

## STILL LAGGING BEHIND: DIAGNOSING JUDICIAL APPROACHES TO ‘BODILY INJURY’ CLAIMS FOR PSYCHIATRIC INJURY UNDER THE *MONTREAL CONVENTION OF 1999*

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*International civil aviation is today a mature global industry, without which the modern world is unimaginable. That modern world increasingly recognises, in view of advancing medical science, that the dualist distinction between body and mind is artificial. Yet recent judicial interpretation of the term ‘bodily injury’ in the Convention for the Unification of Certain Rules for International Carriage by Air (‘Montreal’) of 1999 has revalidated this distinction by denying compensation for psychiatric injury in the field of international civil aviation. This article challenges that interpretation by explaining the physical nature of psychiatric injury with reference to medical literature and neuroimaging technologies. It argues that the ordinary meaning of ‘bodily injury’ across Montreal’s authentic texts encompasses psychiatric injury, supporting this construction by examining both Montreal’s travaux préparatoires and its parties’ municipal jurisprudence. After briefly addressing policy concerns, it concludes that national courts may permit recovery for pure psychiatric injury under Montreal.*

### I INTRODUCTION

Contemporary catastrophes illustrate the perennial dangers of international civil aviation, such dangers including the risk of psychiatric injury due to accidents.<sup>1</sup> Yet recent authority, most notably the decision of the New South Wales Court of Appeal in *Pel-Air Aviation Pty Ltd v Casey* (‘*Casey*’),<sup>2</sup> has revalidated the dualist body–mind or ‘somatic–psychic’ distinction, and thereby denied compensation for psychiatric injury sustained in the context of private international air travel on

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1 See Patrick Hatch, ‘Australia Grounds Boeing’s 737 MAX in Wake of Fatal Crashes’, *The Sydney Morning Herald* (online, 12 March 2019) <<https://www.smh.com.au/business/companies/australia-grounds-boeing-s-737-max-in-wake-of-fatal-crashes-20190312-p513hi.html>>; Julie Allen, ‘Boeing Crash Payouts Linked to Victims’ Final Minutes’, *Irish Independent* (online, 13 May 2019) <<https://www.independent.ie/world-news/north-america/boeing-crash-payouts-linked-to-victims-final-minutes-38104849.html>>.

2 (2017) 93 NSWLR 438 (‘*Casey*’).

the basis that such injury does not constitute ‘bodily injury’. The persistence of this distinction shows that judicial attitudes to pure psychiatric injury in the field of international civil aviation lag behind other areas of the law, which have long recognised pure psychiatric injury as just as real and damaging as external physical injury,<sup>3</sup> as well as current medical opinion, which has for decades impugned the somatic–psychic distinction as artificial.<sup>4</sup>

This article challenges that distinction in the context of article 17(1) of the *Convention for the Unification of Certain Rules for International Carriage by Air* (‘*Montreal*’),<sup>5</sup> and argues that pure psychiatric injury constitutes ‘bodily injury’ compensable under that article. Others have argued as much before.<sup>6</sup> What this article contributes to that argument is a new categorisation of the aviation law authorities, serious scientific exposition of psychiatric injury’s physical nature, consideration of the intentions of *Montreal*’s drafters regarding psychiatric injury, multilingual analysis of *Montreal*’s authentic texts and a review of municipal jurisprudence discussing bodily injury.

In analysing the compensability of psychiatric injury under article 17(1) of *Montreal*, this article focuses especially on post-traumatic stress disorder (‘PTSD’),<sup>7</sup> the psychiatric injury receiving the most significant judicial attention in international aviation law jurisprudence.<sup>8</sup> Part II considers the background and purposes of *Montreal* and its predecessor treaty,<sup>9</sup> the *Convention pour l’Unification de Certaines Règles Relatives au Transport Aérien International* [Convention for the Unification of Certain Rules Relating to International Carriage by Air] (‘*Warsaw*’), and discusses the jurisprudence interpreting their application, identifying opposing threads of dualism and physicalism running through the cases, before scientifically considering the physical nature of PTSD, demonstrable with current neuroimaging technology. Part III argues that *Montreal* permits pure psychiatric injury claims on

