ostensibly favor men over women and children. An argument can, therefore, be made for age and gender discrimination within the Convention.[149] One could also imagine an instance where the human remains are cremated. Obviously, ashes in an urn will never weigh as much as a casket with a dead body. In this way, the Convention fails to account for damages equally, as weight and thus reward depend upon intimate decisions regarding the final disposition of human remains. Contract law does not account for this.[150]

Second, Article 22 provisions relating to cargo limit carrier liability where value exceeds the *consignor's actual interest in delivery at destination* in which case liability is limited to such actual interest.[151] The concern here is that this provision, though perfectly logical as a contract principle, is nevertheless lacking a few key words related to human remains. For example, mustn't the disposition of human remains always be timely? One could imagine no worse experience than having a loved one's remains delayed for a period of days before reaching the final resting place, particularly in cultures and religions that require a timely or speedy burial.[152] Human re-

149. *But see Pers. Adm'r* of Mass. *v. Feeney*, *442 U.S. 256, 271–72* (*1979*). Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.

Id.

150. To be sure, there are a few instances where the mishandling of dead bodies may result in a breach of contract cause of action. *See, e.g.*, *Wilson v. Houston Funeral Home,* 50 Cal. Rptr. 2d 169, 173 (Cal. Ct. App. 1996); *Sarri v. Jongordon Corp.,* 7 Cal. Rptr. 2d 82, 88-89 (Cal. Ct. App. 1992); *Crisci v. Sec. Ins. Co.,* 426 P.2d 173, 179 (Cal. 1967).

151. Montreal Convention art. 22.

152. Regina Prosser et al., *An Orthodox Perspective of the Jewish-end-of-life Experience*, 30 HOME HEALTHCARE NURSE 579, 584 (2012) (writing that in the Jewish funeral rights, "burial is performed within 24 hours of a death and cremation is a prohibited act"); Carol Komaromy, *Cultural Diversity in Death and Dying*, 11 NURSING MGMT. 32, 33 (Dec. 2004).

Ideally, a Muslim burial occurs within 24 hours of death . . . . Religious principles are often interpreted and applied with a degree of flexibility. For instance, some Muslims in east London send bodies back to their

mains are perishable; that they have already "perished" in the traditional sense makes no difference. As the language stands, there is no impetus to have the airlines act promptly to correct any delay. Better language could perhaps read "actual interest in *timely* delivery at destination," rather than just "delivery at destination."

Article 22 further provides that the carrier is liable for the higher value if the consignor has declared the cargo at a higher value. A cynical person might ask, how is it possible to declare a higher value for human remains? If we assume 300 pounds for the total weight of the casket (200 pounds, 90.7 kilograms) and human remains (100 pounds, 45.3 kilograms),[153] the recoverable figure comes to approximately 136 kg X 19 SDR = 2,584 SDR or $1,505. If we assume the average weight of an adult at a conservative 70 kilograms (about 156 pounds), the figure would be slightly higher. These figures reiterate how the Convention would operate to give different monetary remedies if human remains are classified as cargo, with those remedies being solely based on the weight of the remains, state of the remains (whether cremated or uncremated), and the personal decisions of the deceased and the family in the final disposition of remains. It is clear that remedy by weight simply does not allow for fair recovery in the case of a more or less uniform harm (losing, damaging, or delaying human remains).

Furthermore, how to declare a higher value is not specifically indicated in the Convention. The airlines have attempted to fill this void in their shipment contracts. For example, American Airlines' The Air Cargo Tariff ("TACT") rules have several provisions related to restrictions on declared value of cargo and valuation charges. The airline will not accept any shipment that exceeds a declared value of 500,000 USD (or local currency equivalent) unless advance arrangements have been made. Further, "[t]he maximum limit of declared value on any American Airlines aircraft shall not exceed 2,000,000 USD unless advance arrangements have been made."[154]

Here, we see that American Airlines has elected to use USD as the indicator of value. As of October 1, 2016, 1 SDR is equivalent

---

> ancestral homes for burial, even though this involves the embalming of the body by non-Muslims and, inevitably, delays in burial well beyond 24 hours.

Id.

153. It is easy to reach this 300-pound mark because the average weight of a casket is 200–400 pounds. *10+ Best Tips for Pallbearers*, LOVE LIVES ON, https://bit.ly/2Yx62eI [https://perma.cc/G6J3-8YX3] (last visited July 5, 2019).

