Only Bodily Injury Recoverable for Aviation Accidents: How Is That Still Possible?

by Delphine Defossez*

1. *Introduction*

Consider two situations involving international airline flights with poor maintenance. In the first, the pilot avoids a crash *in extremis* while in the second situation, the plane crashes resulting in loss of lives or severe injuries. If the passengers in the first scenario – where none of them suffered a physical injury – file a suit seeking recovery for emotional distress caused by their belief that the plane would crash, the court will probably not award any compensation. However, if the passengers in the second scenario file a suit, they will most probably be compensated. One may wonder how this is possible, as the passengers in both scenarios could reasonably believe that they would die.[1]

The Warsaw and Montreal Conventions govern the liability of airlines to passengers during international air transportation. Since 1933, recovery for accidents suffered on international flights is subject to the Warsaw Convention's limitation of compensation to "bodily injury."[2] Article 17 of the Convention imposes liability upon the carrier only if the plaintiff proves: (1) an accident (2) causing either (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking.[3] To address perceived inequities stemming from this limitation, some courts invoked a liberal interpretation of the phrase "bodily injury."[4] This has resulted in a fragmented judicial response that threatens the treaty's goal of international uniformity.

In 1999, representatives from 121 States agreed to replace the aging Warsaw Convention with a new treaty, the Montreal Convention.[5] Although Article 17 of the Montreal Convention of 1999 kept the same language,[6] the treaty's history and the negotiations suggest that the great majority of the signatories intended to broaden the type of damages recoverable beyond the strictly interpreted bodily injury.[7] Indeed, a condition to the United States' participation was the

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1 This scenario was introduced and first addressed in Steven R. Pounian & Megan Wolfe Benett, *Recovery for Psychic Injuries Under Warsaw, Montreal Conventions*, N.Y. L.J. (ONLINE) (Nov. 18, 2009), http://www.kreindler.com/Publications/Recovery-for-Psychic-Injuries-Under-Warsaw-Montreal-Conventions.shtml.

2 Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 17, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].

3 E. Airlines v. Floyd, 499 U.S. 530, 111 S. Ct. 1489 (1991).

4 *See, e.g.*, Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238 (S.D.N.Y.1975); McCaskey v. Cont'l Airlines, Inc., 159 F. Supp. 2d 562, 576 (S.D. Tex. 2001).

5 CHARLES F. KRAUSE & KENT C. KRAUSE, AVIATION TORT AND REGULATORY LAW § 11:13 (2d ed. 2002).

6 Convention for the Unification of Certain Rules for International Carriage by Air art. 17, *opened for signature* May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 372 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].

7 *See, e.g.*, Letter of Submittal of Strobe Talbott, U.S. Dep't of State, to the U.S. Senate, S. Treaty Doc. No. 106-45, 1999 WL 33292734, at 16–17 (June 23, 2000).

addition of recovery for "mental injury in the absence of accompanying physical injury."[8] While a clear majority approved adding recovery for mental injury, the new Convention retained the wording of its predecessor.[9] Courts interpreting bodily injury under the Montreal Convention should closely review the intent of the signatories before adopting the previous treaty's precedent.

A recent Australian case, *Pel-Air Aviation Pty Ltd. v. Casey*,[10] has reopened the debate about whether psychological damages should be recoverable under the Convention. In that case, the appellee, Ms. Karen Casey, was a nurse employed by Care Flight (New South Wales) in November 2009. She traveled on a small aircraft to Samoa with a physician, Dr. David Helm, to evacuate a patient and her husband and return them to Melbourne. The aircraft was scheduled to refuel at Norfolk Island on the return journey but bad weather prevented the pilot from landing, as a result of which he ditched the aircraft in the sea. All six of the persons on board survived the landing and were rescued after spending about 90 minutes in the water off Norfolk Island. The experience was terrifying for Ms. Casey and she suffered significant physical injuries, including spinal injuries and an injury to her right knee. In addition, Ms. Casey came to suffer from the following three psychiatric conditions: (1) post-traumatic stress disorder (PTSD); (2) a major depressive disorder; and (3) an anxiety disorder. On top of that, she also developed a complex pain syndrome. These injuries, conditions, and syndrome have been severely debilitating, precluding Ms. Casey from working and seriously affecting her quality of life.

Both Ms. Casey and Dr. Helm brought District Court proceedings against Pel-Air, claiming damages. The judgment of the primary judge in favor of Ms. Casey was appealed by Pel-Air on the grounds, inter alia, that PTSD does not constitute bodily injury within the meaning of the Montreal Convention, and that therefore the primary judge erred in his conclusion. After the Court of Appeal of New South Wales reviewed the authorities in detail, it concluded that the expression "bodily injury" connotes damage to a person's body without excluding damage to a person's brain.[11] The evidence did not demonstrate that the PTSD of Ms. Casey had resulted from actual physical harm to her brain. Although it was demonstrated that the PTSD could be attributed to biochemical changes in the brain, the appeals court was of the opinion that it did not constitute a bodily injury.[12] This decision is the fullest discussion on the issue of pure psychological harm since the English case of *Morris v. KLM Royal Dutch Airlines; King v. Bristow Helicopters Ltd.* in 2002.[13] This decision also shows that the law is lagging far behind the developments in neuroscience, which have demonstrated that PTSD is an alteration of the brain itself and is a form of bodily injury.

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[8] Int'l Civil Aviation Org., International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal (May 10–28, 1999), Minutes, Doc. 9775-DC/2, at 44 (2001).

[9] "At the International Conference on Air Law at which the Convention was adopted, delegates considered making express reference to recovery for mental injury, but instead resolved to leave untouched legal precedents developed under the language of the Warsaw Convention, acknowledging that such precedents currently allow the recovery of mental injury in certain situations and that the law in this area will continue to develop in the future." *See* Letter of Submittal of Strobe Talbott, *supra* note 7, at 16–17.

[10] [2017] NSWCA 32 (9 March 2017) (Austl.).

[11] *Id.* ¶ 40.

[12] *Id.* ¶ 52.

[13] [2002] UKHL 7, [2002] 2 AC 628 (U.K.).