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- 3 See, eg, *Eaves v Blaenclydach Colliery Co Ltd* [1909] 2 KB 73, 75 (Cozens-Hardy MR, Fletcher Moulton LJ agreeing at 76, Farwell LJ agreeing at 76); *Owens v Liverpool Corporation* [1939] 1 KB 394, 400 (MacKinnon LJ) (‘*Owens*’); *Stewart v Rudner*, 84 NW 2d 816, 822 (Smith J) (Mich, 1957); *McLoughlin v O’Brian* [1983] 1 AC 410, 418 (Lord Wilberforce) (‘*McLoughlin*’). Cf Christopher Andrews and Vernon Nase, ‘Psychiatric Injury in Aviation Accidents under the Warsaw and Montreal Conventions: The Interface between Medicine and Law’ (2011) 76(1) *Journal of Air Law and Commerce* 3, 39. It has been suggested that judicial decisions in the area of international civil aviation ‘separating physical and mental, are ... compounding and perpetuating the stigma’ attached to psychiatric injuries and illnesses: at 40; a stigma that the lay public has long attached to so called ‘mental’ illness ‘as different from and more shameful than physical illness’: Mark Schoenberg, Morton G Miller and Constance E Schoenberg, ‘The Mind–Body Dichotomy Reified: An Illustrative Case’ (1978) 135(10) *American Journal of Psychiatry* 1224, 1225. However, these considerations are beyond the scope of this article.
- 4 For an early example, see Schoenberg, Miller and Schoenberg (n 3).
- 5 *Convention for the Unification of Certain Rules for International Carriage by Air*, opened for signature 28 May 1999, 2242 UNTS 309 (entered into force 4 November 2003) (‘*Montreal*’).
- 6 See Andrews and Nase (n 3) 6.
- 7 See generally American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5<sup>th</sup> ed, 2013) 274 ff (‘*DSM–5*’).
- 8 See below Part II(B)(1)(c)–(2).
- 9 *Convention pour l’Unification de Certaines Règles Relatives au Transport Aérien International* [Convention for the Unification of Certain Rules Relating to International Carriage by Air], opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933) [tr author] (‘*Warsaw*’). See further below Part II(A)(1).

the basis of fundamental principles of treaty interpretation and treatment of bodily injury in municipal jurisprudence, before briefly addressing policy concerns. Part IV concludes.

Before proceeding, it is necessary to note that the term ‘bodily injury’ is pervasive in law. Perhaps because ‘[l]awyers are not expert scientists nor ... always familiar with the accurate use of medical language’,<sup>10</sup> legal authorities in different contexts describe psychiatric injury variously (and interchangeably)<sup>11</sup> as ‘nervous shock’,<sup>12</sup> ‘mental injury’,<sup>13</sup> ‘psychic injury’,<sup>14</sup> ‘psychological injury’,<sup>15</sup> ‘psychiatric harm’<sup>16</sup> and other things besides.<sup>17</sup>

This article proceeds, as courts have proceeded,<sup>18</sup> on the assumption that, in the context of article 17 of both *Montreal* and *Warsaw*, such terms are all equiparable to recognised psychiatric injury, of which PTSD is an example.<sup>19</sup> Judges have discussed such terminology’s benefits<sup>20</sup> and detriments,<sup>21</sup> here it is simply noted that the term ‘mental injury’ is devoid of actual meaning<sup>22</sup> and apt to mislead.<sup>23</sup> Put bluntly, thinking of the ‘mind’ as an entity is, as a Justice of the High Court of Australia has observed, ‘a mistakenly simple view of a complex phenomenon’.<sup>24</sup> Adopting respectfully Lord Hobhouse’s words in *Morris v KLM Royal Dutch Airlines* (*Morris*),<sup>25</sup> when interpreting the term ‘bodily injury’, ‘it is not sound to use such expressions as “mental injury” ... *mental* means relating to the mind. The

10 *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 681 (Lord Hobhouse of Woodborough) (*Morris*).

11 See *Dulieu v White & Sons* [1901] 2 KB 669, 672 (Kennedy J) (England and Wales High Court) (*Dulieu*); Peter Handford, *Tort Liability for Mental Harm* (Lawbook Co, 3<sup>rd</sup> rev ed, 2017) 137.

