

# Aviation Law for Personal Injury Lawyers

Max Archer



# Categorising Aviation Cases

- ▶ The key issue- is this a case to which the **Montreal Convention 1999** or **2004 Order** applies?
- ▶ Generally two categories of personal injury case involving aircraft: those that come within the scope of these instruments, and those that do not.
- ▶ This presentation will focus in the main on the former category.

## What is the Montreal Convention 1999

- ▶ Successor to the **Warsaw Convention 1929** (to which some jurisdictions are signatories still).
- ▶ International treaty to which most countries (including the UK and the EU) are signatories.
- ▶ A 'complete code' governing the liability of air carriers to passengers, contains provisions in respect of death and personal injury as well as baggage and cargo.
- ▶ Note the **2004 Order (Carriage by Air (Application of Provisions) Order 2004)**, enacting a version of the **MC99** to domestic flights.

# The Montreal Convention 1999 (MC99)

- ▶ What is its Scope?
- ▶ When can injured passengers claim compensation?
- ▶ What can they claim compensation for?

# Scope of the MC99

1. This Convention applies to **all international carriage of persons**, baggage or cargo **performed by aircraft for reward**. It applies **equally to gratuitous carriage by aircraft performed by an air transport undertaking**.
2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

## Note 2004 Order (it's different)

*1. This Schedule applies to all carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.*

Aircraft? See *Laroche v Spirit of Adventure* [2008] EWHC 788 QB.



# Passenger?

Disley v Levine [2001] EWCA Civ 1087 A claim brought by an individual who had been injured during a paragliding training course did not fall within the provisions of the Carriage by Air Acts (Application of Provisions) Order 1967 because (1) a paraglider was not an "aircraft"; (2) there had been no carriage for reward, and (3) the claimant had not been a passenger.

Wucher v Santer [2015] ECLI:EU:C:2015:122, Mr Santer, had suffered injury an accident which occurred during a flight in a helicopter owned by an Austrian carrier. He was injured when the door of the helicopter flew open while he was holding it, so that explosives could be thrown to blast an avalanche. This was his task according to his employment contract with a third company, which had in turn entered into a contract with the air carrier for the transport of its employees. CJEU held that concept of a 'passenger' includes any person who is on a flight with the consent of the air carrier or the aircraft operator, excluding on-duty members of both the flight crew and the cabin crew."

## For Reward?

- ▶ Not an issue for the vast majority of cases.
- ▶ Concept of 'for reward' should be given a wide meaning.
- ▶ See Fisher v Koller (1978) 27 ZLW 60 (Austrian Sup Ct, 1977), 15 Avi 17 186, a decision of the Austrian Supreme Court in which a flight on a 'share expenses' basis was held to be 'for reward'.
- ▶ Any kind of 'consideration' probably counts.

# International Carriage



## Exclusivity- Art. 29 MC99

*In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.*

## A complete code

- ▶ Yes, if the MC99 applies the carrier's liability is governed exclusively by the MC99.....but you don't have to sue the carrier.
- ▶ See Stott v Thomas Cook [2014] UKSC 15 and note in particular Lady Hale's comments on potential injustice of exclusivity.
- ▶ Note the existence of disability regs 1107/2006.

# Substantive Scope

- ▶ Encompasses 'operations' of embarkation and disembarkation.
- ▶ So accidents within the terminal may be covered.
- ▶ See Philips v New Zealand [2002] EWHC 800 where it was held that (1) the **MC99** applied as soon as a passenger had presented a valid ticket for travel which had been accepted and a boarding pass issued. Accordingly, it applied in the instant case, and (2) where a passenger was required to take a particular step or to go to a particular place for boarding, that would be a process of embarkation. The process of embarkation did not have to be a continuous one. It was necessary to distinguish between when a passenger was free to do as he wished and when he had to comply with the directions or requirements imposed on him by the airline; a passenger spending time in the public or private lounges at an airport or shopping or drinking at a restaurant, was not in the process of embarkation

## LIMITATION PERIOD IS 2 YEARS!!

- ▶ Two years from the date of disembarkation from the flight.
- ▶ Cannot be extended, there is no s.33. Once you are out, that's it!

# What is an “accident”?



## Key provisions

### Article 17:

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.

## Art 21

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights **if the carrier proves that:**

- ▶ (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- ▶ (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Air France v Saks  
470 US 392 (1985)

“We conclude that liability... arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger. The definition should be flexibly applied after assessment of all the circumstances surrounding the passenger’s injuries.”

