

# Flying in the face of convention

When does psychiatric injury sustained onboard become compensable? **Katherine Deal QC & Asela Wijeyaratne** examine the cases pushing the boundaries of current definitions

## IN BRIEF

► Aviation case law updates; psychiatric injury and the Montreal Convention.

This article considers recent cases in Australia, the US and Scotland on the vexed question of liability for psychiatric injury under the Montreal Convention.

The Warsaw Convention, which opened for signature in 1929, had the 'primary purpose of... limiting the liability of air carriers in order to foster the growth of the fledgling aviation industry' (*Transworld Airlines Inc v Franklin Mint Corp* 466 US 243 (1984), citing conference minutes). One of the varied ways it did so was to limit liability to 'bodily injury'.

The Montreal Convention 1999, the successor multilateral treaty to which the UK is a party, has the stated purpose of providing a 'modernized uniform liability regime for international air transportation'. As with the Warsaw Convention, it provides, among other things, for strict liability in certain circumstances for 'bodily injury', up to a financial limit. The Montreal Convention has effect in English law by virtue of a statutory instrument. The EU ratified the Montreal Convention on 29 April 2004. The provisions of the Convention relating to air carrier liability were incorporated into Council Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002.

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

The issue of whether the words 'bodily injury' precludes liability for pure psychiatric injury has generated litigation and debate. The orthodox position is that damages for psychiatric injury are only recoverable if that injury has been caused by physical damage to the body (including to the damage to the brain and/or nervous system); *Morris v KLM Royal Dutch Airlines*; *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] All

ER (D) 394 (Feb). Physical injury caused by psychological damage is also compensable (for example a peptic ulcer caused by post-traumatic stress disorder (PTSD), as in *King*, above). Therefore, a psychiatric injury not caused by a physical injury does not constitute compensable 'bodily injury' under the Montreal Convention. Three recent cases consider the limits of the definition.

## Australia

In *Pel-Air Aviation Pty Ltd v Casey* [2015] NSWSC 566, the New South Wales Supreme Court held that PTSD was a compensable bodily injury.

Ms Casey, a nurse, was on board a flight from Samoa to Melbourne in order to help transport a patient and her husband. The plane was scheduled to land at Norfolk Island to refuel. Due to severe weather conditions, the plane failed to land four times. The pilot was forced to ditch the aircraft in the sea. Remarkably, all six people aboard survived the crash; however, they had to remain afloat in heavy seas, in the darkness, with no beacons or any form of communication, until they were rescued after 90 minutes by a fishing boat. Ms Casey suffered serious physical injuries. She also suffered PTSD, a major depressive disorder, an anxiety disorder and chronic pain syndrome.

Ms Casey brought a claim against Pel-Air under the Montreal Convention. Pel-Air conceded that Ms Casey's physical injuries were compensable. Pel-Air also conceded (perhaps surprisingly) that the major depressive disorder, the anxiety disorder

and the chronic pain syndrome were compensable as they had been caused by her physical injuries. However, Pel-Air denied liability for Ms Casey's PTSD, submitting that this was caused by the trauma she had experienced during the crash and not her resulting physical injuries.

The court held the PTSD in this case was consequent on damage to her brain and to other parts of her body involved in normal brain functioning, which have had the result that her brain is no longer capable of functioning normally. Therefore, the PTSD Ms Casey suffered was a compensable bodily injury.

However, the New South Wales Court of Appeal soon reversed this 'landmark' decision: *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32. In quashing the decision at first instance, the Court of Appeal found that the judge had erred in concluding that Ms Casey's PTSD constituted a 'bodily injury'. The Court of Appeal held:

- although the expert evidence was that Ms Casey's symptoms were likely to be associated with changes to brain chemistry, showing functional or neurochemical changes to the brain is insufficient. In the absence of medical evidence to the contrary, such changes cannot fairly be described as 'injuries' to the body; and
- importance must be attached to the adjective 'bodily' as a limiting word. It draws a distinction between bodily and mental injuries: mental injuries are covered only if they are a manifestation

of physical injuries, or if they result from physical injuries (including physical injuries to the brain).

The New South Wales Court of Appeal therefore restated and reaffirmed the traditional position that psychiatric injury will only be recoverable if it is consequent on physical injury; physical injury includes actual damage to the brain but not abnormal brain functioning or neurochemical imbalance. The decision does however leave open the possibility of more nuanced and sophisticated medical evidence being deployed in the future to show that neuro-chemical imbalance and/or changes in brain functioning amount to bodily injury.

### United States of America

In *Jane Doe v Etihad Airways* PJSC No 16-1042, 6th Cir, (30 August 2017), the US Court of Appeals for the Sixth Circuit found Etihad Airways liable for damages for mental distress because the damage resulted from an accident that caused physical injury. They reversed the decision made by the US District Court for the Eastern District of Michigan which found that because the plaintiff's mental injuries were caused by the 'accident' itself and not the 'bodily injuries' sustained in the accident, there could be no recovery.

