

INTERPRETATION OF THE TERM 'BODILY INJURY' IN
INTERNATIONAL AIR TRANSPORTATION- WHETHER RECOVERY FOR
MENTAL INJURY IS TENABLE UNDER THE WARSAW SYSTEM AND
MONTREAL CONVENTION ?

BY

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ABSTRACT

In international air travel, the Warsaw Convention and the Montreal Convention are the main instruments applicable in case of liability of carrier to redress passenger injury. Under the liability framework of both the Conventions, passengers have been allowed a limited recovery of bodily injury. Judicial decisions have given controversial interpretations for claims dealing with mental injury which has led to a fragmented and inconsistent judicial precedent. The author argues that despite the retention of the same phrase of bodily injury in Montreal Convention, there is a new hope which has emerged to adjudicate claims beyond bodily injury.

A close analysis of the Montreal Convention's history and negotiations allows claims dealing with mental injuries. The change in policy framework from protecting the airline industry to protecting the passenger, and comparison with other International Conventions support the same analysis.

The research paper aims to examine the current existing legal regime dealing with liability of a carrier with regard to a passenger injury. The author argues that a different approach and analysis has to be adopted by courts while dealing with a claim under the Montreal Convention than the Warsaw Convention in light of new emerging medical science, which will be in consonance with the objective and purpose of the Montreal Convention.

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1. INTRODUCTION

In a comforting age of recognition of mental health across the world, the concern arises with respect to the tenability of the mental injury claims under the current international civil aviation legal regime. In a fictitious situation of an aircraft meeting with an accident, even if there is no physical harm to majority of the passengers, the question arises as to what would happen if some passengers suffer from post-traumatic stress disorders, hereinafter referred to as ‘PTSD’ or other kinds of mental injuries after experiencing a frightening escape. Whether such claims can be compensated under the current legal framework?

In international air travel, liability of air carriers to passengers is either governed by the framework of Warsaw Convention,¹ or the Montreal Convention.² The most important and critical provision regarding liability for passenger injury is Article 17³ of the Warsaw Convention. The Montreal Convention incorporates similar requirements in case of a passenger injury with mere deletion of words.⁴ Within the framework of Article 17, recovery for accidents suffered on international flights has been limited to bodily injury and compensation for pure mental injury has been excluded.⁵ This limitation has been derived from the interpretation of the Warsaw Convention’s French term ‘lésion corporelle’ which strictly requires physical injury to a passenger in its English translation.⁶ There are also certain concerns regarding the acceptance of recovery for mental injury, including the ‘opening of the floodgates’ argument, difficulties regarding proof, disproof, diagnosis and causation of mental injuries.⁷

¹ Warsaw Convention for the Unification of Certain Rules relating to International Transportation by Air, [Warsaw Convention] opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (entered into force on Oct. 29, 1934).

² Convention for the Unification of Certain rules for International Carriage by Air, [Montreal Convention] opened for signature May 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 309 (entered into force on Nov. 4, 2003).

³ Article 17- 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.

⁴ Only the phrase ‘or wounding of a passenger’ was not carried forward into the Montreal Convention. See also Paul Stephen Dempsey and MichealMilde, *International Air Carrier Liability: The Montreal Convention of 1999* (Centre for Research in Air & Space Law, 2005) 55.

⁵ *Eastern Airlines Inc. v. Floyd* [1991] 499 U.S. 530, 544.

⁶ *ibid.* 543.

⁷ Dr. Christopher Andres and Dr. Vernon Nase, ‘Psychiatric Injury in Aviation Accidents under the Warsaw and Montreal Conventions: The Interface between Medicine and Law’ (2011) 76 *Journal of Air Law and Commerce* 3, 4.

Initially the interpretation has almost universally required physical injury, however, there has been a minor and disputed widening of scope of liability along with time.⁸ Some judicial decisions have recognized a right to recover damages under Article 17 for mental injury caused by, related directly to and emanating from an accompanying physical or bodily injury.⁹ But in such cases, damage is not awarded for standalone or separate mental injury, but on the account of medically proven mental suffering caused directly by and emanating from the bodily injury.¹⁰ In recent decisions, having reliance on the medical advancements, the courts have concluded that mental injuries can be considered as bodily injuries and therefore, can be compensated under the liability regime.¹¹

Certain concerns as to what happens in case of a pure mental injury or in a case where the accident causes mental injury which, in turn, causes bodily injury need to be legally examined to come to a conclusion. The questions regarding whether recovery for pure mental injury or for the mental injury that precedes its physical manifestation can be permitted under the existing legal regime are yet to be answered. The current work aims to analyse the existing legal framework along with various judicial decisions for carrier liability to find out the extent of inclusion of damages for mental injury, if allowed.

During the course of the paper, it will be observed that courts in different jurisdictions have used distinctive terminology while dealing a claim for mental injury, including physiological damage or injury, emotional damage or injury or distress and psychiatric injury.¹² For the sake of brevity, the author uses the word ‘mental injury’ throughout while explaining her opinion.