An “Event”: DVT and Air Travel Group  
Litigation  
[2005] UKHL 72

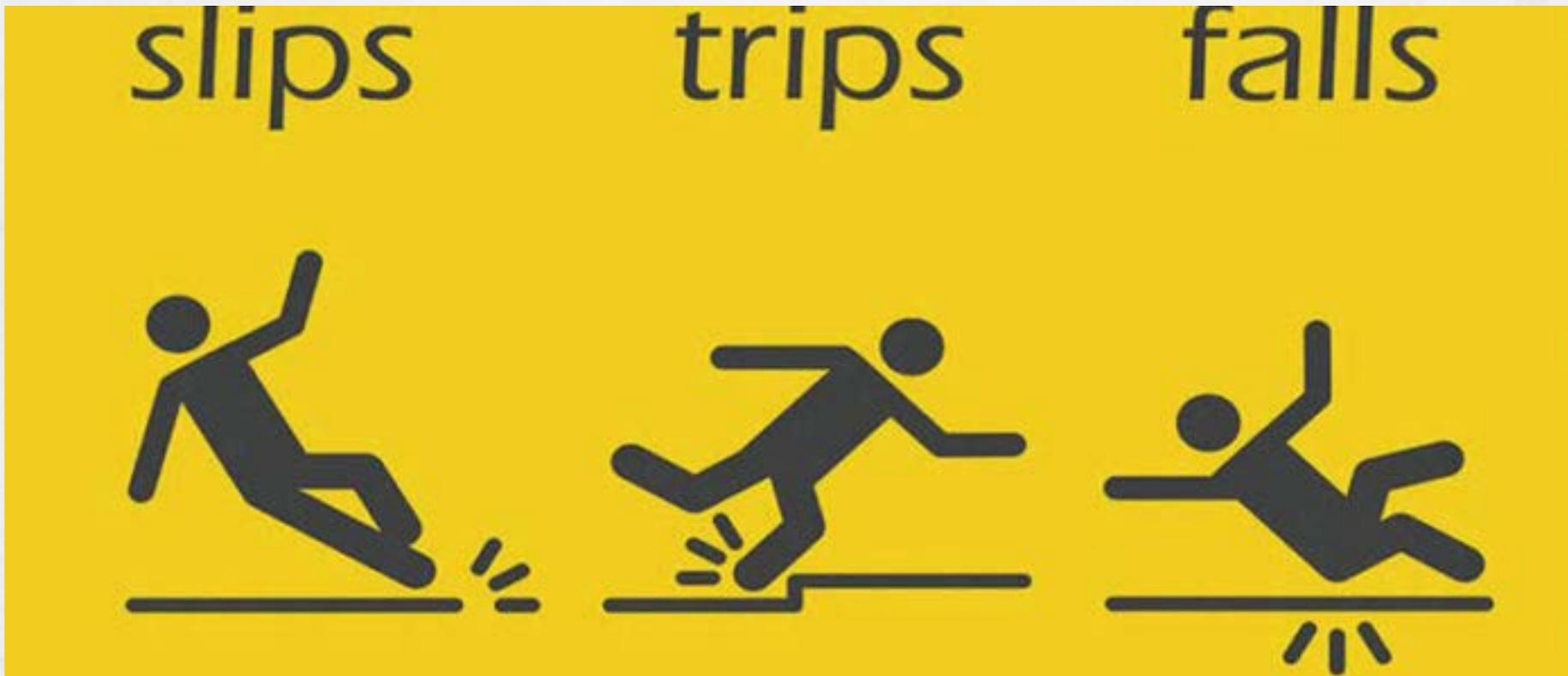
## Lord Mance:

“...an event may in some circumstances exist, where there has been crew inaction in a context where action might normally be expected.”

“Unexpected or Unusual”: Ford v  
Malaysian Airlines  
[2013] EWCA Civ 1163

The act of giving an air passenger an injection of a diuretic in the course of an international commercial flight, which exacerbated her physical discomfort caused by fluid retention resulting from urethral stenosis, did not constitute an "accident". The key question was whether the actual act of giving F an injection of a diuretic in the circumstances that prevailed could be characterised as an unusual event from F's perspective and whether the "unusual nature" of that event was a "cause" leading to the bodily injury. The circumstances in which the injection was administered by D was not characterised as "unusual" for the purposes of art. 17.1. There was no evidence that the administration of the injection was done in an abnormal way. The only unusual aspect of the injection was that it was carried out in the course of an international flight by a passenger doctor on another passenger, with proper consent.