154. Am. Airlines AA/001, Section 8.3 Information by Carrier 1, 99 (Apr. 2019), https://bit.ly/2FW8d3X [https://perma.cc/TC4C-9QQ6].

to 0.58252 USD.[155] If a loved one declared a value of 500,000 USD (maximum that could be declared on an American Airlines flight without prior arrangements), that value would be 291,260 SDR. Assuming a total weight of 206 kilograms (136 kilograms or 300 pound casket; 70 kilograms or 156 pound human remains), the per kilogram declared value would be roughly 1,413 SDR. This clearly subjects the consignor to valuation charges under American Airlines contract terms. The valuation charges provision indicates "unless otherwise noted, consignments valued at more than 19 SDR[ ] per kilograms [sic] will be assessed valuation charges of 0.50 percent of the Shipper's declared value for carriage exceeding 19 SDR[ ] per kilograms [sic]."[156]

Ultimately, under American Airlines contract terms, one can declare whatever value, up to 2,000,000 USD, as long as one is willing to pay for it. Still, in the event of a mishap, it's unclear whether that declared value will be in excess of the actual interest in *timely* delivery under Article 22 of the Convention. A 500,000 USD declared value is more than most life insurance policies. As a comparison, armed service members generally have life insurance policies of $400,000 that pay out upon death.[157] One would think that this declaration of value and the extra money that is assessed in valuation charges would provide an impetus for American Airlines to make *timely* delivery with no mishap.

Delta Airlines' International Notice Concerning Carriers Limitation on Liability mirrors American Airlines' valuation charge standard (in excess of 19 SDR). The contract language provides in pertinent part:

> If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention or the Montreal Convention may be applicable and[,] in most cases[,] limit the liability of the Carrier in respect of loss of, damage, or delay to cargo. Depending on the applicable regime, and unless a higher value is declared, liability of the Carrier may be limited to 19 Special Drawing Rights per kilogram.[158]

Just like American Airlines, Delta also permits a declaration of higher value on cargo by noting that "for cargo accepted for car-

155. Special Drawing Right (SDR) Factsheet, *supra* note 22.

156. *See* Section 8.3 Information by Carrier, *supra* note 154.

157. DEF. FIN. & ACCOUNTING SERV., *Service Members' Group Life Insurance* (Feb. 11, 2014), https://bit.ly/32gloGC [https://perma.cc/A6BJ-722E].

158. DELTA AIRLINES, *International Notice Concerning Carriers' Limitation of Liability*, https://bit.ly/2G7K5eK [https://perma.cc/UK49-7N7A] (last visited July 10, 2019).

riage, the Warsaw Convention and the Montreal Convention permit [the] shipper to increase the limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required."[159]

United Airlines' International Conditions of Contract also uses 19 SDR as a limitation of liability and directly cites the Montreal Convention. The limitation stands "unless a greater per kilogram monetary limit is provided in any applicable Convention or in Carrier's general conditions of carriage."[160] Yet again, we see the same language as in other contracts: "[f]or cargo accepted for carriage, the Warsaw Convention and the Montreal Convention permit the shipper to increase the limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required."[161] Both United Airlines and Delta seem to use the same notice concerning carriers' limitation of liability.

VII. WHERE DO WE GO FROM HERE? SUGGESTED APPROACHES

The Montreal Convention's classification of human remains as cargo, coupled with its liability limits in the case of destruction, loss, damage, or delay in the carriage of cargo, produces palpably unfair results for plaintiffs. The question then arises, where do we go from here?

The most effective recommendation would be for the Convention to allow recovery for emotional distress without physical injury. This is unlikely to happen for a number of reasons, two of which merit mentioning here. First, changing the Convention would likely take a long time and would require ratification of the changes by all signatories. As a point of illustration, although the Montreal Convention was signed in Montreal in 1999, the U.S. Congress did not ratify the treaty until 2003.[162] It is likely the process of amending the Convention may take even longer, especially if signatories do not agree on the amendments. Second, airlines are

159. *Id.* § 6.1.

160. UNITED AIRLINES, INTERNATIONAL CONDITIONS OF CONTRACT NOTICE CONCERNING CARRIERS LIMITATION OF LIABILITY § 4 (July 1, 2010), https://bit.ly/30t4m6i [https://perma.cc/3M57-3FXG].

161. *Id.* § 6/6.1.

162. *See* Ehrlich v. Am. Airlines Inc., 360 F.3d 366, 372 (2d Cir. 2004) (analyzing the applicability of the Montreal Convention prior to and after ratification in 2003).

likely to push back against any amendments that are designed to provide for pain and suffering unaccompanied by physical injury.[163]

Closely related to recovery for emotional distress is whether corpses or cremated human remains should come under the purview of "goods."[164] It might be worthwhile to have a discussion about whether society should give human remains the dignity and respect of personhood or should lump human remains within the bundle of property rights.[165] If only to avoid anomalous results in the Convention, the former would be preferable, at least to those whose dead relatives are being transported by the carriers. There is something viscerally revolting about classifying a decedent as a good or cargo.