The aim of this article is to examine the evolution and present state of the law governing the preemption of passenger claims for compensation for bodily injury arising from international air travel under the Montreal and Warsaw Conventions after *Casey* by analyzing case law in the United States, the United Kingdom, and Australia. The major problem with this case law is that it is fragmented with contradicting judgments. This article first analyzes the psychological harms, then moves to the term "bodily injury" as interpreted by the courts. Finally, the issue of PTSD and the outcomes under the Montreal Convention are analyzed.

Currently, in only two instances does an international airline passenger have some chance of compensation for emotional distress: if there is an injury to the brain itself; or if the emotional distress is directly linked to bodily injury. If mental conditions such as PTSD begin to be regarded as bodily injuries, it will tremendously expand the civil liability exposure of air carriers. The article highlights the absurdities created by the conflicting judgments on the interpretation of the Convention, which result in the family of a decedent being able to claim for damages on top of the death while a person suffering from PTSD is left with her traumas without compensation. Such an outcome is especially unsatisfying when compared with criminal law, where policymakers have increasingly begun to recognize a biological basis for emotional disabilities.[14]

2. *Psychological Harms*

With the evolution of air transport, the need for international common rules emerged. Flying is one of the biggest assets to mankind. At the same time, and although technology has greatly advanced, it is still a dangerous activity with devastating consequences in case of accidents. These accidents increased the need to regulate commercial aviation. The creation of an adequate and uniform compensation system for passengers, which at the same time encouraged the growth of a nascent field, was necessary. The necessary prophylactic measures were embodied in a uniform law, the Convention for the Unification of Certain Rules Relating to International Carriage by Air.[15] This first Convention, commonly called the Warsaw Convention, was designed to limit air carriers' potential liability in the event of accidents as a compromise between the needs of the carriers and the passengers.[16] It was established in 1929 and was later amended several times due, in part, to the continued development of commercial aviation. The year 1999 saw another attempt to modernize the rules on aviation liability, the Montreal Convention.[17] Due to the large number of parties, compromises had to be found, leading to some remaining flaws in the Convention that need to be solved by courts around the world.

International air carrier liability is the only area of tort law where psychiatric illness, no matter how catastrophic, provides no basis for recovery. This issue has long troubled common law courts. An air carrier's liability as set out in the Convention is a substitute for any civil liability the carrier may have under any other law, restricting the rights of passengers to the wording of Article 17. Article 17 of the Montreal Convention is based on an exclusively French provision in the Warsaw Convention, which provided that an international air carrier is responsible for "dommage survenu en cas de mort, de blessure ou de toute autre lésion

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[14] Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036, 2173 (2013).

[15] Warsaw Convention, *supra* note 2.

[16] Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498–99 (1967).

[17] Montreal Convention, *supra* note 6.

corporelle."[18] Article 17(1) of the Convention kept this idea of *lésion corporelle* and states: "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."[19]

In the earlier cases involving the Warsaw Convention, such as *Rosman v. Trans World Airlines, Inc.*, the court only agreed to compensate passengers in respect of their "palpable, conspicuous physical injury" but not their "mental injury with no observable 'bodily' as distinguished from 'behavioral' manifestations."[20] Some newer cases reiterated the old approach, such as *Eastern Airlines, Inc. v. Floyd*, where the United States Supreme Court reversed a federal appeals court decision and concluded 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."[21] In reaching its ruling, the Supreme Court relied primarily on its interpretation of *lésion corporelle* in the Warsaw Convention. After having consulted various sources, the Court concluded that "[t]ranslating lésion corporelle as bodily injury" was consistent with French jurisprudence, the treaty negotiations, and post-treaty conduct by the Warsaw signatories. The Court expressly refrained from expressing a view as to whether passengers could recover for mental injuries that were accompanied by physical injuries, as the passengers in *Floyd* had not alleged physical injury or physical manifestation of injury.

The contact rule, requiring a contact between the body and an object in order to show bodily injury, was argued by airlines but rejected in *Burnett v. Trans World Airlines*,[22] where the court held that "brief reflection allows one to pose many instances in which a bodily injury may result without any physical contact whatsoever. Such a sterile interpretation would surely do violence to the intent of the Warsaw framers."[23] The courts took a liberal approach with regard to bodily injury but never adopted that approach for psychological harms, mainly due to several concerns with regard to emotional harm.[24]

The jurisprudence reflects these concerns: first, emotional harm can be feigned; second, such damages are difficult to measure; finally and most importantly, unconstrained liability could impede industrial growth and goes against the aim of the Conventions. Such concerns have resulted in strict limits on the types of damages that a passenger can recover; therefore, courts in the United States have permitted recovery for pain and suffering from a physical injury, such as a broken arm, but have denied it in cases where passengers thought they were going to die from an imminent crash but ultimately came through the experience without physical harm. Having realized that this approach led to unfair outcomes, U.S. courts began allowing recovery for mental injury in some circumstances.[25] Due to the fact that there is no guidance on the side of the Convention, the decisions varied widely. For instance, some courts only allowed recovery

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[18] Warsaw Convention, *supra* note 2, art. 17.
[19] *Id.*
[20] 314 N.E.2d 848, 855 (N.Y. 1974).
[21] 499 U.S. 530, 552, 111 S. Ct. 1489, 1502 (1991).
[22] 368 F. Supp. 1152 (D.N.M. 1973).
[23] *Id.* at 1158.
[24] *Husserl*, 388 F. Supp. at 1250. *See* Ruwantissa I. R. Abeyratne, *Mental Distress in Aviation Claims – Emergent Trends*, 65 J. AIR L. & COM. 225 (2000).
[25] Non-aviation case: Gillman v. Burlington N. R.R. Co., 878 F.2d 1020 (7th Cir. 1989).

for mental injury when it flowed from bodily injury.[26] As the Ninth Circuit Court of Appeals stated in *Carey v. United Airlines*, passengers who suffered psychological injuries that did not flow from physical injuries had no recourse: "To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention."[27] The Eleventh Circuit Court of Appeals addressed the issue in *Floyd v. Eastern Airlines Inc.*,[28] where it held that mental injuries can be recovered even if they did not result from bodily injury. In this case, the plane was preparing to crash in the ocean when miraculously the engines restarted, allowing the plane to land safely. As stated *supra*, the Supreme Court subsequently reversed this decision. Passengers were frightened and many suffered severe psychological injury but were denied compensation.

