



INTERNATIONAL CONFERENCE ON AIR LAW

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CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT (UNLAWFUL INTERFERENCE CONVENTION), AND CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES (GENERAL RISKS CONVENTION)

(Presented by the International Air Transport Association (IATA))

1. BACKGROUND

1.1 This Working Paper addresses IATA's views on the issue of the recoverability of damages for mental injury in both the Unlawful Interference and General Risks Conventions.

2. DISCUSSION

2.1 Both draft conventions provide that "*damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.*"¹

2.2 This definition would allow recovery for damages not only for mental injury that stems from a bodily injury but also stand-alone mental injury with no related physical harm. It is also noteworthy that the term "likelihood" makes the provision ambiguous when determining the scope of recoverable damages.

2.3 The inclusion of mental injury and its proposed definition in both conventions provides neither balance nor clarity in its attempt to unify and harmonise international air law in this area.

2.4 Whilst it is relatively simple to verify the existence of physical injury, verification of mental injury is far more complex. Unlike bodily injury, mental injury cannot be objectively tested. The

¹ See DCCD Doc No. 3, *Draft Convention on Compensation for Damage to Third Parties, Resulting From Acts of Unlawful Interference Involving Aircraft*, Art. 3, paragraph 3; and DCCD Doc No. 4, *Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties*, Art. 3, paragraph 3.

evaluator must rely to a great extent on the assertions of the person being diagnosed and base his diagnosis on the very symptoms which the claimant himself alleges (e.g. difficulty in sleeping, flashbacks, lack of concentration). Airlines have great difficulty in resolving mental injury claims because of issues in proving causation between the condition diagnosed and the event.

2.5 There is an increasing risk of fraudulent claims where only mental injury is alleged. Some tests have been developed to try to eliminate the possibility of fraudulent claims but these are not foolproof. Indeed, the myriad difficulties associated with the verification of mental injury attract a substantial numbers of fraudulent claims, which in practice lead to an escalation of protracted, costly litigation or settlements to avoid litigation.

2.6 The inclusion of mental injury widens the pool of potential claimants and that further extends the potentially borderless and unbounded nature of third party risk damages. This is in clear detriment to those victims who suffer physical injury and will not facilitate prompt compensation, one of the key objectives of the Modernization of the Rome Convention project.

2.7 The inclusion of damages for mental injury in both conventions will result in severe cost implications for the industry, such as the cost of claims handling and the likely upward pressure on insurance rates. Indeed, the extension of liability to cover claims for mental injury may influence some insurers to decline to write third party cover.

2.8 Member States will recall that the Montreal Convention 1999 (MC99) – an internationally accepted instrument that already has achieved ninety ratifications – does not make any reference to mental injury. Although the issue was discussed at length during the preparatory work of the Diplomatic Conference of May 1999, which ultimately led to the adoption of MC99, the Plenary Meeting – by a policy decision – expressly opted to exclude mental injury.²

2.9. Member States should also consider the fact that courts around the world have expressly recognized that stand-alone mental injury is not recoverable under MC99 and the Warsaw regime.³

2.10 When one considers in particular the Unlawful Interference Convention, it seems unfair now to expand the basis of recoverable damages in cases where the primary cause of the accident is in fact an act of terrorism that is beyond the operator's control.

² See ICAO, *International Conference on Air Law* – Vol. 1 Minutes, ICAO Doc 9775 – DC/2 (1999).

³ See *Eastern v. Floyd* (USA, 499 U.S. 530 – 1991) clarifying that Art. 17 of the 1929 Warsaw Convention does not allow recovery for purely mental injuries; *El Al Israel Airlines v. Tseng* (USA, 525 U.S. 155 – 1999) not allowing solely psychic or psychosomatic injuries; *Enrlich v. American Airlines, Inc.*, (USA, 360 F. 3d 366 2d Cir. - 2004) rejecting mental injuries not caused by bodily injury; *Terrafranca v. Virgin Atlantic Airways Ltd.* (USA, 151 F. 3d 108, 3d Cir., 1998) excluding damages of psychological nature; *King v. Bristow Helicopters LTD and Morris v. KLM Royal Dutch Airlines* (UK, 1 Lloyd's Rep. 745 - 2004) not recognizing purely emotional distress and depression as recoverable damages; *Kotsambis v. Singapore Airlines* (Australia, 1997 42 N.S. W.L.R. 110) not accepting purely psychological injury; *Louis – Patrick Simard v. Air Canada* (Canada, Superior Court of the Province of Quebec, District of Montreal, No. 500-06-000357-067, 2007) declaring that MC99 excludes compensation for any purely psychological injury; *Plourde v. Services Aériens F. B. O. Inc – Skyservice* (Canada, decision by the Superior Court dated 5 December 2005, 500-06-00283-057, upheld by the Court of Appeal on 28 May 2007) stating that the term “bodily injury” does not encompass psychological or moral injury suffered in the carriage of a passenger.

2.11 The guiding principle, which has governed the whole project of the Modernization of the Rome Convention, has been that third party victim protection ought to be at least as good as passenger protection under MC99. But it cannot be fair that third party victims should be treated better than passengers.

2.12 IATA and its Member Airlines are of the firm belief that both conventions should provide certain and prompt compensation to direct victims of acts of unlawful interference and ordinary third party damages. We feel that the inclusion of mental injury in both conventions, as currently envisaged, will have the unintended consequence of undermining that objective.

3. CONCLUSION

3.1 For the above reasons, IATA urges the Member States to eliminate completely and expressly the notion of recoverability of damages for mental injury from both conventions which have been proposed for the consideration of the Diplomatic Conference.

3.2 We therefore propose that Article 3, paragraphs 3 and 4 of the Unlawful Interference Convention be deleted, and that Article 3, paragraph 1 of said convention be amended to read:

“The operator shall be liable for damage sustained in case of death or bodily injury or for damage to property within the scope of this Convention upon condition only that the damage was caused by the unlawful interference with an aircraft in flight.”

3.3 We also propose that Article 3, paragraphs 3 and 4 of the General Risks Convention be deleted, and that Article 3, paragraph 1 of said convention be amended to read:

“The operator shall be liable for damage sustained in case of death or bodily injury or for damage to property within the scope of this Convention upon condition only that the damage was caused by an aircraft in flight.”

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