



## INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

### COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

(Presented by the McGill University Institute of Air & Space Law)

#### **Memo re. Article 5 GRC/Article 22 UIC pursuant to discussions before plenary session of Diplomatic Conference, 25 April 2009**

1. During discussions before the plenary session concerning Article 5 GRC and Article 22 UIC, there was support from the floor for the proposition initially tabled by France that the text should be articulated such as to establish a clear hierarchy amongst the compensable forms of human injury; death – bodily injury – mental injury. We wish to submit respectfully that there are a number of nuances to this issue, which necessitate a closer examination.

2. The body did not discuss in the establishment of a priority of claims how it would deal with cases where multiple heads of damage were invoked, an issue which should be borne in careful consideration in the final draft. A claim resulting from the death of a person on the ground may seek damages for bodily injury through a claim for pre-death pain and suffering, and may also claim damages for mental anguish on the part of the deceased who witnessed events leading to his/her own fate, or on the part of indirect victims under the head of *solatium doloris*. Moreover a claim for bodily injury will often be accompanied by a claim for emotional damages, and a distinction can be drawn between those emotional damages which predated the injury, and those which flow from the injury.<sup>1</sup> Jurisprudence under the Warsaw/Montreal Conventions, which are interpreted to exclude indemnification for pure mental injury,<sup>2</sup> do permit recovery for emotional prejudice incurred as a result of the bodily injuries.<sup>3</sup> The drafting committee should establish its precise intentions before revising Articles 5 GRC and 22 UIC. The committee must decide whether it intends to prioritize all claims flowing from death, bodily injury, and mental anguish in that order, or whether it intends to indemnify the heads of damages in order such that for example a bodily injury claim would be prioritized over the mental anguish element of a claim resulting from death.

3. The IASL submits that a claim for mental anguish flowing from bodily injury should be given priority over a claim premised purely on psychological prejudice. It is common to many legal systems, and to the interpretation of the Warsaw and Montreal Conventions, that mental anguish flowing from bodily injury is treated preferentially as compared to pure mental anguish. This results from the increased certainty of the prejudice and the elevated trauma of a person who incurred physical harm.

<sup>1</sup> *Jack v. Trans World Airlines* 854 F. Supp. 654 (N.D. Cal 1994).

<sup>2</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489 (1991).

<sup>3</sup> *Re. Inflight Explosion on Trans World Airlines* 778 F. Supp. 625 (E.D.N.Y. 1991), *Lloyd v. American Airlines* 291 F. 3rd 503 (8th Cir. 2002).

4. Furthermore, it is submitted that consideration may be lent to a distinction between pecuniary and non-pecuniary losses. Although death may be the ultimate loss which a legal system has to attempt to compensate, it should not be underestimated that bodily injuries in some instances can be highly traumatic and may result in complete loss of bodily function. This can result in elevated and ongoing medical expenses, and major continuous trauma for proximate care-givers. Therefore, the IASL does not believe that every head of damage brought under a death claim should automatically be given priority over pecuniary losses flowing from bodily injury. Heads of damage such as pre-death pain and suffering, loss of consortium, and *solatium doloris* should all be settled after ensuring that at least the medical expenses, if not all the pecuniary losses, of bodily injury victims are satisfied.

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