⁸Jack v. World Airlines Inc. [1994] 854 F. Supp. 654 (N.D. Cal.); Turturro v. Continental Airlines [2001] 128 F. Supp. 2d 170, 178 (S.D.N.Y.); Lloyd v. American Airlines [2002] 291 F.3rd 503 (8th Circuit); Ehrlich v. American Airlines Inc. [2004] 360 F.3d 366 (2d Circuit); Weaver v. Delta Airlines [1999] 56 F. Supp. 2d 1190(N.D.); King v. Bristow Helicopters Ltd. (2002) 1 Lloyd’s Rep. 745,746 (H.L.); Casey v. Pel-Air Aviation Pty Ltd; Helm v. Pel-Air Aviation Pty Ltd (2015) NSWSC 566.

⁹Jack v. World Airlines Inc. [1994] 854 F. Supp. 654 (N.D. Cal.); Turturro v. Continental Airlines [2001] 128 F. Supp. 2d 170, 178 (S.D.N.Y.); Lloyd v. American Airlines [2002] 291 F.3rd 503 (8th Circuit); Ehrlich v. American Airlines Inc. [2004] 360 F.3d 366 (2d Circuit).

¹⁰ibid. See also George N. Tompkins, Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999 (Kluwer Law International, 2010) 73.

¹¹Weaver v. Delta Airlines [1999] 56 F. Supp. 2d 1190(N.D.); King v. Bristow Helicopters Ltd. (2002) 1 Lloyd’s Rep. 745,746 (H.L.); Casey v. Pel-Air Aviation Pty Ltd; Helm v. Pel-Air Aviation Pty Ltd (2015) NSWSC 566.

¹²Air France v. Saks [1985] 470 U.S. 392; Eastern Airlines, Inc. v. Floyd [1991] 499 U.S. 530; El Al Isr. Airlines Limited v. Tseng [1999] 525 U.S. 155, 170.

2. WHAT IS MENTAL INJURY?

Traditionally, the common law was hesitant to recognize mental distress as an independent basis for recovery.¹³ The primary concerns for denying recovery for emotional distress included that emotional harm can be feigned, or imagined;¹⁴ difficult to measure in monetary terms;¹⁵ exposure of defendants to unlimited liability¹⁶ and particularly, the potential for fictitious claims.¹⁷

Today, recovery for purely mental injury is recognised in the tort law of many states¹⁸ and protections are used such as ‘impact rule,’¹⁹ ‘zone of danger rule,’²⁰ and ‘physical manifestations requirement’²¹ to limit both application and amount of recovery and to alleviate spurious claims.²²

The term ‘mental injury’ includes both psychiatric injuries and emotional harm.²³ Emotional harm, for instance, distress, upset or fear is distinguished from a psychiatric injury since it does not equate to a recognised psychiatric disorder.²⁴ A distinction can be seen in English law in relation to nervous shock. Nervous shock is a term which is used to describe psychiatric illness

¹³Fowler V. Harper and Fleming James, Jr. *The Law of Torts* (vol. 1, Little, Brown & Company 1966) 665; Magruder ‘Mental and Emotional Disturbance in the Law of Torts’ (1936) 49 *Harvard Law Review* 1033, 1035.

¹⁴ Paul Stephen Dempsey, ‘Accidents & Injuries in Air Law: The Clash of the Titans’ 1, 15 <<https://www.mcgill.ca/iasl/files/iasl/ASPL636-Accidents-Injuries.pdf>> accessed 20 July, 2017.

¹⁵Isabella (n 8) 228.

¹⁶ Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (permitting recovery for emotional distress would lead to a flood of litigation, would allow fictitious and speculative claims, and would lead to recovery for injuries which were not the natural results of the negligent act); Chittrick v. Philadelphia Rapid Trans. Co., 224 Pa. 13, 73 A. 4 (1909) (mental injury, by nature, is easily feigned and thus fictitious claims would flood the courts).

¹⁷ibid.

¹⁸W. Page Keeton et al., *Prosser and Keeton on Torts* (5thedn, West Group 1984) 12.

¹⁹ The impact rule requires a blow or impact as a condition for recovering damages in negligent infliction of emotional distress actions. The impact rule was established in the landmark case of Mitchell v. Rochester Ry. Co. [1896]151 N.Y. 107, 45 N.E. 354.

²⁰ The zone of danger rule was established in Orlo v. Connecticut Co. [1941] 128 Conn. 231, 21 A.2d 402. In Orlo, the plaintiff was a passenger in a vehicle following the defendant's trolley. The trolley struck trolley wires, causing the wires to snap and fall upon the vehicle in which the plaintiff was seated. The plaintiff remained seated in the vehicle while the wires flashed and hissed about. The plaintiff allegedly suffered nervous shock as well as aggravation to pre-existing physical ailments. The court allowed recovery because the plaintiff was within such close proximity to the accident that there was substantial risk of physical injury.

²¹ Traditionally, courts have been reluctant to allow recovery for emotional distress itself, and recovery was always limited to the physical manifestations of emotional distress. Robb v. Pennsylvania R.R. Co. [1965] 210 A.2d 709, 714-15 (Del.)

²²David L. Farnbauch, ‘Pre-Impact Pain and Suffering Damages in Aviation Accidents’ 20 (2) *Valparaiso University Law Review* 219,224.

²³ Des Butler, *Damages for Psychiatric Injuries* (Federation Press, 2004) 88.