Next, a stronger and practical suggestion may be for the courts to interpret the Convention in such a way as to avoid the absurdities and anomalous results of recovery based only on the weight of the human remains and casket alone. Courts have cautioned time and again that "[w]henever possible, interpretations of a treaty that produce anomalous or illogical results should be avoided."[166] Here, as discussed in Part VII, it is absurd to recover more from the negligent mishandling of an adult or overweight decedent versus an infant decedent. Surely, this is an absurdity that the courts can avoid. Interpreting the Convention to avoid this absurd result is further

---

163. *See, e.g.*, Brief of Amicus Curiae Int'l Air Transport Ass'n in Support of Petition for a Writ of Certiorari at 20–21, Etihad Airways P.J.S.C. v. Doe, 138 S. Ct. 1548 (2018) (No. 17-977). The brief states:

> The goal of prompt claim resolution will not be achieved as commercial air carriers will now be forced to litigate mental injury claims that are unrelated to bodily injury, particularly where they are questionable. Discovery on the type and extent of the mental injury sustained—including whether treatment was sought—will burden the courts and parties with expensive expert discovery. Concern over fraudulent physical and mental injury allegations will likely hinder settlement discussions.

Id.

164. RUWANTISSA ABEYRATNE, CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY 216 (2014) ("Do corpses or cremated human remains come under the purview of goods? It might be worthwhile for a detailed discussion of the status of human remains in the global aviation context and a revisit of the 1957 ICAO guidelines.").

165. *See, e.g.*, Walter Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17 (1924). The author notes:

> There are few questions in the entire field of law that are so prolific a source of interest as whether or not there exists a property right in a dead body. It is certain under the modern conception of the law applicable that there can be no commercial property in a dead body. The wide divergence of opinion lies in whether there is that right to possession which apparently is an incident of an absolute or qualified property interest.

Id. at 17.

166. Ehrlich v. Am. Airlines Inc., 360 F.3d 366, 387 (2d Cir. 2004).

strengthened by the fact that the U.S. Supreme Court has neither been presented with nor addressed the issue of whether human remains should be treated as cargo under the Convention. In *Floyd*, the Court expressed no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.[167] This means there is room for the recovery for pain and suffering resulting from the mishandling of human remains.

Alternatively, to overcome the Montreal Convention's liability limits, plaintiffs can try to argue the willful misconduct exception. Article 25 of the Warsaw Convention provides:

> The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the Court seised [sic] of the case, is considered to be equivalent to willful misconduct.[168]

The question has always been whether the willful misconduct exception was abrogated by the Montreal Convention.[169] It is true that unlike the Warsaw Convention, the Montreal Convention does not have any exception to the limit of liability for willful misconduct *per se*. Rather, Article 22(5) has language akin to willful misconduct. It states:

---

167. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552–53 (1991). The court indicated:

> We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" . . . such injuries, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is not presented here because respondents do not allege physical injury or physical manifestation of injury.

Id. (citations omitted).

168. Warsaw Convention art. 25.

169. *See, e.g.*, Bassam v. Am. Airlines, 287 F. App'x. 309, 312–13 (5th Cir. 2008). The court noted:

> Only four articles of the Montreal Convention are relevant here. Article 17 defines conditions for carrier liability for harm to passengers, including death or bodily injury and for loss or damage to checked baggage. Article 19 similarly defines conditions for carrier liability for damage caused by delay in the carriage by air of passengers, baggage, or cargo. Articles 21 and 22 set forth a strict liability regime for fault of the carrier as to these damages but place a limitation of liability for each type of claim. *Article 22(5), however, provides a willful misconduct exception to this limitation*.

Id. at 313 (emphasis added).

> The foregoing provisions of paragraph 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, *done with intent to cause damage or recklessly and with knowledge that damage would probably result*; provided that in the case of such act or omission of a servant or agent, it is also proved that such servants or agents was acting within the scope of its employment.[170]

This indicates that Article 22(3) liability in the case of carriage of cargo is excluded from the Article 22(5) exceptions, because it only refers to the provisions of paragraphs 1 and 2 (i.e., Articles 22(1) and 22(2)). But whether the exclusion of Article 22(3) from the exceptions provided for in Article 22(5) means that the limit on liability is unbreakable is an issue federal courts have not decided.[171] The bottom line is, under Article 22(3), the use of willful misconduct argument is a Hail Mary. Even under Article 22(5), the plaintiff bears a heavy burden of showing willful misconduct.[172] Succinctly put, under this exception, the plaintiff can only win on a wing and a prayer.