12 See, eg, *Dulieu* [1901] 2 KB 669, 672 (Kennedy J); *Page v Smith* [1996] 1 AC 155, 171 (Lord Jauncey of Tullichettle) (*Page*).

13 See, eg, *Dulieu* [1901] 2 KB 669, 672 (Kennedy J).

14 See, eg, *Eastern Airlines Inc v Floyd*, 499 US 530, 544–5 (Marshall J for the Court) (1991) (*Floyd*).

15 See, eg, *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110, 112, 114–15 (Meagher JA), 121–2 (Stein JA) (*Kotsambasis*).

16 See, eg, *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212, 215 (Kiefel CJ, Bell, Keane and Edelman JJ) (*Parkes Shire Council*).

17 For a comprehensive list, see *Saadati v Moorhead* [2017] 1 SCR 543, 549 n 1 (Brown J for the Court) (*Saadati*).

18 See, eg, *Hammond v Bristow Helicopters Ltd* 1999 SLT 919, 924 (Lord Philip) (Court of Session – Outer House) (*Hammond*); *Morris* [2002] 2 AC 628, 648 (Lord Hope of Craighead).

19 *Hammond* 1999 SLT 919, 924 (Lord Philip).

20 See, eg, *Jaensch v Coffey* (1984) 155 CLR 549, 560 (Brennan J) (*Jaensch*); *Tame v New South Wales* (2002) 211 CLR 317, 427 (Callinan J) (*Tame*).

21 See, eg, *R v Chan-Fook* [1994] 1 WLR 689, 696 (Hobhouse LJ for the Court) (*Chan-Fook*). See also *Attia v British Gas plc* [1988] 1 QB 304, 317 (Bingham LJ, Woolf LJ agreeing at 317), affd [1988] 1 WLR 307 (*Attia*); *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 188 (Blanchard J for Gault, Henry, Keith and Blanchard JJ) (Court of Appeal) (*van Soest*).

22 *Morris* [2002] 2 AC 628, 681–2 (Lord Hobhouse of Woodborough). See also Andrews and Nase (n 3) 64. It is regrettable that the terminology of ‘mental harm’ has been enshrined in Australian civil liability legislation: see, eg, *Civil Liability Act 2002* (NSW) s 31 and counterparts in other Australian jurisdictions.

23 See Handford (n 11) 137–8.

24 *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626, 637 (Windeyer J) (*Semlitch*).

25 [2002] 2 AC 628.

mind is a metaphysical concept associated with the self-consciousness of human beings'.<sup>26</sup>

Mindful that current terminology is subject to ever-deepening neuroscientific understanding,<sup>27</sup> this article employs exclusively the preferred modern medical term 'psychiatric injury'<sup>28</sup> to comprehend physical injuries to the brain and nervous system, both being physical entities,<sup>29</sup> and 'pure psychiatric injury' to signify instances where such injuries are the only physical injuries sustained.

## II THE CONVENTIONS, THEIR JURISPRUDENCE AND THE SCIENCE OF PSYCHIATRIC INJURY

### A The Conventions

#### 1 Warsaw

In October 1929, when international air travel was 'in its infancy',<sup>30</sup> 34 States' representatives met in Warsaw, Poland, at the Second International Conference on Private Aeronautical Law ('Warsaw Conference'),<sup>31</sup> to consider a draft civil aviation convention.<sup>32</sup> Concluded in French, *Warsaw* was adopted with a view to stimulating growth in the newly emerging airline industry,<sup>33</sup> entered into force on 13 February 1933<sup>34</sup> and dominated international civil aviation law for the next 70 years.

Courts the world over have recognised *Warsaw's* purposes as twofold: establishing uniformity in international civil aviation,<sup>35</sup> considered one of *Warsaw's*

26 Ibid 681–2 (emphasis in original), cf 648 (Lord Hope of Craighead).

27 See *van Soest* [2000] 1 NZLR 179, 198 (Blanchard J for Gault, Henry, Keith and Blanchard JJ); *Tame* (2002) 211 CLR 317, 382 (Gummow and Kirby JJ).