²⁴Behrens & Ors v Bertram Mills Circus Ltd. [1957] 2 QB 1.

or injury, such as PTSD, or clinical depression, arising from witnessing a traumatising event.²⁵ A person suffering from nervous shock does not have to suffer any physical harm or any personal danger.²⁶ In addition, while in English law, there is a duty of care to not cause nervous shock, it generally excludes compensation for emotions such as grief and stress.²⁷

In the United States, there has been uniformity in respect of the concept of mental injury and the recoverability of damages for the same. Conventionally, a plaintiff was allowed to recover damages for mental injury only when it was accompanied by physical injury²⁸, but in most states, plaintiffs may now recover for mental injury by reference to a recognised psychiatric disorder.²⁹ However, few states, namely Indiana and Kentucky require a physical impact i.e. some form of physical manifestation of injury in order to permit recovery for mental injury.³⁰

In the context of air travel, tort recovery for pre-impact emotional distress is common and most courts have entertained them under state law.³¹ Pre-impact emotional distress refers to the fear of impending death or bodily harm that a passenger on an airplane experiences upon discovering that flight, and therefore, his/her life is in danger.³² In such cases, the primary issue is whether the plaintiffs actually suffered distress,³³ and not whether claims for purely psychological injuries are permissible.³⁴ Thus, tort recovery suggests validity of the monetary compensation for mental injury.

In case of legal outline, the provisions of the Warsaw Convention and Montreal Convention are of exclusive application and have mandatory effect.³⁵ As a result, all the claims relating to passenger injury are to be brought under the Warsaw Convention or Montreal Convention and

²⁵'Defining the Boundaries for Nervous Shock' (Aviation Bulletin, Clyde & Co., August 2013)<http://www.clydeco.com/uploads/Files/Publications/2013/CC003644_Aviation_Bulletin_12.08.13.pdf>, accessed 20 July, 2017.

²⁶ibid.

²⁷Hicks v Chief Constable of South Yorkshire [1992] All ER 65.

²⁸Mitchell v Rochester Ry. 151 N.Y. , 45 N.E. 354 (1896).

²⁹ibid.

³⁰Steel Technologies, Inc v Congleton [2007] 234 SW3d 920 (Ky); Atlantic Coast Airlines v Cook [2006] (8557) NE2d 989 (Ind).

³¹Betsy J. Grey, 'The Future of Emotional Harm' (2014-2015) 83 Fordham Law Review 2605, 2623.

³²David L. Farnbauch, 'Pre-Impact pain and Suffering Damages in Aviation Accidents' (1986) 20 (2) Vapparaiso University Law Review 219, 225.

³³Lousina Ann Collins, 'Pre and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents' (1993-1994) 59 Journal of Air Law & Commerce 403, 409.

³⁴ibid.

³⁵ Andrew Field, 'International Air Carriage, the Montreal Convention and the Injuries for which There is No Compensation' (2006) 12 Canterbury Law Review 237, 241.

otherwise, no claim can be brought under any national law.³⁶ Therefore, all the claims dealing with mental injury in an international air travel are to be examined within the framework of both these Conventions. In general, recovery for purely mental injuries has been denied by courts as it is difficult to identify which mental injuries are caused by the accident and as a result, can be compensated under international air law.³⁷ As a result, damages arising out of emotional distress are allowed under Article 17 of this convention only to the extent that they flow from the bodily injury suffered.³⁸

These aforementioned references of the English and United States law are not to interpret the provisions of the Warsaw and Montreal Conventions since that contravenes the principles of treaty interpretation under the Vienna Convention on the Law of Treaties.³⁹ The aim is to provide a domestic legal framework about mental injury against the view that during drafting of the Warsaw Convention in 1919, recovery for mental distress was excluded in common law jurisdictions.⁴⁰

The bodily injury has always been seen in terms of evident structural changes to the physical body.⁴¹ However, the modern psychiatry has left behind the dualist approach of mind and body as ‘Events and processes with which psychiatry is concerned are both physical and mental and ...the distinction resides not in the events and processes but in the linguistic/conceptual framework used in referring to them.’⁴²

On the basis of evolution of scientific and medical understanding of purely mental injury, the distinction between purely mental and physical injuries has blurred.⁴³ The development in

³⁶Tory A. Wteigand, ‘Accident, Exclusivity and Passenger Disturbances under the Warsaw Convention’ (2001)16 (4) American University International Law Review, 892, 931.

³⁷ibid.

³⁸Kruger v. United Airlines (N.D.Cal 2007) 32 Aviation Cases 15,703. See also Jonathan E. Demay, ‘Recent Developments in Aviation Law’ (2008) 73 Journal of Air Law & Commerce 131, 219.

³⁹ Article 27- Internal Law and Observance of Treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

⁴⁰See Eastern Airlines, Inc. v. Floyd [1991] 499 U.S. 530, 545. ‘Although French law recognized recovery for certain types of mental distress long before the Convention was drafted, ... in common-law jurisdictions mental distress generally was excluded from recovery in 1929.’

⁴¹Eastern Airlines, Inc. v. Floyd [1991] 499 U.S. 530, 545.

⁴²Aviel Goodman, ‘Organic Unity Theory: The Mind-Body Problem Revisited’ (1991) 148 (5) The American Journal of Psychiatry 553, 562.