# Slipping and Tripping Cases



# No accident

- ▶ Barclay v British Airways: slip on plastic strip in aircraft
- ▶ Vanderwall v United Airlines: trip on litter in aircraft
- ▶ Cannon v My Travel: slip on permanently uncovered wet aircraft ramp

# Accident

- ▶ Singhal v British Airways PLC: trip on misaligned jetway
- ▶ Gezzi v British Airways PLC v British Airways PLC: slip on wet aircraft stairs
- ▶ Labbadia v Alitalia: slip on temporarily uncovered icy aircraft stairs

# Deliberate acts by other passengers

- ▶ Morris v KLM Royal Dutch Airlines [2002] QB 100
- ▶ Indecent assault by a male passenger on a 15 year old unaccompanied female passenger in the adjacent seat.
- ▶ Held to be an accident but no bodily injury (see below).

# GN v ZU ECLI:EU:C:2019:1127

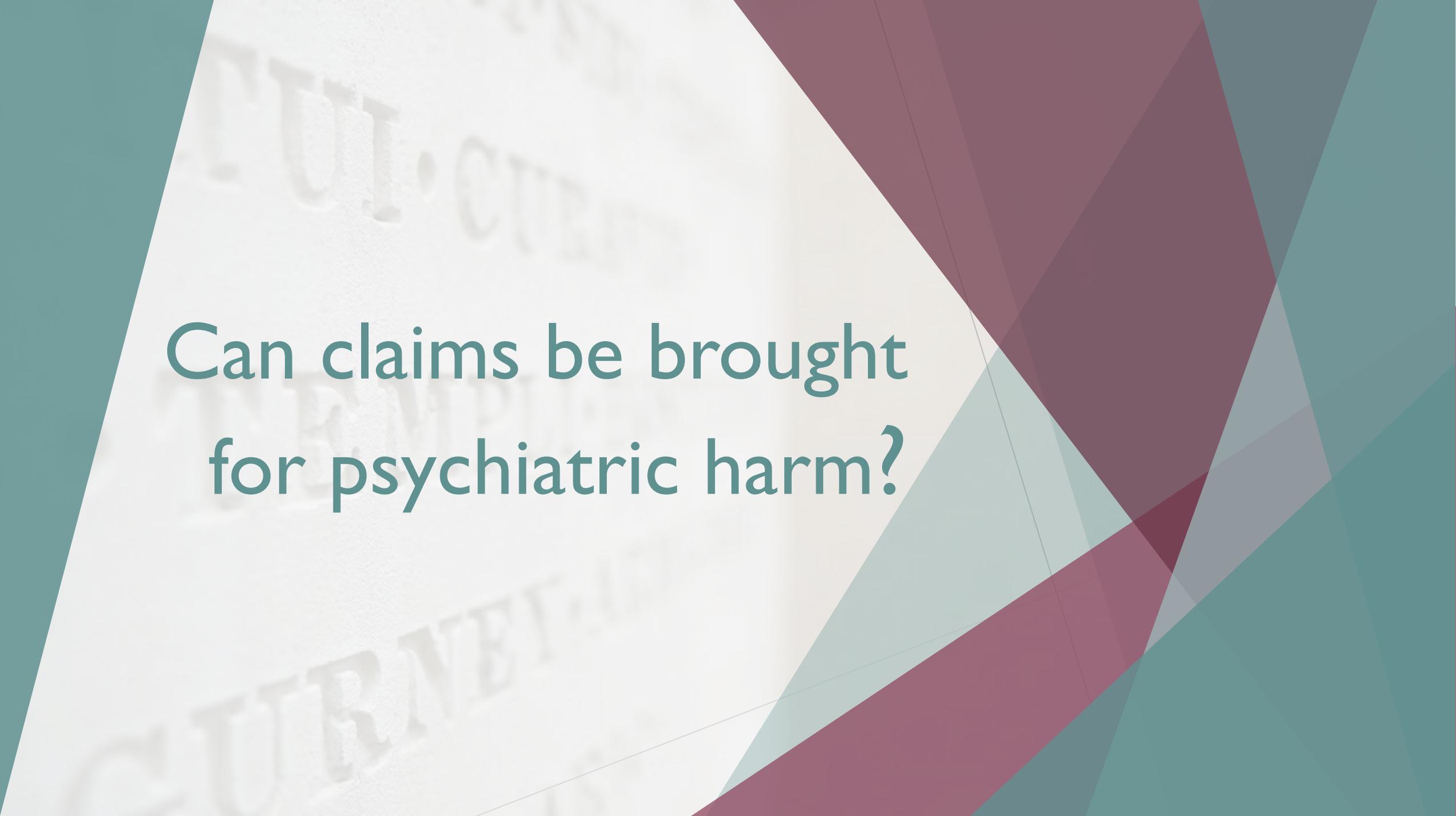
34. *Since the concept of ‘accident’ is not defined anywhere in the Montreal Convention, reference must be made to the ordinary meaning of that concept in its context, in the light of the object and purpose of that convention.*

