

Psychological injury in travel litigation: a fresh approach?

Michael Hagan & Asela Wijeyaratne examine a case study on recovery under the Montreal Convention for psychological injury following aviation accidents

IN BRIEF

► The recent case of *Clark v Jet2.com Ltd* tested the English court's reaction to the textual interpretation in *Doe*.

In an *NLJ* update on aviation case law in June 2019, case law from a number of jurisdictions on the vexed question of liability for psychiatric injury under the Montreal Convention was considered ('Flying in the face of convention', 169 *NLJ* 7844). This edition revisits the seminal decision of the US Sixth Circuit Court of Appeal in the matter of *Doe v Etihad Airways*, PJSC, No.16-1042 (6th Cir, 2017) and considers the authors' own recently compromised case of *Clark v Jet2.com Ltd* (claim no G96YX506, County Court at Liverpool) which to our knowledge is the first attempt in the English courts to litigate the permissive 'plain text' interpretation of the Montreal Convention adopted in *Doe*.

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

The Montreal Convention 1999 is the successor multilateral treaty to which the UK is a party. As with the Warsaw Convention, it provides, among other things, for strict liability in certain circumstances for 'bodily injury', up to a financial limit. The Montreal Convention has effect in English law by virtue of a statutory instrument (SI 2002/263).

Article 17(1) of the Montreal Convention

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

In what circumstances then is psychological injury compensable?

Textual interpretation

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

The orthodox interpretation on the scope of compensable injury can be stated as follows:

Accident, ie being pricked by a needle:

- a) Bodily injury, ie the small puncture wound in the claimant's finger, (*compensable*);
- b) Psychological injury (*not compensable* unless it is caused by the bodily injury).

The orthodox position is that damages for psychiatric injury are only recoverable if that injury has been caused by physical damage to the body (including damage to the brain and/or nervous system): *Morris v KLM Royal Dutch Airlines*, *King v Bristow Helicopters Ltd* [2002] UKHL 7. Physical injury caused by psychological damage is also compensable (for example a peptic ulcer caused by post-traumatic stress

disorder, as in *King*, above). Therefore, under the orthodox interpretation, a psychiatric injury not caused by a physical injury would not constitute compensable 'bodily injury'.

The court in *Doe* departed from the orthodox interpretation and applied a 'textual interpretation'. The textual interpretation of the Montreal Convention can be stated as follows:

Accident, ie being pricked by a needle:

- a) Bodily injury, ie the small puncture wound in the claimant's finger, (*compensable*);
- b) Psychological injury (*also compensable*, so long as it results from an accident that also causes bodily injury, even though the psychological injury might not flow from such bodily injury).

The court in *Doe* held that a plaintiff may recover damages for mental injuries if they are caused either directly by her bodily injury or, more generally, by the accident that caused the bodily injury. This was on the basis of a textual interpretation of Article 17(a) that:

a) the words 'in case of' do not mean 'caused by'; rather they mean 'in the event of' and/or 'during a case in which there is'; and

b) the words 'upon condition only' provide that the carrier's liability is conditioned only on the occurrence of an accident which causes death or bodily injury on board the aircraft or during embarkation or disembarkation.

Accordingly, on this interpretation, if the

passenger sustains bodily injury on board the aircraft as a result of an accident, the passenger may also recover damages for psychological injury suffered, regardless of whether or not such psychological injury was caused by the bodily injury.

Clark v Jet2: the English court

Turning then to *Clark v Jet2*. The claimant, Mr Clark, was injured during the course of a flight from Lanzarote to Manchester in September 2018. During the flight, while Mr Clark was sitting in his seat on the aircraft, he was struck on the head by a box which fell from an overhead locker. The accident caused a lump on his head and some bruising.

In the days after the accident, Mr Clark developed a sensation of increasing pressure in his head with a slurring of speech and poor balance. He also experienced paraesthesia around the eye and light-headedness. In the weeks and months that followed, Mr Clark experienced problems with spatial awareness, lack of concentration, dizziness and psychological symptoms, including anxiety and suicidal thoughts.

Medical evidence in the fields of neurology, neuropsychology and psychiatry was obtained by Mr Clark.

In summary, the experts' consensus opinion was that:

- ▶ there was no organic damage to the brain;
- ▶ there was a mild head injury presenting with a lump and some bruising;
- ▶ the accident (but not the mild head injury itself) caused Mr Clark to develop a mixed anxiety and depressive disorder; and
- ▶ except for the short-lived lump to the head and bruising, all of Mr Clark's subsequent symptoms were a psychological reaction to the accident.

The authors took the view that Mr Clark's case presented a suitable opportunity to test the English court's reaction to the textual interpretation in *Doe*. Not only did the above aetiology of symptoms neatly fit the broader gateway in *Doe*, but also Mr Clark had nothing by way of material pre-existing psychological ill-health.

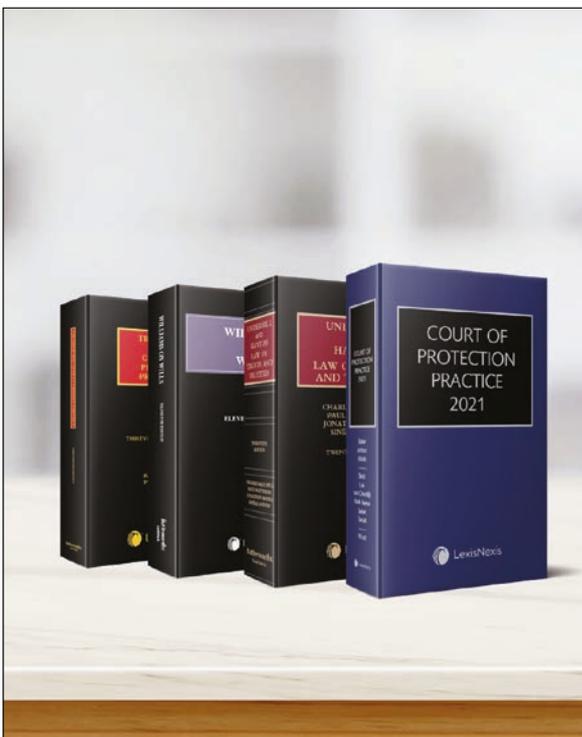
Mr Clark issued proceedings against the defendant carrier in August 2020, and proceedings were served in November 2020. In reliance on *Doe*, it was Mr Clark's pleaded case that, on a proper interpretation of Article 17(1) of the Montreal Convention, the only prerequisite to recovering

damages for psychological injury caused by the accident was that the claimant also sustained some physical injury. In express reliance on *Morris v KLM*, the defendant maintained in its defence that only psychological injuries which were caused by physical injury were compensable and that 'such a link is difficult to establish'.

Mr Clark's case was compromised on terms which, in the authors' opinion, reflected the full value of Mr Clark's general damages for psychological injury.

While it is difficult to extrapolate from this case alone, it is likely that the arguments in *Doe* will be deployed in suitable cases with increasing regularity. Although it remains the case that the position in *Morris v KLM* is the current orthodoxy, it is inevitable that parties must now weigh the prospects and risks of the textual interpretation gaining a firmer foothold, in this jurisdiction and elsewhere. Such a development would, if it occurs, lead to an incremental move towards the harmonisation of the regime for air carrier liability with the general regime for domestic public liability. **NLJ**

Michael Hagan, head of travel litigation, Fletchers Solicitors (www.fletcherssolicitors.co.uk) & **Asela Wijeyaratne**, 3 Hare Court (www.3harecourt.com).



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