⁴³John F. Easton et al., ‘Post Traumatic “Lesion Corporelle”: A Continuum of Bodily Injury Under the Warsaw Convention’ (2003) 68 Journal of Air Law & Commerce 665, 666.

scientific research questions the dualism between mind and body and can affect heavily litigated issue of ‘mental injury’ within the ambit of Article 17.⁴⁴ Dr. Harris in *In re Air Crash at Little Rock Arkansas* explained in his testimony that certain medical tests can be used to examine physical changes to the brain, including magnetic resonance spectroscopy, positron emission tomography, scans.⁴⁵ In addition, the use of neuroimaging in medical research has recently shown physical effects of PTSD⁴⁶ which further supports the view that the distinction between bodily and mental injury is diminishing.

3. THE GOVERNING INTERNATIONAL LIABILITY REGIME

3.1 The Warsaw System

The Warsaw System collectively includes the Warsaw Convention along with amending protocols and supplementary instruments.⁴⁷ Article 17 of the Warsaw Convention lists the occurrences of death, wounding and bodily injury by referring to the physical world.⁴⁸ In its original text in French, the word ‘lésion corporelle’ has been used. In French contract law, a lesion means-a pecuniary loss may occur for rescission of the contract when there is a disparity between the parties’ contractual obligations.⁴⁹ In addition, *Dommage corpore*, is a type of damages in French law which can be recoverable and may include physical, mental, and moral damage, as well as any pecuniary loss resulting from personal injury.⁵⁰

To make ‘lésion corporelle’ with its preceding words, ‘lésion’ must be taken in its literal sense with its physical connotations. On the one hand, interpretation on the basis of pure literal meaning of the words concludes that the conditions for ‘lésion corporelle’ are not satisfied by mental injury alone.⁵¹ On the another hand, if both a concrete and an abstract interpretation can be given to the broad definition of ‘lésion’, the French legal usage ‘lésion corporelle’ can

⁴⁴Hanna (n 26) 142.

⁴⁵*In re Air Crash at Little Rock Ark* [2002] 291 F.3d 503, 512 (8th Circuit).

⁴⁶Ruwantissa I.R. Abeyratne, ‘Mental Distress in Aviation Claims-Emergent Trends’, (1999-2000) 65 *Journal of Air Law & Commerce* 225, 229.

⁴⁷Postal History of ICAO,

<http://www.icao.int/secretariat/postalhistory/the_warsaw_system_on_air_carriers_liability.htm> accessed 20 July, 2017.

⁴⁸Georgette Miller, *Liability in International Air Transport* (1977, Kluwer-Deventer, The Netherlands) 112.

⁴⁹B. Nicholas, *French Law of Contracts* (1982) 131-137.

⁵⁰Dana Stanculescu, ‘Reforms for Mental Health Under Article 17 of the Warsaw Convention : An Analysis of Lesion Corporelle’ (1984-85) 8 *Hastings International and Comparative Law Review* 339, 361.

⁵¹*ibid.*

include mental suffering as it includes ‘any injury suffered by the plaintiff as a person distinct from any injury done to his patrimony i.e., his belongings economic assets or interests.’⁵² When it is applicable to the Warsaw Convention, ‘the use of the word ‘lésion’ after the words ‘death or wounding’ comprises and contemplates cases of traumatism or disturbance of the mind which do not immediately become manifest, but have a causal relationship with the accident.’⁵³ In the opinion of Professor Mankiewicz, a leading expert on the Warsaw Convention and Aviation Law, if ‘lésion corporelle’ was intended to refer only to injury caused by physical impact, it is likely that the civil law experts who drafted the Warsaw Convention in 1929 would not have singled out and specifically referred to a particular case of physical impact such as ‘blessure’ i.e. wounding. The cause of action for mental injury was recognised by French law as far back as 1857.⁵⁴ In consequence, whether one embraces the importance of the usage in 1929 or present times, ‘lésion corporelle’ seems to incorporate a mental element.

Taking in account both the opinions, no conclusive answer can be given to the question as to how ‘lésion corporelle’ is to be read in accordance with its French legal meaning. A literal interpretation seems to exclude recovery for mental injury, where as a liberal interpretation seems to include recovery for mental injury. Even the minutes of the Warsaw Conference signifies that there was no discussion with regard to the term ‘lésion corporelle’ and the fact that it includes recovery for mental injury.

The subsequent agreements namely, the Hague Protocol, Guatemala City Protocol and Montreal Agreement which substituted the term ‘personal injury’ for the term ‘wounding and bodily injury’ and left the French term ‘lésion corporelle’ unchanged. As regards to these Agreements, one view is that analysis of the French term ‘lésion corporelle’ and subsequent conduct of the parties clarifies the intent of the drafters and thus, reveals that Article 17 provides recovery for purely mental injuries unaccompanied by physical trauma. In *Air France v. Saks*,⁵⁵ the Court

⁵² Miller, *Compensable Damages Under Article 17 of the Warsaw Convention*, 1 AIR L. 210, 211-13 (1976). See also Joseph William Boone, ‘International Air Carriers-Psychic Injury and the Warsaw Convention’ (1975-1976) 27 Mercer Law Review 589, 590.

⁵³ Mankiewicz, *The Application of Article 17 of the Warsaw Convention to Mental Suffering Not Related to Physical Injury*, 4 Annals Air & Space Law, 187, 201 (1979).

