

Bodily Injury
and the
Montreal
Convention

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BODILY INJURY AND THE MONTREAL CONVENTION

Introduction

What constitutes bodily injury for the purposes of recovering compensation under the Montreal Convention is an area of law that has challenged judges and lawyers down through the years and is a topic on which there is a substantial amount of information. This article sets out some of the salient points which govern this area of law with particular emphasis on the law in Ireland.

An Exclusive Cause of Action

A starting point for this article is to understand the principle that the Montreal Convention (“the Convention”) provides an exclusive cause of action. This principle was very clearly established by the House of Lords in the landmark English case of *Sidhu and others .v. British Airways plc*, 1997. Lord Hope in that case held that “*The 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...*”

Essentially, what this means is that where no remedy is provided for a claimant under the Convention, no remedy exists. This case of *Sidhu* was cited in the Irish Supreme Court decision of *AHP Manufacturing B.V. t/a Wyeth Medica .v. DHL Worldwide Network N.V, DHL Worldwide Express GmbH and DHL International (Ireland) Limited*, 30th July 2001. This principal was also mentioned obiter dictum in the judgment of Blayney J in the Irish Supreme Court case of *S. Smyth and Company Limited .v. Aer Turas Teoranta*, 3rd February 1997.

The Convention was given force of law in Ireland by virtue of the Air Navigation and Transport (International Conventions) Act 2004.

Article 17 of the Convention

Article 17 of the Convention provides that “*The carrier is liable for damage sustained in case of death or bodily injury (emphasis added) 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.*”

Provided the other criteria necessary to establish that there has been an “*accident*” within the Convention, it is clear that only physical injury sustained is recoverable under the Convention. Where the issue becomes more complex is in determining whether or not a passenger who has suffered a recognisable mental condition is entitled to be compensated.

Psychological Injury

It has been established that purely psychological injury is not in itself sufficient for a claimant to recover under the Convention. In the English case of *Morris .v. KLM [2002] UKHL 7*, the Court of Appeal dismissed the Plaintiff’s claim on this basis. In that case, the Plaintiff, who was a fifteen year old girl, was sexually assaulted by a male passenger sitting next to her. She claimed that she suffered clinical depression as a result. She did not assert that there had been any physical injuries arising or connected with her depression. While finding there had been an “*accident*” within the meaning of the Warsaw Convention (the precursor to the Convention), the Court of Appeal dismissed her appeal on the basis that the Plaintiff had sustained a mental injury only which fell outside of Article 17.

The Irish Courts have also taken this view in the Circuit Court case of *Geraldine Howe .v. Cityflyer Express Limited, 12th October 1998*. In that case, the Plaintiff claimed to have suffered nervous shock and post traumatic stress disorder as a result of one of the engines of the aircraft on which she was a passenger catching fire. Judge Haugh looked at the wording of the Warsaw Convention and said that had the translators “*wished to allow for an award of damages for nervous shock, the term “personal injury” would have been used.*” While Judge Haugh acknowledged that the Plaintiff suffered a personal injury, he held that she could not recover damages under Article 17 of the Warsaw Convention because her injury was psychological in nature.

The issues become more complicated when a passenger suffers a psychological injury and a physical injury. There are no leading Irish decisions on this topic. However, now set out are some of the situations which can arise in this area and which have been looked at by other jurisdictions:

(i) **Physical Injury leading to psychological injury**

There is case law which favours recovery for psychological injuries provided such injuries are caused by the physical injuries sustained. This was the view of the District Court in the United States case of *Jack .v. Trans World Airlines Inc, 854 F Supp 654 (ND Cal, 1994)*. It distinguished between a situation where a psychological injury was caused by the physical injury and one which was not but merely related to the accident itself. No recovery was

allowed in the latter situation. The generally accepted view would be that damages are recoverable if a claimant can prove that his psychological injuries were caused by his physical injuries.

(ii) **Psychological injury leading to physical injury**

The House of Lords in the English case of *King .v. Bristow Helicopters [2002] UKHL* examined this scenario. The Plaintiff in that case was a passenger on board a helicopter when, shortly after take off, the engines failed. The helicopter did not crash but safely landed. The Plaintiff sustained post traumatic stress disorder as a result of which he developed the onset of peptic ulcer disease. The Plaintiff's appeal was allowed.

Lord Hope in that case said "*A peptic ulcer disorder involves the tissues of the body, and it is not difficult to see that it is a kind of bodily injury...while there is no general right to recover damages under Article 17 for mental injury sustained by a passenger, damages for the physical manifestations of a mental injury will be recoverable.*"

On this basis, the Plaintiff could recover but only in respect of the peptic ulcer as it was a physical injury caused by psychological trauma.

(iii) **Post traumatic stress disorder-a form of bodily injury?**

The issue of whether Post Traumatic Stress Disorder ("PTSD") could be considered a physical injury to the brain and so give rise to recovery under the Convention has arisen in a number of leading cases in the United States and the United Kingdom.

In the United States case of *Weaver v Delta Airlines Inc (1999) 56F Supp 2d 1190*, the Plaintiff maintained she sustained chronic PTSD as a result of an emergency landing of the defendant airline with whom she was travelling as a passenger. The Plaintiff relied on scientific research to show that her PTSD evidenced an injury to her brain. On this basis, she was able to recover under the Warsaw Convention.

Similarly, in *In re Crash at Little Rock, Arkansas, on June 1, 1999 (2000) 27 Avi 18,428*, the Judge held that..."*evidence presented at the trial, both in the form of expert testimony and exhibits, established that PTSD is a biological/physical as well as a psychological injury.*" However, the decision in that case was later rejected by the Court of Appeal. The Plaintiff's doctor had opined that the Plaintiff's brain had undergone a physical change on the basis of symptoms of disrupted sleep and concentration and flashbacks. The Court of Appeal found

this was not enough to establish a physical change to the Plaintiff's brain and said certain tests which could have shown the functioning of her brain were not applied.

The majority view in the *King* case (supra) was that recovery was possible under the Warsaw Convention if evidence was produced of injury to the brain. Lord Mackay said "*I would apply the simple test, does 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?*"

Conclusion

What the above case law demonstrates is that a clear precedent has been set that psychological injury alone is not sufficient for a claimant to recover damages against an airline under the Convention. Although not bound by the decision of the Circuit Court in the case of *Howe* (supra), it is likely that the Irish High Court, which is a court of unlimited jurisdiction, will find the arguments made by the House of Lords in the English case of *Morris* (supra) very persuasive. This is good news for the airlines which might otherwise be faced with exaggerated, or even fraudulent claims, by opportunistic passengers.

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