Assuming, *arguendo*, that the Convention's liability limits cannot be changed easily, the airlines themselves can make changes to the policies and procedures for handling human remains. For example, airlines can require that human remains be stored in secure areas during layovers or stopovers. This common sense practice would add an element of ordinary care to such sensitive transport.

As a point of comparison, the carriers can learn from the U.S. Army, even though the Convention does not apply to military aircrafts or transport.[173] The Army transports human remains using commercial aircrafts and has specific procedures and policies for

---

170. Montreal Convention art. 22(5).

171. *But see* the Appellate Court of Nigeria which found Article 22(3) limits on liability unbreakable. Referring to Article 22(5), it noted, in pertinent part:

> It is important and noteworthy that the above paragraph excluded paragraph 3 which deals with liability in the case of carriage of cargo. The clear intention to exclude carriage of cargo is confirmed by article 30 which deals with actions brought against a servant or agent of the carrier. They are also entitled to the limits of liability under the Convention just as the carrier . . . . By these provisions negligence or willful misconduct seem to play no role in the case of carriage of cargo under the Montreal Convention.

Emirate Airline v. Tochukwu Aforka & Anor, [2014] LPELR-22686 (CA) (Nigeria).

172. *Bayer Corp. v. British Airways, LLC,* 210 F.3d 236, 239 (4th Cir. 2000).

173. Article 57(b) provides that the Convention does not apply to "the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities." Montreal Convention art. 57(b).

the care and disposition of dead service members.[174] For example, each body has an escort (preferably from the same unit as the deceased) who is responsible for staying with the body from the time it is loaded onto the plane to the time it is handed over to the party designated to receive the remains. The escort carries all documentation.[175] Similarly, airlines could appoint special employees to accompany human remains if the family cannot designate a responsible party. This mirrors the military escort practice and would ensure some level of accountability, which seems reasonable when dealing with such special transportation. Of course, there may be additional costs if the airline appoints a special employee, but this overall cost would be far less than the cost of potential litigation. This would also solve the problem of plaintiffs having to declare a higher value for human remains as contemplated by the Convention. Moreover, it is unlikely that many human remains will be transported without an accompanying relative in the first place.

Finally, there is one more approach which runs counter to the central thesis of this paper that merits mentioning here. That is, doing nothing and leaving any solution to market forces, i.e., laissez-faire economics. This approach may be attractive to those who oppose more regulations on the airline industry or those who often decry the perceived intrusive nature of federal courts into regulated industries. This approach begets the following questions: Why should the courts get involved in the Montreal Convention? Why not allow the signatories to the Convention to figure things out? Despite the superficial logic of doing nothing, this approach is flawed in two respects. First, federal courts are already involved in resolving disputes regarding the Convention.[176] Second, this approach eludes the issue: the Montreal Convention's classification of human remains as ordinary cargo and application of ordinary cargo recovery rules is inhuman and absurd. Doing nothing is tantamount to saying there is no problem. That is an approach this author cannot countenance.

CONCLUSION

This paper began with the story of a southern California father seeking damages for pain and suffering resulting from the misidentification of his son's body. It notes that even though domestic courts provide remedies for emotional distress caused by the mis-

174. *See* DEP'T OF THE ARMY, ARMY MORTUARY AFFAIRS PROGRAM, ARMY REG. 638.2 (Nov 28, 2016) (on file with author).

175. *Id.*

176. *See* Federal cases, *infra* Part V.

handling of human remains, the Montreal Convention excludes any such recovery, limiting the damages to the weight of the decedent and casket multiplied by the prevailing SDR. In a nutshell, this paper's main argument is as follows: the Montreal Convention's classification of human remains as ordinary cargo, requiring the application of ordinary cargo rules, is both inhuman and absurd. This absurdity is exemplified by disparities in "worth." With damages dependent on the weight of human remains and casket or container, heavier persons in heavier caskets are worth more than lighter persons in lighter caskets.

This paper acknowledges that a change in the Convention is likely impracticable. However, it suggests that federal courts can use their power of interpretation of treaties to avoid the absurdities and anomalous results. It also calls on airlines to use common sense measures that would ensure timely delivery of human remains with less risk of causing emotional pain and suffering. To paraphrase the title, although death can be strange, it need not be in the Montreal Convention.