⁵⁴ *ibid.*

⁵⁵ 470 U.S. 392 (1985); See Laurie S. Truesdell, ‘Air France v. Saks: The Applicability of the Warsaw Convention to a Passenger Injury Sustained During a Routine International Flight’ (1986) 11 North Carolina Journal of International Law and Commercial regulation 157, 161.

held that ‘reference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps clarify the meaning of the term.’⁵⁶

3.2 The Montreal Convention

In 1999, Montreal Convention was adopted with a view to modernize and replace the instruments of the Warsaw System.⁵⁷ Article 17 of the Montreal Convention introduced inconsequential changes in its wording and language was remarkably similar to Article 17 of the Warsaw Convention.⁵⁸

However, regardless of the fact that the Warsaw or Montreal Convention applies, the requirements for recovery are virtually identical.⁵⁹ The liability is imposed under Article 17 if the plaintiff proves: (1) an accident (2) caused (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking.⁶⁰

From the negotiations of the Montreal Convention, it is evident that at Montreal, majority of states had a desire to expand available recovery for mental injury.⁶¹ However, during the final days of the Convention, the term ‘bodily injury’ was retained with the conviction that the then current-interpretation of the term ‘bodily injury’ as established by judicial precedent was still developing.⁶² As suggested by Egyptian delegate that record could ‘show the intent behind the term ‘bodily injury’ and would give a unified meaning to it.’⁶³ Thus, the proceeding of the Convention should inform judicial decision making.⁶⁴

The French meaning of the term ‘lésion corporelle’ holds significance only for a claim under the Warsaw Convention, since the Montreal Convention is equally authentic both in English and

⁵⁶ *ibid.* at 403.

⁵⁷ ICAO Doc.9775-DC/2, *International Conference on Air Law, Volume 1, Minutes* (199) [Montreal Minutes] 32-34.

⁵⁸ Pablo Mendes De Leon & Werner Eyskens, ‘The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System’ (2000-2001) 66 *Journal of Air Law & Commerce* 1155, 1164.

⁵⁹ Paul Stephen Dempsey and Micheal Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Centre for Research in Air & Space Law, 2005) 55.

⁶⁰ *Eastern Airlines, Inc. v. Floyd* [1991] 499 U.S. 530, 543. See also Lindsey Ray Altmeyer, ‘The Montreal Convention-The Eleventh Circuit Embraces Airlines Practice of “Bumping” to deny Plaintiffs’ recovery for personal injury under Article 17 (2015) 80 *Journal of Air Law & Commerce* 239, 242.

⁶¹ *ibid.* at 72.

⁶² Montreal Minutes at 201. See also ICAO, Convention for the Unification of Certain Rules for International Carriage by Air, Explanatory Note for Article 17, May 28, 1999 reprinted in S. Treaty Doc. No. 106-45 (1999).

⁶³ *Ibid.* at 112.

⁶⁴ *ibid.*

French. The drafting of the Warsaw Convention is silent on the discussion regarding the meaning of the term ‘lésion corporelle’ since drafters may not have envisaged the case of mental injury occurring without physical injuries.⁶⁵ However, the argument is not convincing relying on the fact that French text was drafted by experts of Civil law where recovery for mental injury was allowed. Thus, relying on the basis of purpose of the Warsaw Convention dealing with limitation of liability of air carrier, recovery for mental injury may not be allowed within the framework of Article 17 of the Warsaw Convention.

On the other hand, the courts can play a significant role in developing the jurisprudence under the Montreal Convention where on the basis of negotiations, to say the least, it can be inferred by Courts that recovery for mental injury associated with bodily injury is permissible.

4. INCOHERENT AND DIVERGENT JUDICIAL PRECEDENTS IN VARIOUS JURISDICTIONS

Before *Floyd*, the courts in the United States were sharply split with regard to the interpretation of the term ‘bodily injury’ under Article 17 of the Warsaw Convention. There were some cases in which the courts have allowed recovery under Article 17 for purely emotional distress.⁶⁶ Other courts concluded that damages for emotional distress unaccompanied by physical trauma were not allowed.⁶⁷ The controversy was finally put an end to by the Supreme Court of the United States in the case of *Eastern Airlines Inc v. Floyd*.⁶⁸ During the flight from Miami, Florida to Bahamas in May, 1983, one of the aircraft’s three engine lost oil pressure and eventually, the other two engines failed. The Passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, one of the engines restarted and the plane was landed safely at Miami International Airport.⁶⁹

The Supreme Court reversed the Circuit Court judgement and held that Article 17 of the Warsaw Convention does not permit recovery for mental injury in absence of physical injury or physical

⁶⁵ Miller (n 48) 126.

⁶⁶ See *Karfunkel v. Compagnie National Air France*, 427 F. Supp 971 (S.D.N.Y. 1977) ; *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Cp.*, 388 F. Supp 1238 (S.D.N.Y. 1975); *Palagonia v. Trans World Airlines*, 110 Misc. 2d 479 (N.Y. Supp. Ct. 1978).

⁶⁷ *Burnett v. Trans World Airlines*, 368 F. Supp. 1152 (D.N.M. 1973); *Rosman v. Trans World Airlines*, 34 N.Y. 2d 385 (1974).

⁶⁸ 113 L. Ed. 2d 569 (U.S. Sup. Ct. 1991)

⁶⁹ *ibid.*

manifestation of injury. The Court examined the text of the Convention as well as its history and negotiations.