35. **The ordinary meaning given to the concept of ‘accident’ is that of an unforeseen, harmful and involuntary event.**

36. *Furthermore, in accordance with the third paragraph of the preamble to the Montreal Convention, the States Parties, recognising ‘the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution’, decided to lay down a system of strict liability for air carriers. A system of that kind implies, however, as is apparent from the fifth paragraph of the preamble to the Montreal Convention, that an ‘equitable balance of interests’ be maintained, in particular the interests of air carriers and of passengers (see, to that effect, judgments of 6 May 2010, Walz, C-63/09, EU:C:2010:251, paragraphs 31 and 33, and of 22 November 2012, Espada Sánchez and Others, C-410/11, EU:C:2012:747, paragraphs 29 and 30).*

## Finally, see also.....

- ▶ L v Altehrhein Luftfahrt GmbH, 12 May 2021, Case C-70/20- Hard Landing case....not an accident. Does not mean that all such cases will fail.
- ▶ Coming soon JR v Austrian Airlines, Case C-589/20, a case on whether it matters that C cannot identify the cause of their slip/trip. Advocate General has delivered his opinion, CJEU decision awaited.

The background features a light beige area on the left with faint, embossed text including 'TUICTE', 'MAY 1971', and 'COURTNEY'. The right side is dominated by overlapping geometric shapes in shades of teal and maroon.

Can claims be brought  
for psychiatric harm?

## Article 17:

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.

Re Air Crash at Little Rock, Ark., on 6/1/1999  
118 F. Supp. 2d 916 (E.D. Ark. 2000)

*‘physical manifestations of mental injuries such as weight loss, sleeplessness or physical changes in the brain resulting from PTSD are not compensable.’*

# Morris v KLM & King v Bristow

## Helicopters

[2002] UKHL 7

## Held:

The brain as a part of the body was perfectly capable of being injured, and where the injury had a physical manifestation, damages were claimable. There was respectable medical support for the view that, for example, a major depressive disorder was the expression of physical changes in the brain and its hormonal chemistry. Such physical changes were capable of amounting to an injury and, if they did, they were bodily injuries. Also cases of post-traumatic stress disorder which had been shown to have a physical element in changes of the brain had been successful.

# Pel-Air Aviation Pty Ltd v Casey

[2017] NSWCA 32

*“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”*

*The evidence established “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”.*

*‘bodily injury’ connotes damage to a person’s body, but there is no reason to regard this as excluding consideration of damage to a person’s brain. Thus if the evidence in a particular case demonstrates that there has been a physical destruction of a part or parts of the brain, “bodily injury” will have been proved.’*

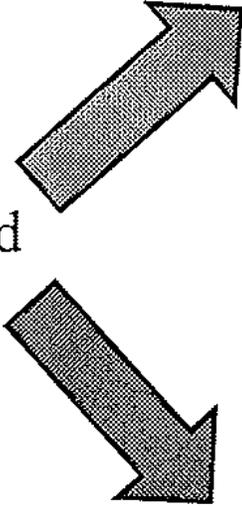
*‘there was no proof here that Ms Casey’s PTSD resulted from actual physical damage to her brain. However the more difficult question that arises is whether the biochemical changes in her brain, of which there is evidence in the present case, constitute “bodily injuries”. My conclusion is that they do not.’*

# Doe v Etihad

No. 16-1042 (6th Cir. Aug. 30, 2017)

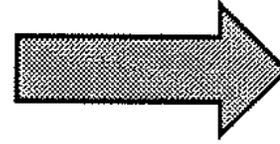
## **ACCIDENT**

[i.e., being pricked  
by a needle]



## **Bodily Injury**

[i.e., the small puncture  
wound in Doe's finger]  
**(compensable)**



## **Mental Anguish**

**(compensable only if it is  
caused by the bodily injury)**

## **Mental Anguish**

**(not compensable, even though  
it is caused by the same accident  
that caused the bodily injury)**

## Bodily Injury

[i.e., the small puncture wound in Doe's finger]  
(**compensable**)

## Mental Anguish

(**compensable**)

## ACCIDENT<sup>10</sup>

[i.e., being pricked by a needle]

## Mental Anguish

(**also compensable**, so long as it results from an accident that *also* causes bodily injury, even though the mental anguish might not flow from such bodily injury)

Where are we heading?