28 See Handford (n 11) ix, 119 especially n 14.

29 Ibid 140–1.

30 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 196 (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Povey*'); International Civil Aviation Organization, *International Conference on Air Law: Montreal, 10–28 May 1999 – Minutes* (ICAO Doc No 9775–DC/2, 1999) vol 1, 37 ('*Montreal Minutes*'). See also *Narayanan v British Airways*, 747 F 3d 1125, 1133 (Pregerson J) (9<sup>th</sup> Cir, 2014) ('*Narayanan*').

31 *Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw: Minutes*, tr Robert C Horner and Didier Legrez (Fred B Rothman & Co, 1975) 5–10 ('*Warsaw Minutes*').

32 Ibid 12–13, 257–68.

33 *Re Air Crash at Belle Harbor, New York, on November 12, 2001* (SD NY, 02 MDL 1448(RWS), 02 Civ 6746(JFK), 02 Civ 6747(JFK), 5 May 2003) slip op 2 (Keenan J).

34 *Warsaw* (n 9).

35 *Povey* (2005) 223 CLR 189, 202 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Parkes Shire Council* (2019) 266 CLR 212, 226 (Kiefel CJ, Bell, Keane and Edelman JJ), 230–1, 245–6 (Gordon J); *Emery Air Freight Corporation v Merck Sharpe & Dohme (Australia) Pty Ltd* (1999) 47 NSWLR 696, 704 (Mason P) ('*Merck Sharpe & Dohme*'); *Sidhu v British Airways plc* [1997] AC 430, 453 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434) ('*Sidhu*'); *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 499 (Lord Scott of Foscote), 509 (Lord Steyn) ('*Deep Vein Thrombosis*'); *El Al Israel Airlines Ltd v Tseng*, 525 US 155, 169–70 (Ginsburg J for the Court) (1999) ('*Tseng*'); *Rosman v Trans World Airlines Inc*, 314 NE 2d 848, 854 (Rabin J, Breitel CJ, Jasen, Gabrielli, Jones and Wachtler JJ agreeing at 859) (NY, 1974) ('*Rosman*'); *Tasman Pulp & Paper Co Ltd v Brambles JB O'Loughlen Ltd* [1981] 2 NZLR 225, 227 (Prichard J) (High Court) ('*Tasman Pulp*'); *Naval-Torres v Northwest Airlines Inc* (1998) 159 DLR (4<sup>th</sup>) 67, 72 (Sharpe J) (Ontario Court – General Division)

enduring strengths,<sup>36</sup> and limiting carriers' potential liability in case of accidents.<sup>37</sup> In this sense, the 'carriers received the chief benefit from [Warsaw]'<sup>38</sup> through financial limitations on passenger recovery which have long been criticised on the basis that the original policy of the Convention is outdated.<sup>39</sup>

## 2 Montreal

In May 1999, 121 States' representatives met in Montreal, Canada, to negotiate and adopt a treaty to replace *Warsaw*.<sup>40</sup> The *Warsaw* system was never intended to be long-lasting,<sup>41</sup> but by 1999 it had developed into a 'complex and confusing array'<sup>42</sup> of international agreements.<sup>43</sup> Decided cases illustrate clearly the *Warsaw* system's fragmentation,<sup>44</sup> subjecting carriers by the turn of the 21<sup>st</sup> century

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(*'Naval-Torres'*); *Connaught Laboratories Ltd v British Airways* (2002) 61 OR (3d) 204, 221–2 (Molloy J), aff'd (2005) 77 OR (3d) 34, 37 (Court of Appeal) (*'Connaught Laboratories'*); *Potgieter v British Airways plc* [2005] ZAWCHC 5 (25 January 2005) [24] (Davis J) (*'Potgieter'*). See also *Warsaw* (n 9) Preamble para 2; *Warsaw Minutes* (n 31) 13, 35–6, 49, 87.