Such an approach is, perhaps, a step forward but it also has created aberrant results. For example, a passenger who is molested by a steward, resulting in scratches and mental injuries, will have to prove that the mental injuries derived from the scratches rather than the assault.[29] Such an aberrant outcome was recognized in the Australian case *American Airlines, Inc. v. Georgeopoulos [No. 2]*,[30] where Judge Sheller held:

> [I]t could not be suggested that if a passenger was shocked by the fear of imminent death in a plane crash and thereafter injured her hip in obeying a direction to move to the front of the aircraft, she would be able to recover for her mental injuries, but if she had not injured her hip, such recovery would have been denied. I think the US Supreme Court [in *Floyd*], when it used the word 'accompanied', had in mind to leave open the question whether the carrier was liable for mental injuries, consequent upon physical injuries, or emotional shock which had resulted in organic damage such as a coronary thrombosis or stroke.
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> I think Stein JA in Kotsambasis at 121 correctly delimited the ambit of recovery for psychic injury when he said 'where mental anguish follows and is caused by physical injury, recovery for both injuries is covered . . . . Moreover, if the psychological injury is proven to be a species of bodily injury, then it would constitute 'bodily injury' within the article.' Mr Evatt accepted that the stress disorder was not the consequence of any physical injury. The appellant is not therefore liable under Article 17 for Mr and Mrs Georgeopoulos' nervous shock or mental distress.[31]

In *Jack v. Trans World Airlines*,[32] the court also recognized the aberrant outcome that can be created: "the happenstance of getting scratched on the way down the evacuation slide [might] enable one passenger to obtain a substantially greater recovery than an unscratched fellow

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[26] Jack v. Trans World Airlines, 854 F. Supp. 654 (N.D. Cal. 1994), *In re* Air Crash at Little Rock, 118 F. Supp. 2d 916 (E.D. Ark. 2000), Longo v. Air France, 25 Av. Cas. (CCH) 17,629 (S.D.N.Y. Jul. 25, 1996), Alvarez v. Am. Airlines, Inc., 27 Av. Cas. (CCH) 17,475 (S.D.N.Y Feb. 7, 2000). *Contra* Marks v. Virgin Atl. Airways Ltd., Civ. No. 0251 (SAS). (S.D.N.Y. July 13, 2004); Rothschild v. Tower Air, Inc., 1995 WL 71053 (E.D. Pa. 1995).

[27] 255 F.3d 1044, 1053 (9th Cir. 2001).

[28] 872 F. 2d 1462 (11th Cir. 1989), *rev'd*, 499 U.S. 530 (1991).

[29] McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 VAND. J. TRANSNAT'L L. 1043, 1045 (2008).

[30] [1998] NSWCA 273 (5 August 1998) 6 (Austl.).

[31] *Id.* at 11–12.

[32] 854 F. Supp. 654 (N.D. Cal. 1994).

passenger who was equally terrified by the plane crash."[33] In *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*,[34] the district court held that passengers with physical injury could recover for pre-impact terror regardless of whether the emotional injury was causally related to the bodily injury. This decision, however, did not impact the already established jurisprudence.

Another aberrant result can be found in *Diaz Lugo v. American Airlines, Inc*.[35] Indeed, a lower U.S. court allowed a husband to recover for emotional distress for his wife, who suffered coffee burns aboard an American Airlines flight. It seems that third parties do not need to suffer bodily injury for recovery and only the passenger must. The argument used by the husband to recover was an analogy to wrongful death claims by spouses, which are recoverable. The court held that Article 17 does not limit recoverable damages to those suffered by the passenger but instead obliges the carrier to compensate for damages sustained without specifying who suffered them.[36] Similarly, in *Kruger v. United Airlines*,[37] the husband could recover for a loss of consortium due to a fellow passenger's backpack striking the head of his wife and causing her to fall unconscious during the flight. He could recover for emotional injury under Article 29 of the Montreal Convention, which states that actions for damages may be brought "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." The U.S. Supreme Court concluded in an earlier case, *Zicherman v. Korean Airlines*, that this provision left the question of who may recover open to domestic law.[38] Such an approach means that under Article 17 recovery for purely emotional damages is prohibited, but if the domestic law allows recovery for a spouse's emotional injury, then the third party can recover without any prohibition under the Convention. This also means that if Ms. Casey had a husband and Australia allowed for recovery for a spouse's emotional injury, he could claim compensation without any personal injury while she could not for her PTSD.

The explicit dictum of the Supreme Court in *Floyd* that the Court "express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries"[39] left the door open to other courts to decide.[40] Indeed, after the *Floyd* judgment, American courts have interpreted the existence of one of the three elements – death, physical injury, or physical manifestation of injury – as a prerequisite to the recovery of damages for emotional distress. Based on the *Floyd* logic, some courts subsequently ruled that only those mental injuries related to or flowing from a physical injury are compensable. Accordingly, the U.S. Court of Appeals for the Eighth Circuit, in *Lloyd v. American Airlines, Inc*.,[41] allowed recovery for mental injuries "only to the extent the distress is caused by the physical injuries sustained." The Second Circuit adopted a similar approach in *Ehrlich v. American Airlines, Inc.*,[42] where a couple had sought to recover for physical and mental injuries suffered when their flight left the runway while landing.

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[33] *Id.* at 668.
[34] 954 F. Supp. 175 (N.D. Ill. 1997).
[35] 686 F. Supp. 373 (D.P.R. 1988).
[36] *Id.* at 376.
[37] 2007 U.S. Dist. LEXIS 14747 (N.D. Cal. Mar. 1, 2007).
[38] 515 U.S. 217 (1996).
[39] 499 U.S. at 552.
[40] Jean-Paul Boulee, Note, *Recovery for Mental Injuries That Are Accompanied by Physical Injuries Under Article 17 of the Warsaw Convention: The Progeny of Eastern Airlines, Inc. v. Floyd*, 24 GA. J. INT'L & COMP. L. 501 (1995).
[41] 291 F.3d 503, 509 (8th Cir. 2002).
[42] 360 F.3d 366 (2d Cir. 2004). *See also* Bobian v. Czech Airlines, 93 Fed. App'x 406 (3d Cir. 2004).

The main question in *Ehrlich* was whether the plaintiffs' mental injuries flowed from the physical injuries they suffered. Since that was found not to be the case, they were not allowed to recover for the emotional distress caused by the accident.