In order to determine the French legal meaning of ‘lésion corporelle’, the Court examined the French legal materials including legislation, cases and treatises. The Court observed that there was no French legal provision in force in 1929 which contained the term ‘lésion corporelle’ and there was no French court decision explaining the meaning of the same phrase. In consequence, the Court that ‘neither that “lésion corporelle” was a widely used term in French law nor that the term specifically encompassed psychic injuries.’⁷⁰

Then, the Court examined the negotiating history of the Warsaw Convention and concluded that translation of ‘lésion corporelle’ as ‘bodily injury’ was in consonance with its history.⁷¹ The Court considered that as ‘many jurisdictions did not recognize recovery for mental injury at that time,’ ‘the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.’⁷² The Court further examined the subsequent conduct of the parties to the Warsaw Convention in the Montreal Agreement and Guatemala City Protocol and stated that it was not an evidence of substantive change and clarify the term ‘lésion corporelle’.

After the Supreme Court decision in *Floyd*, majority of the lower courts found that mental harm unaccompanied by physical harm is not recoverable.⁷³ In a recent decision of *Jane Doe v. Etihad Airways*,⁷⁴ the United States District Court for the Eastern District of Michigan reaffirmed the position that recovery of damages for mental injury that was not caused by any bodily injury is not permissible under the Montreal Convention.

In the United Kingdom, the most important cases which have dealt with the issue of mental injury under the Warsaw Convention are *King v. Bristow Helicopters Ltd.*⁷⁵ and *Morris v. K.L.M.*

⁷⁰ *ibid.* 538. See also Max Chester, ‘The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries under the Warsaw Convention’ (2000-2001) 84 *Marquette Law Review* 227, 229.

⁷¹ *ibid.* 542.

⁷² *ibid.* at 544-545.

⁷³ *Alder v. Malev Hungarian Airlines* [1992] WL 15144 (S.D.N.Y.); *In re Flight Explosion on Trans World Airlines* 778 F. Supp. 625 (E.D.N.Y. 1991); *Al Israel Airlines Ltd v. Tsui Yuan Tseng* 525 U.S. 155 (1999); *Longo v. Air France* [1996] WL 866124 2; *Terrafranca v. Virgin Atlantic Airways* 151 F.3rd 108 (3rd Cir. 1998).

⁷⁴ E.D. Mich. Oct. 13, 2015

⁷⁵ (2002) 1 Lloyd’s Rep. 745,746 (H.L.)

Royal Dutch Airlines.⁷⁶ Both the appeals were heard together by the House of Lords since both cases dealt with same issue. In *King's* case, an action was brought by the plaintiff who was a passenger on a helicopter transporting workers off a North Sea oil platform. Both of the helicopter's engines failed suddenly and due to the crash, the plaintiff suffered PTSD with symptoms including insomnia, nightmares, anxiety and a fear of flying. He also alleged that the accident also led to peptic ulcer.⁷⁷ In the case of *Morris*, the appellant was an underage girl who was travelling unaccompanied from Kuala Lumpur to Amsterdam who was sexually assaulted by a male passenger who was sitting right next to her. She claimed damages for mental anguish that she suffered because of the incident.

In the decision, the House of Lords held that damages can be awarded for physical manifestations of mental injury as long as a causal link can be established between the mental injury and the physical symptoms during the accident. However, no recovery would be allowed in case there are no physical symptoms.⁷⁸ As a result, the appeal in *King's* was allowed and he could recover for his ulcer. On the other hand, the appellant, *Morris* was denied recovery for purely psychological injury.

Even though decision in *King's* endorses the same position of irrecoverability of damages or pure mental injury under the Warsaw Convention, it does go a step further to support that certain psychological conditions which were earlier regarded as not compensable can be allowed if it is proven on the basis of modern medical science that they manifest in physically measurable symptoms.

In Australia, there is limited jurisprudence examining the issue of mental injury. The issue of tension between physical injury and psychiatric injuries was raised again in the recent of *Casey v. Pel-Air Aviation Pty Ltd; Helm v. Pel-Air Aviation Pty Ltd*⁷⁹ where a claim was sought by Miss Casey against Pel Air, the flight operator contending that she suffered from a complex pain syndrome, a major depressive disorder, an anxiety disorder and PTSD. In order to come to a decision, Justice Schmidt analysed the decisions in the US and the UK. In the reasoning, the decision referred to the speech of Lord Hobhouse in *King's* case detail at length. In the case of

⁷⁶ (2002) 1 Lloyd's Rep. 745 (H.L.) See also Andrew Field, 'Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated' (2005) 28 Dalhousie 69, 82.

⁷⁷ *King* (2002) 2 A.C. 630

⁷⁸ *ibid.*

⁷⁹ (2015) NSWSC 566.

King, even though in that case the claim for PTSD failed, the House of Lords accepted that in certain situations, PTSD can be considered as a compensable bodily injury.⁸⁰

Justice Schmidt concluded that ‘the evidence established that the PTSD Ms Casey developed and continued to suffer was not merely the result of an injury to her mind, caused by the shock, fear and other emotional trauma caused by the crash but also involved an injury to her brain and other parts of her body involved in normal brain function, and thus constituted a psychiatric injury caused by a physical route.’⁸¹ Thus, PTSD was considered to be a physical injury within the boundaries of Article 17 of the Montreal Convention and damages were allowed.