# Jurisdiction- Art 33 MC99

- (i) The domicile of the carrier;
- (ii) The carrier's principle place of business;
- (iii) A place of business of the carrier through which the contract has been made;
- (iv) Where the claim results from the death or injury of a passenger: *'the territory of a state party in which at the time of the accident the passenger has his or her principal and permanent residence, and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement'*.

## Jurisdictions (i)-(iii)

- (i) Domicile of carrier;
  - (ii) Carrier's principle place of business;
  - (iii) Place of business of the carrier through which the contract has been made.
- 
- ▶ Fairly straight forward most of the time. ....
  - ▶ See Aikpitanhi v. Iberia Airlines of Spain, C tried to sue in US on grounds that plaintiffs alleged that although Iberia's head office was in Spain, it had registered to do business in Florida, and thus it was domiciled in the United States. Restrictive approach taken, argument failed.



## (iv) The Place of Destination

- ▶ In the case of a return ticket the place of destination will be the jurisdiction that the passenger is returning to (Grein v Imperial Airways [1937] 1 K.B. 50).
- ▶ For the purposes of Article 33, the "*place of destination is determined by discerning the "intention of the parties as expressed in the contract of transportation, i.e., the ticket or other instrument."* Klos v. Polskie Linie Lotnicze, 133 F.3d 164, 167-69 (2d Cir. 1997)).
- ▶ In *Re Alleged Food Poisoning*, 770 F.2d flight was an intermediate leg of a round trip originating and terminating in Riyadh, Saudi Arabia, with stops in Dharhan, Saudi Arabia; London; Washington, D.C.; and New York City:

*'That a single, undivided transportation has only one beginning and one end would seem logically clear. This interpretation is supported by the Convention, which in Article 1(2) uses the term "destination" in the singular, implying that there is only one "destination" for an undivided transportation. Article 1(2) also draws a distinction between a "destination" and an "agreed stopping place." It is the "destination," and not an "agreed stopping place," that controls for purposes of treaty jurisdiction under the Convention'*

# The Fifth Jurisdiction

*'the territory of a state party in which at the time of the accident the passenger has **his or her principal and permanent residence**, and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement'.*

- Not 'domicile'! There was a big bust up about this between the French and the US in the course of the negotiations over the MC99.
- 'Principal and permanent residence' is the compromise position.
- Inclusion of the fifth jurisdiction was thought to be "an essential element of any new international agreement on passenger liability."
- Provides greater protection for consumers.

# Choi v Asiana Airlines 2015 WL 394198

- ▶ Claimant spent 8 weeks of the year in the USA, the remainder of the time she lived and worked in Korea.
- ▶ She maintained a residence in Korea and never stayed in the USA for more than a few weeks or at one principle residence.
- ▶ She had at one time owned a property in the USA and stated that she intended to live in the USA permanently.
- ▶ **Not good enough.....**

# Hornsby v Lufthansa German, 593 F. Supp. 2d 1132

- ▶ C allegedly injured during a turbulence incident on a flight from Frankfurt, Germany, to Los Angeles.
- ▶ C was a U.S. citizen, admitted that at the time of the incident she was living and working in Germany, was traveling on a round-trip ticket to return to Germany, had bank accounts and doctors in Germany, and received her mail and maintained telephone numbers in Germany.
- ▶ C admitted that she sold her home in California more than two years before the incident. T
- ▶ C maintained a California driver's license, had a bank account in California, maintained a storage facility and post office box in California, voted in U.S. elections by absentee ballot, and filed U.S. tax returns.
- ▶ C declared that she never intended to become a permanent resident of Germany or any other country outside of the United States.
- ▶ **Established jurisdiction in the US.**

## Proper Law? The Convention is silent on the issue.

- ▶ BUT - In art.33 'Questions of procedure shall be governed by the law of the court seized of the case.'
- ▶ Zicherman v Korean Airlines 516 U.S. 217 (1996) indicates that choice of law rules of the forum should be used.
- ▶ See also Silverman v Ryanair [2021] EWHC Civ 2955

## Other Aviation Cases

- ▶ Airline Staff- Often injured in the course of their duty.
- ▶ Many air crashes in which the **MC99** or the **2004 Order** are not engaged. Sometimes the carrier is not the defendant.
- ▶ Lose some of the advantages of the **MC99**, ie strict liability, but you might gain in other respects.
- ▶ Determined by normal tortious principles (likely to be foreign law issues).
- ▶ Note that specialist expert evidence often required- piloting etc.