The plaintiff pricked her finger on a hypodermic needle hidden in a seat pocket on a flight from Abu Dhabi to Chicago. She claimed damages for physical injury, as well as emotional distress linked to fears she may have contracted HIV or hepatitis.

It was held on appeal that:

- ▶ The lower court wrongly accepted Etihad's textual interpretation of Art 17(1) that 'in the case of' meant 'caused by', which would impose an additional causal restriction which the plain text of Art 17(1) does not contemplate; indeed, it would contradict the text. The plain meaning of 'in case of' is conditional, not causal.
- ▶ The phrase 'upon condition only' is new to the Montreal Convention and is not found in the Warsaw Convention (the predecessor to the Montreal Convention), and it makes clear that the passenger's recovery is conditioned only on the occurrence of an accident that causes death or bodily injury either on board the aircraft or during boarding or disembarkation.
- ▶ Under Etihad's approach, a plaintiff seeking to recover damages for mental anguish would instead have to prove that an accident caused bodily injury, which in turn caused the mental anguish. But that framework is neither

found in the text of the Montreal Convention, nor supported by the history and purpose of the Montreal Convention.

- ▶ Etihad's approach to causation burdens the injured passenger far more than the text requires, that would be an anomalous result: surely, for example, harm such as insomnia or fear of flying might initially result from the crash-landing but then be exacerbated by the bodily injury. Would only the portion of harm traceable and subsequent to the bodily injury be recoverable?
- ▶ Therefore, a plaintiff may recover damages for mental injuries if they are caused either directly by her bodily injury or more generally by the accident that caused the bodily injury.
- ▶ Etihad is liable for damage arising from that anguish regardless of whether the anguish was directly caused by the physical hole in the plaintiff's finger or by the fact that the plaintiff was pricked by the needle.

This case represents a significant departure from orthodoxy in the recoverability for psychiatric injury under the Montreal Convention: allowing such injury to be recoverable whether caused by a physical injury or generally by the accident that caused the bodily injury. However, it remains to be seen whether this approach will be followed by the United States Supreme Court (which denied Etihad's petition for certiorari (order list: 854 US)) and other jurisdictions, or whether, as was submitted by the carrier in the next case considered in this article, it is 'an anomaly which flew in the face of established authority'.

### Scotland

The most recent consideration of this issue was by the All-Scotland Sheriff Personal Injury Court in *Caroline Delaney v Jet2.com Limited* [2019] SC EDIN 13. Ms Delaney, having flown from Glasgow to Tenerife South Airport, was en route from the aircraft to the terminal building, on an airport transfer bus which collided with another airside vehicle, a truck carrying concrete pillars. She claimed to have suffered both physical and psychiatric injuries.

Ms Delaney brought a claim against Jet2.com under the Montreal Convention. The action was settled, for a sum of £9,200 in respect of damages. The sole question for the court, on an issue relevant to costs, was whether it was reasonable for Ms Delaney's solicitors to have instructed a psychiatrist to provide a report. While that must involve consideration of the law, it was

not for the court to decide which party's interpretation of the Montreal Convention was correct.

The court considered that:

- ▶ It was not open to the court to speculate whether the sum tendered included an element for psychiatric injury or not; there was at least a risk of Ms Delaney being found entitled to damages for psychiatric injury and the carrier bought off that risk.
- ▶ It cannot be stated with any certainty that Ms Delaney had no claim for psychiatric injury.
- ▶ The most that can be taken from *Doe v Etihad Airways* is that there was a 'colourable argument' that a plain reading of Art 17 of the Montreal Convention, renders that article a more amenable basis for a claim for psychiatric injury than the corresponding wording in the Warsaw Convention.
- ▶ There was therefore 'a colourable argument' that damages for psychiatric injury might be recovered in this case. The claim put psychiatric injury in issue. Irrespective of the view taken of the law, no claim could have been presented without a psychiatric report. Therefore, it was proportionate for the psychiatrist to be instructed.

### Conclusion

The current orthodoxy under Art 17(1) of the Montreal Convention is that:

- ▶ Psychiatric injury which is caused directly by physical injury suffered in an accident is a compensable injury (as is physical injury caused by psychiatric damage); and
- ▶ 'Pure' psychiatric injury suffered in an accident where there is no physical injury, is not a compensable injury.

However, *Doe v Etihad Airways* leaves open an argument, based on a plain text analysis of Art 17(1), that psychiatric injury, not caused directly by physical injury, but more generally by the accident that caused the physical injury, is compensable injury under the Montreal Convention. As this argument is at least colourable (to use the phrase deployed in *Delaney*), the authors expect to see an increasing number of attempts at recovery for such injuries and the more sophisticated use of medical evidence to that end. As stated by the court in *Delaney*, the law 'remains uncertain', but the law must, 'after all, be given the opportunity to develop'. Watch this (air)space. **NLJ**