In France, the French Courts including the Court of Cassation have allowed recovery for mental injury in case of a work accident,⁸² but in case of aviation accidents, the Court have not stated any view with regard to the meaning of ‘lésion corporelle’ and inclusion of recovery for mental injury pursuant to Article 17.⁸³ As a result, French jurisprudence does not clarify with regard to the issue of allowing damages for mental injury within the framework of Article 17, however, it can be concluded that the French law does allow damages for mental injury.

In Germany, the main instrument applicable with regard to aviation claims is the Air Traffic Act. In its English translation, Section 45 of the Act provides for a strict liability of the carrier for death and personal injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking.⁸⁴ However, section 44 of the Act clarifies that the provisions are only applicable as far as the Warsaw Convention, the Montreal Convention or the Council Regulation (EC) No 2027/97 as amended by the Regulation (EC) No 889/2002 do not apply or do not lay down rules.⁸⁵

An inference can be made to the one of the articles of Ottos Riese dealing with the application of Section 45 of the Act,⁸⁶ which was translated by Professor R.H. Mankiewicz as:

⁸⁰ (2002) 1 Lloyd’s Rep. 745,746 (H.L.)

⁸¹(2015) NSWSC 566.

⁸² Cas. Soc. 27 janv. 1961 : Bull. civ. 1961 n ° 134 ;Cour de cassation, Civil Division 2, N° de pourvoi: 02-30576

⁸³TGI Paris, 11 mai 1984 : RFD aérien 1984, p. 450

⁸⁴ibid.

⁸⁵ibid.

⁸⁶ , He was a member of the German delegation to the Warsaw Convention and later became a Judge of the German Supreme Court as well as the head of the German delegation here, mentioned as evidence in the case of *Palagonia v. Trans World Airlines*.

‘By mentioning the harm to the health, somewhat liberal translation of the French text which mentions ‘lésion corporelle’, next to Körperverletzung, namely ‘blessure’ which is a French term used in this, ‘blessure’ is intended to make it clear that any harm of the physical or psychic well-being is to be included, even if that harm has not resulted in a mechanical impact or in anatomic modification in the human body.

On the basis of divergent precedents and legal framework across the world, there is a wide disagreement as to whether the term ‘lésion corporelle’ or ‘bodily injury’ still encompasses mental injury. Since *Floyd*, there has been a range of claims regarding recovery of damages for mainly the following situations: pure mental injury, mental injury manifested in physical injury, mental injury flowing from physical injury and mental injury which is not related to physical injury. It has been agreed by most courts that recovery for pure mental injury is not permissible. Some Courts conclude that mental injury is not compensable where it has resulted only in physical manifestations for instance weight loss or sleeplessness.

On the other hand, some courts have also concluded that mental injury is compensable if it flows from a physical injury. Despite the varying results, the Courts have given not convincing reasoning by not considering the French text binding while dealing a claim under the Warsaw Convention. However, in cases where Courts have considered the meaning of the French legal term ‘lésion corporelle’, it has again led to different results with *Floyd* excluding recovery for mental injury and *Palagonia* encompassing such injury. The decision of Supreme Court of Australia in case of *Casey* distorts the distinction between mental and physical injury. As a result, the inconsistency in these judicial decisions fails the purpose of the Warsaw and Montreal Convention to bring uniformity.

5. REASONS FOR ADOPTING A MODERN APPROACH

It is noteworthy that the International Conventions namely, the Athens Convention, 1974⁸⁷, the Inland Waterways Convention, 1976⁸⁸, Rail Conventions⁸⁹ uses the word ‘personal injury’ for damage and injuries suffered. The use of the broad term ‘personal injury’ goes beyond mere

⁸⁷ Robert D. Peltz, ‘The Athens Convention revisited’ (2012) 43 (4) Journal of Maritime Law and Commerce 491, 500.

⁸⁸ Article 5, The Inlands Waterways Convention, 1976.

⁸⁹ <https://www.otif.org/pdf_external/e/RU-CIV-1999-e.PDF> accessed 20 July, 2017.

physical injury and includes claims for mental injury as well.⁹⁰ In addition, Inland Waterways Convention has a specific reference to mental harm in its provision.

More importantly, Both the Draft Conventions, namely the Convention on Compensation for Damage to Third Parties, resulting from Acts of Unlawful Interference Involving Aircraft and Convention on Compensation for Damage Caused by Aircraft to Third Parties provide that ‘damage due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognized psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.’ Although both the Conventions are not yet in force.

Therefore, on the one hand, all the other modes of transport provide for a recovery for mental injury. With regard to aviation also, recovery for mental injury is envisaged in both the Draft Conventions mentioned above. On the other hand, compensation for mental injury is negated in international commercial air law regime. Furthermore, it is inconsistent to have different compensation regimes for passengers and third party victims. Consequently, it is necessary to seek a balance between the scope of passenger’s recovery and that of third party. Moreover, during the proceedings of the Montreal Convention, multiple nations, including Pakistan and Chile agreed with the inclusion of recovery for mental injury, but advocated replacing ‘bodily injury’ with ‘personal injury’ or ‘damage to health’ should be permitted.