Other courts awarded damages when the mental injury was associated with bodily injury. For instance, in the Australian case of *Kotsambasis v. Singapore Airlines Ltd.*,[43] Stein JA balanced the radical approach of sticking to the wording of the Convention by adding that "where mental anguish follows and is caused by physical injury, recovery for both injuries is covered" by the Convention and that "if the psychological injury is proven to be a species of bodily injury, then it would constitute 'bodily injury' within the article."[44] Some courts are even more flexible and have allowed recovery without any concomitant bodily injury, such as in the case of *Husserl v. Swiss Air Transport Co., Ltd*.[45] The court in this case closely looked at the history, case law, and drafters' intent before concluding that "bodily injury" comprehends mental and psychosomatic injuries. The court concluded that "there is absolutely no indication in either the language of the Convention or its legislative history that the drafters intended to preclude all liability for some types of injury."[46] One explanation for this reasoning is the increasing recognition by science that injuries are not prone to categorization as either mental or physical.[47]

3. *Warsaw and Montreal Conventions: Bodily Injury as Interpreted in Australia, the United States, and the United Kingdom*

Some of the terms contained in Article 17 of the Warsaw and Montreal Conventions, such as "accident" or "bodily injury," have deeply troubled the courts. Indeed, the treaties themselves contain virtually no substantive law on the issue of damages,[48] but instead function as a "pass-through" that authorizes courts to apply domestic law to award damages.[49] The requirements in Article 17 are that there must have been an accident which caused death or bodily injury while the passenger was onboard the aircraft or in the course of embarking or

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[43] [1997] 42 NSWLR 110 (Austl.).

[44] *Id.* at 121.

[45] 388 F. Supp. 1238. *But see* Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848, 854–57 (N.Y. 1974) (refusing recovery for mental injury when there was no manifest bodily injury).

[46] *Husserl*, 388 F. Supp. at 1248.

[47] In the words of the court: "Mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma." *Husserl*, 388 F. Supp. at 1250.

[48] It should be noted that Article 29 of the Montreal Convention specifically bars recovery of punitive, exemplary, or any other noncompensatory damages.

[49] Pursuant to Article 29 of the Montreal Convention, which corresponds to the Warsaw Convention's Article 24. *See* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 225 (1996); AHP Manufacturing B.V. t/a Wyeth Medica Ireland v. DHL Worldwide Network N.V & ors [2001] IESC 71 (Ir.); S. Smyth & Co. Ltd. v. Aer Turas Teoranta, Feb. 3, 1997 (unreported) (Ir.). In *Sidhu and others v. British Airways plc* [1997] AC 431 (HL) (appeal taken from Scot.), Lord Hope established that "[t]he Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of the domestic Law."

disembarking. The different rulings[50] and expert's opinions[51] tend to demonstrate that a passenger will be in the course of embarking or disembarking when s/he has reached the boarding area, after the boarding announcement, but will not be found in the course of embarking or disembarking before check-in, or even before security and after leaving the apron.[52] Concerning what constitutes an "accident" within the meaning of Article 17, the term spawned much litigation before the U.S. Supreme Court addressed the issue. It seems that currently a uniform interpretation is to determine whether there is an unexpected or unusual event or happening external to the passenger.[53] The accident cannot be caused by the passenger's own reaction to the normal conditions of a flight.[54] Additionally, the U.S. Court of Appeals for the Third Circuit found in *Abramson v. Japan Airlines*,[55] that "aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within Article 17."[56] Similarly, in *Air France v. Saks*,[57] the U.S. Supreme Court denied recovery to a passenger who suffered from deafness as a result of the depressurization during landing. The Court was of the opinion that the passenger's injury was caused by "internal" problems rather than by an unusual event during the flight.[58]

In *In re Inflight Explosion on Trans World Airlines*,[59] the court laid down the levels of hierarchy for cases involving psychological harms: first, purely psychological harm; second, mental anguish that precedes physical injury or death; and, finally, psychological harm directly resulting from or occurring with physical injury. The first level is the most troubling one, while the third level is pretty straightforward in most jurisdictions and the second is recoverable only in some jurisdictions. Although it is a U.S. ruling, most courts in common law countries have created a similar hierarchy.

Rulings in the United Kingdom, Australia, and the United States show that psychological harms directly resulting from physical injuries are recoverable while purely psychological harms are mostly denied, as *Casey* clearly demonstrated. Although generally denied in all the studied jurisdictions, the courts' analyses differ greatly. On the one hand, in the U.S., the courts' main focus is whether the injury that occurred on board constitutes an "unusual or unexpected event or happening external to the passenger." On the other hand, Australian and English courts focus on whether the injury was caused by an "accident."

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50 Blumenfeld v. BEA, 11 ZLW 78 (Berlin Ct. App. 1962); Day v. Trans World Airlines, Inc., 393 F. Supp. 217 (S.D.N.Y. 1975); Maugnie v. Cie Nationale Air France, 14 Av. Cas. (CCH) 17,534 (9th Cir. Jan. 19, 1977), *cert. denied*, 431 U.S. 974 (1977); Cour d'appel [CA] [regional court of appeal] Lyon, civ., Feb. 10, 1976, Air Inter v. Sage et al., 1976 RFDA 266, 3 Air L. 4 (1977) (Fr.); Adatia v. Air Canada [1992] PIQR P238 (U.K.); Phillips v. Air New Zealand Ltd. [2002] 2 Lloyd's Rep. 408 (Eng.).

51 CHRISTOPHER NYHOLM SHAWCROSS & KENNETH MACDONALD BEAUMONT, 1 AIR LAW 689 (4th ed. 2008).

52 El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999).

53 Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997); Air France v. Saks, 470 U.S. 392 (1985). *See* PAUL DEMPSEY, ROBERT HARDAWAY & WILLIAM THOMS, AVIATION LAW AND REGULATION (1993).

54 Abramson v. Japan Airlines, 739 F.2d 130, 133 (3d Cir. 1984) ("[A]ggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within Article 17."). *See also* Stone v. Cont'l Airlines & John Doe, 905 F. Supp. 823 (D. Haw. 1995).

55 739 F.2d 130.

56 *Id.* at 133.

57 *Saks*, 470 U.S. 392.

58 *Id.* at 406.

59 778 F. Supp. 625 (E.D.N.Y. 1991).