- 36 See, eg, William Hildred, 'Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading up to the Montreal Agreement' (1967) 33(4) *Journal of Air Law and Commerce* 521, 522; Gregory C Sisk, 'Recovery for Emotional Distress under the Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lésion Corporelle*' (1990) 25(2) *Texas International Law Journal* 127, 155–7.
- 37 *Parkes Shire Council* (2019) 266 CLR 212, 218 (Kiefel CJ, Bell, Keane and Edelman JJ); *Eck v United Arab Airlines Inc*, 203 NE 2d 640, 642 (Burke J, Desmond CJ agreeing at 644, Fuld, Van Voorhis and Scileppi JJ agreeing at 645) (NY, 1964) (*'Eck'*); *Re Air Disaster At Lockerbie, Scotland on December 21, 1988*, 928 F 2d 1267, 1270 (Cardamone J for the Court) (2<sup>nd</sup> Cir, 1991), cert dend *Rein v Pan American World Airways Inc*, 502 US 920 (1991) (*'Lockerbie'*); *Sompo Japan Insurance Inc v Nippon Cargo Airlines Co Ltd*, 522 F 3d 776, 781 (Ripple J for the Court) (7<sup>th</sup> Cir, 2008) (*'Sompo Japan'*). See also *Connaught Laboratories* (2002) 61 OR (3d) 204, 221 (Molloy J); *Warsaw Minutes* (n 31) 39, 47–8; Andreas F Lowenfeld and Allan I Mendelsohn, 'The United States and the Warsaw Convention' (1967) 80(3) *Harvard Law Review* 497, 498–9.
- 38 Lowenfeld and Mendelsohn (n 37) 500.
- 39 Katherine A Staton, 'The Warsaw Convention's Facelift: Will It Meet the Needs of 21<sup>st</sup> Century Air Travel?' (1997) 62(4) *Journal of Air Law and Commerce* 1083, 1085 n 5.
- 40 See generally Charles F Krause and Kent C Krause, *Aviation Tort and Regulatory Law* (2<sup>nd</sup> ed, 2020) vol 1, ch 12. See also *Narayanan*, 747 F 3d 1125, 1127 n 2 (Nguyen J for Fletcher and Nguyen JJ) (9<sup>th</sup> Cir, 2014).
- 41 *Trans World Airlines Inc v Franklin Mint Corporation*, 466 US 243, 259 (O'Connor J for the Court) (1984).
- 42 Joint Standing Committee on Treaties, Parliament of Australia, *Treaties Tabled on 7 December 2004 (3) and 8 February 2005* (Report No 65, May 2005) 24 [5.5] (*'Joint Standing Committee Report'*). See also J Brent Alldredge, 'Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?' (2002) 67(4) *Journal of Air Law and Commerce* 1345, 1354.
- 43 See, eg, *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963); *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, opened for signature 18 September 1961, 500 UNTS 31 (entered into force 1 May 1964). See also generally Thomas J Whalen, 'The New Warsaw Convention: The Montreal Convention' (2000) 25(1) *Air and Space Law* 12, 13.
- 44 See, eg, *Re Korean Airlines Disaster of Sept 1, 1983*, 664 F Supp 1463, 1469 (Robinson CJ) (D DC, 1985); *Chubb & Son Inc v Asiana Airlines*, 214 F 3d 301, 306 (Parker J for the Court) (2<sup>nd</sup> Cir, 2000), cert dend 533 US 928 (2001) (*'Chubb'*).

to a hodgepodge of different liability regimes,<sup>45</sup> as '[n]o one treaty or contract [governed] the relationships of one State with other States'.<sup>46</sup>

Exposition of these instruments exceeds the scope of this article,<sup>47</sup> but by the time of the 1999 International Conference on Air Law ('Montreal Conference'), the need for a new convention to replace *Warsaw's* 'patchwork of liability regimes' was well recognised.<sup>48</sup> For this reason, *Montreal* was praised as 'a vast improvement over the liability regime established under [*Warsaw*], relative to passenger rights in the event of an accident'.<sup>49</sup> *Montreal* entered into force in November 2003.<sup>50</sup>

Although *Montreal* also aims to establish uniformity in international air carriage,<sup>51</sup> its other purpose is 'vastly' different from *Warsaw's*.<sup>52</sup> Whereas protecting the nascent international airline industry was reasonably enough a purpose of *Warsaw*,<sup>53</sup> *Montreal's* purpose was otherwise: by 1999, air travel was safer and the airline industry stronger,<sup>54</sup> such that the balance could fairly be said

45 William J Clinton, *Message from the President of the United States Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air* (Senate Treaty Doc No 106-45, 6 September 2000) ix. See also above n 43.