Some of the states while advocating for inclusion of mental injury asserted that it was already available under Warsaw’s original text. According to the German delegate, the French phrase ‘lésion corporelle’ already encompassed mental injury and only the English version required an amendment to cover both elements.⁹¹ It was pointed out by the delegate from Saudi Arabia that the Arabic text for ‘bodily injury’ includes both mental and physical injury.⁹² The similar view that mental injury was already included in the Warsaw text was retained by the representatives from the Ukraine,⁹³ Uzbekistan,⁹⁴ Spain,⁹⁵ the Russian Federation,⁹⁶ the Syrian Arab Republic,⁹⁷

⁹⁰Michael Milde, ‘Liability for damage caused by Aircraft on the Surface - Past and Current Efforts to Unity the Law’ (2008), 57 Z.L.W. 534, 538. See also Vernon Nase, ‘International Aviation and the Liability for Mental Injury: Is the Best Really an Enemy of the Good.’ 10 Finnish Yearbook of International Law 409,410.

⁹¹Montreal Minutes 68.

⁹²Montreal Minutes 69.

⁹³Montreal Minutes 71.

⁹⁴Montreal Minutes 74.

⁹⁵ *ibid.*

and the Cameroon.⁹⁸ The French delegate also confirmed that the ‘lésion corporelle’ did cover both physical and mental injury and there was always coverage of the problem as a whole.⁹⁹ Therefore, a consensus emerged that new treaty should allow recovery for mental injury.¹⁰⁰

Therefore, the Courts should establish a specific rule of compensation for passengers’ mental injury and develop a jurisprudential policy framework allowing recovery for pure mental injury, specially under the Montreal Convention.

6. CONCLUDING REMARKS

The issue of recovery of mental injury under the Warsaw System and the Montreal Convention entails a lot of controversial jurisprudence across the world. When the Warsaw Convention was drafted, international commercial air transportation was still being developed. For its time, the Warsaw Convention was a major contribution to the unification of law and was quite forward and promising with an aim to protect an emerging airline industry. Since the Convention was only written in French and the drafting history did not help much in solving the mystery regarding inclusion of damages for mental injury, the interpretation of the French legal term ‘lésion corporelle’ mentioned in Article 17 became significant in order to know the intention of the drafters. However, interpretation by courts again gave contradictory results with regard to the meaning of ‘lésion corporelle’ on the premises that there was no French legal document using the same phrase. However, damages for mental injury could be recovered under French law and the debate continued. The continuous fragmented judicial precedent or as Professor Paul Dempsey says, ‘Clash of Titans’ did not square well with what Warsaw Convention had aimed to achieve, i.e. unification of certain rules for international carriage by air.

When the Montreal Convention came into being in 1999, time had changed and airline industry was no longer nascent. It had become a robust and profitable industry by then. The Convention

⁹⁶Montreal Minutes 112.

⁹⁷Montreal Minutes 115.

⁹⁸Montreal Minutes 116.

⁹⁹Montreal Minutes 68.

¹⁰⁰Montreal Minutes 117. It was noted by the Chairman that the ‘the Group...had just agreed by consensus on a definition of damages that was somewhat broader than before as it encompassed mental injury which was not closely associated with bodily injury.’ He also noted that ‘a compromise had just been reached that pure mental injury was recoverable’).

put the Warsaw Convention and all of its amendments into one single document, thus unifying the system of private international air law once again.

Unlike the Warsaw Convention, it was written in six languages including French and English and as a result, both texts were equally authoritative. Therefore, it may not be argued under the Montreal Convention that interpretation of the words used was limited to its French text. The drafting of the Montreal Convention started with a hope to clarify the controversy ongoing for decades with regard to recoverability of damages for mental injury. A great majority of delegates advocated for broad recovery including mental injury, however, efforts failed to alter Warsaw's language limiting recovery to 'bodily injury'. Unfortunately, the same language was retained in Article 17 of the Montreal Convention.

Along with the growth of aviation industry, there have been medical advancements as well which has distorted the dichotomy between mind and body. Today, on the basis of available medical evidences, it can be easily shown that some kinds of mental injuries like PTSD not only affect the mind of a person, but there are physical changes to body as well. In such a situation, courts are given the responsibility to arrive at a conclusion which is sound in terms of both the liability framework envisaged by drafters and medical science. The proceedings of the Montreal Convention confirm the same analogy that the retention of the same phrase was meant to allow states to continue to develop their individual judicial precedents.

In addition, a comparison can be made to other International Conventions namely, the Athens Convention, 1974, the Inland Waterways Convention, 1976, Rail Conventions, Draft Convention on Compensation for Damage to Third Parties, resulting from Acts of Unlawful Interference involving Aircraft, 2008 and Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, 2008 wherein the damages for mental injury are allowed. The author argues that there is no reason to exclude the liability regime applicable to passengers from the same benefits under an industry which is quite healthy at this stage. The limitations of the courts are understandable for a claim under the Warsaw Convention and/or System since courts cannot go beyond the object and purpose of the Convention and intention of the drafters. In contrast, claims for mental injury can still be accepted by courts under the Montreal Convention, not only in cases where mental injury flows from a bodily injury, but also where a physical change is noticeable in body proven on the basis of medical diagnosis and an expert opinion.

In conclusion, the author submits that the courts have to develop a jurisprudential policy which is consistent, uniform and at the same time, adopt measures from exposing air carriers to an unlimited amount of claims for mere distress or fear.