The U.S. Supreme Court regards inaction as constituting an "unexpected event or happening," while Australian and English courts do not consider inaction as an "accident." A case that attracted much criticism is the U.S. case of *Olympic Airways v. Husain*,[60] which heavily relied on the formulation of an accident in *Saks*. In this case, the passenger was allergic to secondhand smoke. His wife asked the flight attendant to move him away from the flight's smoking section, to which the flight attendant falsely responded that there were no vacant seats, resulting in the passenger's death. The U.S. Supreme Court allowed recovery under the argument that any link in the causal chain could be an "unexpected or unusual event or happening that is external to the passenger." The failure of the flight attendant to reseat the passenger constituted an unexpected event. This decision goes against decisions from appellate courts in the United Kingdom and Australia, which made it clear that inaction is not an "event" and therefore could not constitute an accident under Article 17.[61] Lord Phillips, M.R. in the English case, held that "[i]t is not an event; it is a non-event. Inaction is the antithesis of an accident."[62] The two cases relied on in dissent by Justice Scalia were later decided by the highest courts in the U.K. and Australia. Both cases involved deep vein thrombosis (DVT). Both courts emphasized the need to preserve uniformity, but at the same time were critical of the analysis of the U.S. Supreme Court in *Husain*.[63] In Australia, Judge McHugh demonstrated that in *Husain*, the Supreme Court found two plausible and distinct definitions of "accident": first, an unintended happening; and second, "an unusual, fortuitous, unexpected, unforeseen, or unlooked for event, happening or occurrence." Judge McHugh disagreed and held that "[a]n omission may . . . constitute an "accident" when it is part of or associated with an action or statement. . . . But a bare omission to do something cannot constitute an accident."[64] Lord Scott, in the English case, referring to Justice Thomas in *Husain*, who concluded that a plaintiff need only prove "some link in the chain was an unusual or unexpected event external to the passenger," held:

> It is not the function of the court in any of the Convention countries to try to produce in language different from that used in the Convention a comprehensive formulation of the conditions which will lead to article 17 liability. The language of the Convention itself must always be the starting point. . . . [A] judicial formulation of the characteristics of an article 17 accident should not, in my opinion, ever be treated as a substitute for the language used in the Convention.[65]

In *Blansett v. Continental Airlines*,[66] the U.S. Court of Appeals for the Fifth Circuit refused to adopt a rule that any departures from the industry standards would constitute an accident *per se*. Thus, the failure to warn about DVT was not "an unusual or unexpected event." Similarly, in *Blotteaux v. Qantas Airways*,[67] the Ninth Circuit refused to consider the development of DVT as an accident. These two cases, as well as the English and Australian

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60 540 U.S. 644 (2004), *reh'g denied*, 541 U.S. 1007 (2004).
61 Deep Vein Thrombosis & Air Travel Group Litig. [2003] EWCA Civ. 1005 (U.K.); Qantas Ltd. & British Airways plc v. Povey [2003] VSCA 227 (Austl.).
62 [2003] EWCA Civ. 1005.
63 Povey v. Qantas Airways & British Airways [2005] HCA 33 (Austl.); Deep Vein Thrombosis & Air Travel Group Litig. [2005] UKHL 72 (U.K.).
64 [2005] HCA 33, at 85.
65 [2005] UKHL 72, at 12.
66 379 F.3d 177 (5th Cir. 2004).
67 171 Fed. App'x 566 (9th Cir. 2006).

cases, can be distinguished factually from *Husain* as in none of the other cases the passengers asked and were denied assistance which then led to death. The ruling in *Husain* was followed in *Prescod v. AMR*,[68] where the Ninth Circuit concluded that the confiscation by airline employees of a 75-year-old passenger's bag containing her life-sustaining breathing devices and medication was a link in the chain of causes leading to the passenger's death.

On top of the narrow interpretation, it seems that the Conventions' drafters themselves intended to cover only narrow circumstances, in contrast with the language associated with recovery for property damage, which uses the broader term "occurrence" as a trigger for recovery. The Montreal Convention only made inconsequential changes to the Warsaw Convention's liability provision; therefore, the jurisprudence based on the Warsaw system remains relevant.[69]

Under the liability provisions of the treaties, if there has been an accident resulting in a passenger's death or injury, the carrier is liable and the damages are to be determined pursuant to domestic law. However, the deference to domestic laws on damages does not mean that emotional injuries may be recovered. Instead, the injury must fall within the meaning of Article 17 for national law to be applicable. As a result, courts have interpreted the expression "bodily injury" to exclude mental, psychological, and emotional injury, following the requirements of Article 31 of the Vienna Convention[70] to interpret the term by examining the ordinary meaning of the treaty in its context and in the light of its object and purpose.[71] The expression "bodily injury" therefore connotes damage to a person's body, including damage to a person's brain. The problem is to determine whether or not mental injuries are recoverable.

In *Weaver v. Delta Airlines, Inc.*,[72] the uncontradicted medical evidence was that extreme stress could cause actual physical brain damage. The judge observed that "[f]right alone is not compensable, but brain injury from fright is."[73]

It was not until 1991 that the U.S. Supreme Court addressed the meaning of bodily injury, or lésion corporelle,[74] under the Warsaw Convention. Before the Court's decision in *Floyd*, lower courts were split. Some held that bodily injury included mental injuries while others required physical injury before considering mental distress.[75] The Connecticut Supreme Court noted in an insurance case that the term bodily injury

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[68] 383 F.3d 861 (9th Cir. 2004).

[69] Somo Japan Ins. v. Nippon Cargo Airlines, 522 F.3d 776 (7th Cir. 2008); Byrd v. Comair, 501 F. Supp. 2d 902 (E.D. Ky. 2007); Baah v. Virgin Atl. Airways, 473 F. Supp. 2d 591 (S.D.N.Y. 2007); Cont'l Ins. Co. v. Fed. Express Corp., 454 F.3d 951 (9th Cir. 2006).

[70] Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1980 U.N.T.S. 331, 340.

[71] This trend is visible in Europe: Case C–344/04, R (IATA) v. Dept. of Transport, 2006 E.C.R. I–403; Case C–549/07, Wallintin-Hermann v. Alitalia, 2008 E.C.R. I-11061; Case C–63/09, Walz v. Clickair, May 6, 2010.