46 *Chubb*, 214 F 3d 301, 306 (Parker J for the Court) (2<sup>nd</sup> Cir, 2000).

47 But see generally Clinton (n 45) v–ix. See also especially *Daddon v Air France* (1984) 7 S&B Av R 141 (Israel Supreme Court) [tr (1988) 23 *European Transport Law* 87, 95–6, 102 (Lewin J, Bach and Netanyahu JJ agreeing at 110)] ('*Daddon*'); *South Pacific Air Motive Pty Ltd v Magnus* (1998) 87 FCR 301, 316, 318 (Beaumont J), 319 (Hill J), 331, 334, 341–2, 344 (Sackville J) ('*Magnus*'); Michael Milde, "'Warsaw System" and the 1999 Montreal Convention' (Session Paper, International Conference on Contemporary Issues in Air Transport, Air Law and Regulation, 25 April 2008) 11; Caroline Desbiens, 'Air Carrier's Liability for Emotional Distress under Article 17 of the Warsaw Convention: Can It Still Be Invoked?' (1992) 17 *Annals of Air and Space Law* 153, 171–2; Dafna Yorán, 'Recovery of Emotional Distress Damages under Article 17 of the Warsaw Convention: The American versus the Israeli Approach' (1992) 18(3) *Brooklyn Journal of International Law* 811, 841.

48 Clinton (n 45) ix. See also *Montreal Minutes* (n 30) 37.

49 Clinton (n 45) iii. See also *Joint Standing Committee Report* (n 42) 25 [5.11].

50 *Montreal* (n 5).

51 *Thibodeau v Air Canada* [2014] 3 SCR 340, 365, 367–8, 371 (Cromwell J for the Court) ('*Thibodeau*'); *Gontcharov v Canjet* (2012) 111 OR (3d) 135, 139–40 (Wilson J) (Superior Court of Justice) ('*Gontcharov*'); *O'Mara v Air Canada* (2013) 115 OR (3d) 673, 683, 685 (Perell J) ('*O'Mara*'); *Vumbaca v Terminal One Group Association LP*, 859 F Supp 2d 343, 361 (Weinstein J) (ED NY, 2012) ('*Vumbaca*'). See also *Parkes Shire Council* (2019) 266 CLR 212, 230–1 (Gordon J).

52 *Doe v Etihad Airways PJSC*, 870 F 3d 406, 423, 426 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017), cert dend 138 S Ct 1548 (2018) ('*Etihad*'). See generally below Part III(A)–(B).

53 *Tseng*, 525 US 155, 170 (Ginsburg J for the Court) (1999); *Etihad*, 870 F 3d 406, 436 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017). But see *Reed v Wiser*, 414 F Supp 863, 865 (Frankel J) (SD NY, 1976); W Fain Rutherford Jr, 'Maximizing Passenger Recovery under the Warsaw Convention: Articles 17 and 22' (1977) 34(1) *Washington and Lee Law Review* 141, 159. Cf *Day v Trans World Airlines Inc*, 528 F 2d 31, 31 (Kaufman CJ for the Court) (2<sup>nd</sup> Cir, 1975); *Maugnie v Cie Nationale Air France*, 549 F 2d 1256, 1259 (Richey J for the Court) (9<sup>th</sup> Cir, 1977) ('*Maugnie*').

54 *Etihad*, 870 F 3d 406, 423 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017); McKay Cunningham, 'The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?' (2008) 41(4) *Vanderbilt Journal of Transnational Law* 1043, 1052 n 61. See also *Montreal Minutes* (n 30) 37, 46; Andrew Field, "'Turbulence Ahead": Some Difficulties for Plaintiffs with Air Carriers' Liability for Death and Injury under Australian Law' (2005) 13(1) *Torts Law Journal* 62, 62 ('*Turbulence Ahead*'); Max Chester, 'The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries under the Warsaw Convention' (2000) 84(1) *Marquette Law Review* 227, 227; Andrew Field, 'Air Travel, Accidents and Injuries: Why the New Montreal Convention Is Already Outdated' (2005) 28(1) *Dalhousie Law Journal* 69, 97 ('*Accidents and Injuries*').

to have ‘properly shifted away from protecting the carrier and toward protecting the passenger’.<sup>55</sup>

### 3 The Conventions’ Application

#### (a) Cause of Action

While *Montreal* replaced *Warsaw*, it followed its predecessor’s structure.<sup>56</sup> Chapter III’s provisions (including article 17), which provide for carriers’ liability, were considered the most important articles at the Warsaw Conference,<sup>57</sup> and similarly ‘lay at the heart of [the Montreal Conference’s] work’.<sup>58</sup> The authentic English text of article 17(1) of *Montreal*, which is of most significance for present purposes, reads relevantly as follows:

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 ...<sup>59</sup>

Although initially courts construed article 17 of *Warsaw* as merely creating a presumption of carrier liability,<sup>60</sup> the settled modern position is that article 17 of both Conventions creates an independent,<sup>61</sup> event-based<sup>62</sup> and exclusive<sup>63</sup> cause of action, permitting passengers to recover from carriers for damage sustained, provided an accident occurred on board and caused death or bodily injury.

55 *Tseng v El Al Israel Airlines Ltd*, 122 F 3d 99, 107 (Cardamone J for the Court) (2<sup>nd</sup> Cir, 1997), quoted in *Tseng*, 525 US 155, 171 n 12 (Ginsburg J for the Court) (1999); *Ethiad*, 870 F 3d 406, 436 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

56 *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347, 1368 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363) (*‘Stott’*). See also *Weiss v El Al Israel Airlines Ltd*, 433 F Supp 2d 361, 365 (Lynch J) (SD NY, 2006) (*‘Weiss’*); JC Batra, ‘Modernization of the Warsaw System: Montreal 1999’ (2000) 65(3) *Journal of Air Law and Commerce* 429, 437; Whalen (n 43) 17.

57 *Warsaw Minutes* (n 31) 205.

58 *Montreal Minutes* (n 30) 49.

59 *Montreal* (n 5) art 17(1) (emphasis added). Cf *Warsaw* (n 9) art 17, which relevantly provides: ‘*le transporteur est responsable du dommage survenu en cas de mort, de blessure, ou de toute autre lésion corporelle subie par un voyageur lorsque l’accident qui a causé le dommage s’est produit à bord de l’aéronef...* [The carrier is liable for damage sustained in case of death, of wounding, or of any other bodily injury suffered by a passenger if the accident which caused the damage took place on board the aircraft ...]’ [tr author].

60 See, eg, *Grey v American Airlines Inc*, 227 F 2d 282, 285 (Medina J for the Court) (2<sup>nd</sup> Cir, 1955), cert dend 350 US 989 (1956); *Maugnie*, 549 F 2d 1256, 1258 (Richey J for the Court) (9<sup>th</sup> Cir, 1977); *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 260 FLR 37, 50 (Allsop P) (*‘Sercel’*). Cf *Warsaw Minutes* (n 31) 21, 168.

61 See, eg, *Benjamins v British European Airways*, 572 F 2d 913, 919 (Lumbard J for Lumbard and Feinberg JJ) (2<sup>nd</sup> Cir, 1978), cert dend 439 US 1114 (1979); *Bochringer-Mannheim Diagnostics Inc v Pan American World Airways Inc*, 737 F 2d 456, 458 (Politz J for the Court) (5<sup>th</sup> Cir, 1984), cert dend 469 US 1186 (1985); *Lockerbie*, 928 F 2d 1267, 1273–4 (Cardamone J for the Court) (2<sup>nd</sup> Cir, 1991); *Re Air Crash Disaster Near Honolulu, Hawaii, on February 24, 1989*, 783 F Supp 1261, 1263 (Walker J) (ND Cal, 1992) (*‘Honolulu’*); *Sercel* (2012) 260 FLR 37, 51–2 (Allsop P). See also *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1990] 1 QB 326, 331 (Gatehouse J) (England and Wales High Court) (*‘Gatewhite’*); Georgette Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* (Kluwer-Deventer, 1977) 224–5.

62 *Parkes Shire Council* (2019) 266 CLR 212, 225–6 (Kiefel CJ, Bell, Keane and Edelman JJ), 237 (Gordon J).