[72] 56 F. Supp. 2d 1190 (D. Mont. 1999).

[73] *Id.* at 1192.

[74] *See supra* pt. 2.

[75] No recovery: Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1158 (D.N.M. 1973); *Rosman*, 314 N.E.2d at 859 (same). Allowing recovery: Floyd v. E. Airlines, Inc., 872 F.2d 1462, 1490 (11th Cir. 1989); Karfunkel v. Cie Nationale Air France, 427 F. Supp. 971, 976–77 (S.D.N.Y. 1977); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1324 (C.D. Cal. 1975); *Husserl*, 388 F. Supp. at 1253; Borham v. Pan Am. World Airways, No. 85 Civ. 6822, 1986 WL 2974, at *3 (S.D.N.Y. Mar. 5, 1986); Gilbert v. Pan Am. World Airways, No. 85 Civ. 4157, 1989 WL 59623 (S.D.N.Y. June 2, 1989); Palagonia v. Trans World Airlines, 442

> as ordinarily used in the English language strongly suggests something physical and corporeal, as opposed to something purely emotional. Webster's Third New International Dictionary confirms this notion, and associates the term bodily with the physical aspects of the human body, and contrasts it with the nonphysical aspects of the human experience such as the mental and spiritual. In the insurance policy, the word bodily is used as an adjective to modify the terms injury, harm, sickness and disease. Including purely emotional harm arising out of economic loss as a form of bodily injury would be tantamount to defining the term bodily injury with an antonym. At the very least, such a construction would render the term bodily superfluous as an adjective modifying the term injury. It is fair to infer that the use of the term bodily was employed in the policy both accurately and purposefully.[76]

If the evidence in a particular case demonstrates that there has been physical damage to part or parts of the brain, "bodily injury" will have been proved.[77] While the restriction of damages to those related to "bodily injury" is a significant one, the Montreal Convention, along with its predecessor, imposes strict liability on air carriers, removing the need for claimants to prove negligence to complete their causes of action.[78] The terms of the Convention therefore represent a compromise between the interests of claimants and air carriers.

In *Kotsambasis v. Singapore Airlines Ltd.*,[79] Meagher JA opined that "the adjective 'bodily' is a word of qualification or limitation." Moreover, the judge held that it was clear "that the draftsmen of the Convention did not intend to impose absolute liability in respect of all forms of injury."[80] Thus, the term "bodily injury" was never intended to include purely psychological injury. Lord Hobhouse, in *Morris*, taking a wider view of what could constitute bodily injury, concluded:

> [*B*]*odily injury* simply and unambiguously means a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury. It does not include mere emotional upset such as fear, distress, grief or mental anguish. . . . A psychiatric illness may often be evidence of a *bodily injury* or the description of a condition which includes bodily injury. But the passenger

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N.Y.S.2d 670, 671 (N.Y. Sup. Ct. 1978). *See* John F. Easton et al., *Post Traumatic "Lésion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention*, 68 J. AIR L. & COM. 665, 675 (2003).

[76] Moore v. Cont'l Cas. Co., 252 Conn. 405, 410–11, 746 A.2d 1252 (Conn. 2000).

[77] Am. Airlines Inc. v. Georgeopoulos [No. 2] [1998] NSWCA 273; Kotsambasis v. Singapore Airlines Ltd. [1997] 42 NSWLR 110; Morris v. KLM Royal Dutch Airlines; King v. Bristow Helicopters Ltd. [2002] UKHL 7, [2002] 2 AC 628.

[78] The liability is fault-based but with a reversed burden of proof, meaning that the fault will be assumed when damages are proved. It is then up to the carrier to prove that it and its employees had taken "all necessary measures" to prevent the damage and therefore escape liability. Even when the Convention allowed recovery, the damages were capped, initially to 250,000 French francs unless the passenger proved "wilful misconduct" on the part of the carrier. The Montreal Convention increased the cap to 100,000 Special Drawing Rights (SDRs), using the same ceiling as the IATA Intercarrier Agreement (1995), *reprinted in* 3 Av. L. Rep. (CCH) ¶ 27,951 (Aug. 2007) and EU Council Regulation 2027/97, Air Carrier Liability in the Event of Accidents, 1997 O.J. (L285) 1.

[79] [1997] 42 NSWLR 110.

[80] *Id.* at 114.

> must be prepared to prove this, not just prove a psychiatric illness without evidence of its significance for the existence of a *bodily injury*.[81]

Lord Steyn mitigated the approach of Lord Hobhouse by stating:

> [I]f a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms, such as strokes, miscarriages or peptic ulcers, the threshold requirement of bodily injury . . . is . . . satisfied.[82]

Lord Nicholls, agreeing with Lord Hobhouse, rejected the submission based on *Rosman* that bodily injuries were confined to those which are "palpable [and] conspicuous."[83] He noted:

> [T]he brain is part of the body. Injury to a passenger's brain is an injury to a passenger's body just as much as an injury to any other part of his body. Whether injury to a part of a person's body has occurred is, today as much as in 1929, essentially a question of medical evidence. It may be that, in the less advanced state of medical and scientific knowledge 70 years ago, psychiatric disorders would not have been related to physical impairment of the brain or nervous system. But even if that is so, this cannot be a good reason for now excluding this type of bodily injury, if proved by satisfactory evidence, from the scope of article 17. This does not mean that shock, anxiety, fear, distress, grief or other emotional disturbances will as such now fall within article 17. It is all a question of medical evidence.[84]

The exclusion of psychological or emotional harm might mean that an airline employee could racially discriminate against a passenger without fear of liability. As in *Casey*, the plaintiff could recover for the physical injury but not for PTSD.

4. *PTSD and the Conventions*

Post-Traumatic Stress Disorder is a medical condition developed by "some people . . . after experiencing or witnessing a life-threatening event, like combat, a natural disaster, a car accident, or sexual assault."[85] PTSD was regarded with scepticism in the 1980s when it was first recognized as a diagnosable condition in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, known as the "DSM." In the 1980s, PTSD was almost entirely conceptualized in psychological terms. For instance, in *Georgeopoulos [No. 2]*, Judge Sheller held that there was no bodily injury as the claimants did not suffer any "structural alteration to bodily tissues or alteration in the function of an organ or neurochemical change or any other form of damage to tissues or organs."[86] Over the years, the amount of research about PTSD has led to an increase in knowledge about this phenomenon. Dr. Roger K. Pitman stated that "[t]he impact of an environmental event, such as a psychological trauma, must be

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[81] [2002] UKHL 7, [2002] 2 AC 628 ¶ 143.
[82] *Id.* ¶ 20.
[83] 314 N.E.2d at 855.
[84] [2002] UKHL 7, [2002] 2 AC 628 ¶¶ 3–4.
[85] *What is PTSD?*, U.S DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/public/ptsd-overview/basics/what-is-ptsd.asp (last visited June 3, 2017).
[86] [1998] NSWCA 273.

understood at organic, cellular and molecular levels."[87] Neuroscientists have identified three prominent biological conditions present in PTSD cases: first, a reduction in size of the hippocampus was noticed; second, some increase of activities in the amygdala region was analyzed; and finally, a reduction in the volume of the prefrontal cortex was noticeable.[88] As Jonathan Shay, a psychiatrist at the U.S. Department of Veterans Affairs, wrote, "we are dealing with an injury, not an illness, malady, disease, sickness, or disorder."[89]

Some courts have recognized PTSD as a bodily injury. The U.S. District Court in Montana found that PTSD suffered by an airline passenger as a result of an emergency landing constituted "bodily injury" as referred to in the Warsaw Convention.[90] To reach its decision, the court based its reasoning on scientific research demonstrating that PTSD evidences actual trauma to brain cells structures.[91] This decision was followed at first instance in *Lloyd v. American Airlines Inc*. (*In re Air Crash at Little Rock, Arkansas on June 1, 1999*),[92] in which the judge relied upon evidence of research that had shown brain dysfunction in people with PTSD.[93] Earlier, a jury had awarded the plaintiff damages for, among other things, the PTSD she suffered as a result of the crash.[94] On appeal, however, the Eighth Circuit, relying on *Floyd*, ruled that "mental injuries must proximately flow from physical injuries caused by the accident."[95] The court went on to hold that the plaintiff could "recover only emotional damages which flow from the injuries to her legs and the smoke inhalation," which excluded her PTSD.[96] Similarly, in *Terrafranca v. Virgin Atlantic Airways*,[97] the plaintiff argued that due to a dubious double-negative sentence in *Floyd*, she could recover for her PTSD. The sentence in question is "[w]e 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."[98] The Third Circuit rejected "the argument that we can ignore the full text of the [Supreme] Court's opinion and the plain language of Article 17 because of imprecise dictum at the end of the opinion."[99] In *Bobian v. Czech Airlines*,[100] the judge rejected the claim for PTSD on the basis

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[87] Roger K. Pitman et al., *Biological Studies of Post-Traumatic Stress Disorder*, 13 NATURE REVIEWS-NEUROSCIENCE, 769, 769 (2012).

[88] *Scars On the Brain: Is Post-Traumatic Stress Disorder a Form of Bodily Injury?*, VIEWPOINT (Am. Ass'n Ins. Svcs., Inc., Lisle, Ill.) Issue IV, 2015, at 15, http://www.aaisonline.com/Portals/0/AAISDocuments/Viewpoint/Online%20Articles/2015-Issue%20IV/06-Scars%20on%20the%20Brain.pdf.

[89] Jonathan Shay, *Casualties*, DAEDALUS (Am. Acad. Arts & Sciences, Cambridge, Mass.), Summer 2011, at 179, 181.

[90] *Weaver*, 56 F. Supp. 2d 1190, *vacated*, Weaver v. Delta Air Lines, 211 F. Supp. 2d 1252 (D. Mont. 2002). Unfortunately, since the case was vacated, the original case has no precedential value. The value of the original judgment is only as *dicta*.

[91] *Weaver*, 56 F. Supp. 2d at 1192.

[92] 118 F. Supp. 2d 916 (E.D. Ark. 2000).

[93] *Id.* at 924.

[94] *Id.* at 917.

[95] 291 F.3d 503, 509 (8th Cir. 2002).

[96] *Id.* at 511.

[97] 151 F.3d 108 (3d Cir. 1998).

[98] *Floyd*, 499 U.S. at 552.

[99] Terrafranca v. Virgin Atl. Airways, 151 F.3d 108, 111 (3d Cir. 1998).

[100] 93 Fed. App'x at 407.

that the claimants did not allege that they suffered "palpable, conspicuous physical injury," as required by the *Rosman* test.

In *Jane Doe v. United Airlines, Inc.*,[101] another PTSD case, the California Court of Appeal found that the claim did not raise a triable issue. The Court concluded,

> [T]he majority rule, as disclosed by our survey of case authority, is that alterations in an individual's body and behavior intrinsically or characteristically associated with mental distress do not constitute bodily injury under the Warsaw Convention. This rule encompasses alterations or changes in an individual's brain and nervous system characteristically tied to PTSD. At bottom, the rule rests on the recognition that mental distress typically and regularly manifests itself in an individual's brain, nervous system, body and behavior. Accordingly, absent the rule, plaintiffs who suffer mental distress could avoid *Floyd* merely by pointing to changes in their body that characteristically constitute the physical manifestations of their form of distress. Under this rationale, *Weaver*, which does not comply with the majority rule, is wrongly decided. We find the rationale compelling, and thus follow the majority rule, rather than the vacated decision in *Weaver*.[102]

English courts rejected the argument that PTSD constitutes a bodily injury within the meaning of Article 17 of the Warsaw Convention.[103] Lord Hope concluded:

> [F]or the time being I would venture to suggest that one would expect an injury falling within the expression 'bodily injury' to be capable of being demonstrated by an examination of the body of the passenger, making the best use of the most sophisticated means that are now available. The *Weaver* and *Air Crash at Little Rock, Arkansas* [at first instance] cases, as I understand them, did not proceed on that kind of evidence. There was no evidence in either case that the passengers had suffered an injury to the brain that was capable of being demonstrated by means of an examination of the body of the passenger. The argument was that the PTSD itself constituted a manifestation of a physical injury. In my opinion evidence of the kind that was available in those cases is not enough to satisfy the test of showing that a psychiatric illness is or includes a 'bodily injury' for the purposes of article 17.[104]

Lord Mackay proposed a simple test: "[D]oes the evidence demonstrate injury to the body, including in that expression the brain, the central nervous system and all the other components of the body?"[105] Lord Steyn contemplated the recovery of compensation for mental injury where it was caused by physical injury, and compensation for adverse physical symptoms of mental injury, but not for the antecedent mental injury itself. He rejected the view that compensation for mental injury or illness was available to someone who suffered no physical injuries.

In *Casey*, the judges, both in first instance and in appeal, followed the approach that the pain syndrome and the anxiety disorders were partly caused by physical injuries and that

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[101] 160 Cal. App. 4th 1500 (Cal. Ct. App. 2008).
[102] *Id.* at 1511.
[103] Morris v. KLM Royal Dutch Airlines; King v. Bristow Helicopters Ltd. [2002] UKHL 7; [2002] 2 AC 628.
[104] *Id.* at ¶ 126.
[105] *Id.* at ¶ 8.

therefore they fell within the definition of bodily injury. With regard to PTSD, the first instance judge concluded, after reviewing Australian, English, and U.S. cases, that "a diagnosis of PTSD does not exclude the possibility that evidence in a particular case may establish that a person has suffered a bodily injury compensable under the Montreal Convention."[106] The judge went on to establish "that the PTSD which Ms Casey suffers and for which she has also been unsuccessfully treated, is consequent on damage to her brain and to other parts of her bodily processes, which have had the result that her brain is no longer capable of functioning normally."[107] The court of first instance was of the opinion that the PTSD itself had caused physical changes in her brain that impaired its function, and that these changes were compensable under the Montreal Convention. However, the Court of Appeal of New South Wales did not agree with the previous rulings, holding that the conclusion was erroneous as the evidence did not demonstrate that Ms. Casey's PTSD had resulted in actual physical damage to her brain.[108] The Court did not deny that PTSD could create biochemical changes in the brain but in the Court's opinion, these changes could not be said to constitute a bodily injury within the meaning of the Convention.[109]

5. *Conclusion*

While courts in the United States have consistently held a hard line on this bodily injury issue, there have been some conflicting decisions coming out of courts in the United Kingdom. The Australian court's decision in *Casey* could lead to increased pressure in the United States to change the way the terms are interpreted to "better conform" to the international norm. The fact that courts in three of the most influential common law jurisdictions, the United Kingdom, Australia, and the United States, have disagreed fundamentally on important issues does not fit the intent of the Warsaw and Montreal Conventions, which is uniformity.[110] *Casey* is the most complete judgment since *Morris* on the issue of purely psychological harm and might bring even more trouble.

In criminal law, policymakers have increasingly begun to recognize a biological basis for emotional disabilities.[111] A transformation with regard to tort law might be underway as well. While most courts have taken the traditional view that emotional distress unaccompanied by physical harm is not bodily injury, many agree that physical manifestation of emotional distress may constitute bodily injury.[112] Further, the Connecticut Supreme Court ruled in 2015 that emotional distress of bystanders may be actionable if the injuries "are severe and debilitating, such that they warrant a psychiatric diagnosis or otherwise substantially impair the bystander's ability to cope with life's daily routines and demands."[113]

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106 *Casey v. Pel-Air Aviation Pty Ltd.; Helm v. Pel-Air Aviation Pty Ltd.* [2015] NSWSC 566 (15 May 2015) ¶ 109.
107 *Id.*
108 *Pel-Air Aviation Pty Ltd. v. Casey* [2017] NSWCA 32 (9 March 2017) ¶¶ 52–53.
109 *Id.*
110 *See, e.g.*, Int'l Civil Aviation Org., *supra* note 8, at 46–47.
111 Shen, *supra* note 14, at 2038.
112 *See id.* at 2115–16. *See also, e.g.*, Moore v. Cont'l Cas. Co., 252 Conn. 405, 746 A.2d 1252 (2000), *reiterated in* Galgano v. Metro. Prop. & Cas. Ins. Co., 267 Conn. 512, 521, 838 A.2d 993 (2004). *But see* Taylor v. Mucci, 288 Conn. 379 (2008) (ruling that physical manifestations of emotional distress are not bodily injuries).
113 Squeo v. Norwalk Hospital Ass'n, 316 Conn. 558, 113 A.3d 952 (2015). Such damages are only recoverable under the limit applicable to the physically injured plaintiff; no separate coverage limit is triggered because emotional distress does not constitute bodily injury. *Galgano*, 267 Conn. 512.

Currently, there are two broad scenarios in which a person has some chance of compensation for emotional distress. First, if there is an injury to the brain itself; second if the emotional distress is directly linked to bodily injury. By attempting to include PTSD as recoverable, the courts are essentially seeking to add a third dimension which is in-between the two broadly accepted scenarios. Indeed, the reasoning behind the PTSD cases, as exemplified by *Casey* and based on neuroscientific evidence, is that PTSD is a form of bodily injury as its consequence is alteration of the brain itself.

However, if conditions such as PTSD begin to be regarded as bodily injury, it would tremendously expand the civil liability of air carriers, and it is unclear how much such a trend would increase the severity of bodily injury claims. Surprisingly, in death cases, American courts have allowed for the recovery of mental distress experienced by passengers who died in the crash.[114] Indeed, the courts saw a causal link between the accident and the damage sustained. Bizarrely, the rule as it now stands allows for the family of a decedent to recover for mental distress, while refusing compensation to living passengers – who need to cope every day with mental distress caused by an accident – because the distress did not flow from a bodily injury. The main justification for this bizarre outcome is the gatekeeper role that the term "bodily injury" plays in order to avoid overburdening airlines. It also protects against spurious claims and facilitates the proving of such damages. As held in *Maloney v. Conroy*,[115] "because . . . emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for such an injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act."[116]

The ruling in Australia reflects a reaction in law – with potential international implications – to the progress of research in neuroscience. Indeed, the two Conventions were drafted at a time when neuroscience was not as advanced as it is today. Moreover, differentiating bodily injury from emotional distress is undermining the uniformity that the Conventions attempt to achieve. The door has been left open for other courts to find new interpretations of the term "bodily injury." However, there is little to no doubt that, in light of *Casey*, the moment when a court will rule that [recovery for] purely psychological harms [is barred/ under Article 17 is fading away.

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[114] *In re* Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625, 626–27 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992); *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 954 F. Supp. at 178–79.

[115] 208 Conn. 392 (1988).

[116] *Id.* at 397–98.