63 See below Part II(A)(3)(b).

The concept of ‘damage’ in article 17 of both Conventions is distinct from that of ‘bodily injury’,<sup>64</sup> and this article is concerned only with the latter. Yet it is worth noting that what constitutes ‘damage sustained’ has occupied courts for decades,<sup>65</sup> which have interpreted the term as comprehending any ‘actual harm’ suffered,<sup>66</sup> including financial loss<sup>67</sup> and damage of a more intangible character, such as losing a parent.<sup>68</sup> The Supreme Court of the United States has construed the term to mean any ‘legally cognizable harm’ under each forum’s domestic law,<sup>69</sup> and it has been observed that such damage includes pure psychiatric injury.<sup>70</sup>

The term ‘accident’ in article 17(1) is a term of art.<sup>71</sup> Although it is undefined in the Conventions,<sup>72</sup> whether an accident has occurred for the purposes of article 17(1) is today a simple inquiry,<sup>73</sup> merely involving application of the definition of ‘accident’ as ‘an unexpected or unusual event or happening that is external to the passenger’,<sup>74</sup> a definition formulated by the Supreme Court of the United States and now widely accepted.<sup>75</sup> Importantly in relation to PTSD, which by definition manifests only after a traumatic incident,<sup>76</sup> merely the relevant *accident* needs to occur on board, not the *bodily injury* it causes,<sup>77</sup> for a claim to be maintainable under article 17(1).

64 *Parkes Shire Council* (2019) 266 CLR 212, 237–8 (Gordon J); *Eithad*, 870 F 3d 406, 413–14, 417–20 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

65 See, eg, *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454 (England and Wales High Court) (‘Preston’).

66 *Lockerbie*, 928 F 2d 1267, 1281 (Cardamone J for the Court) (2<sup>nd</sup> Cir, 1991); *Re Korean Air Lines Disaster of September 1, 1983*, 932 F 2d 1475, 1485 (Buckley J for the Court) (DC Cir, 1991); *Honolulu*, 783 F Supp 1261, 1265 (Walker J) (ND Cal, 1992).

67 *Preston* [1956] 1 QB 454, 461 (Ormerod J).

68 *Ibid* 462.

69 *Zicherman v Korean Air Lines Co Ltd*, 516 US 217, 231 (Scalia J for the Court) (1996).

70 *Parkes Shire Council* (2019) 266 CLR 212, 237–8 (Gordon J). Cf *Magnus* (1998) 87 FCR 301, 315 (Beaumont J); *Di Falco v Emirates* [2018] VSC 472 (24 August 2018) [33] (Keogh J).

71 See *Naval-Torres* (1998) 159 DLR (4<sup>th</sup>) 67, 76 (Sharpe J). Examples of accidents include, among others, extreme turbulence: *Weintraub v Capital International Airways Inc*, 16 Avi Cas 17,911 (NY Civ Ct, 1980); bomb-scars: *Salerno v Pan American World Airways Inc*, 606 F Supp 656, 657 (Lasker J) (SD NY, 1985); and hijacking: *Pflug v Egyptair Corporation*, 961 F 2d 26, 29, 32 (Pollack J for the Court) (2<sup>nd</sup> Cir, 1992).

72 See *Abramson v Japan Airlines Co Ltd*, 739 F 2d 130, 132 (Sloviter J for the Court) (3<sup>rd</sup> Cir, 1984).

73 *Malaysian Airline Systems Bhd v Krum* [2005] VSCA 232 (20 September 2005) [28] (Ashley JA, Eames JA agreeing at [1], Nettle JA agreeing at [2]).

74 *Air France v Saks*, 470 US 392, 405 (O’Connor J for the Court) (1985) (‘Saks’).

75 See, eg, *Quinn v Canadian Airlines International Ltd* (1994) 18 OR (3d) 326 (Sutherland J) (General Division), affd [1997] OJ 1832 (29 April 1997) (Morden ACJ, Houlden and Goudge JJA) (Court of Appeal); Cour de Cassation [French Court of Cassation], 05-17.248, 14 June 2007 reported in (2007) Bull civ 6 no 230 (‘Arrêt 05-17.248’); *Morris* [2002] 2 AC 628, 655 (Lord Hope of Craighead); *Agrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63, 74 (Ormiston JA, Chernov JA agreeing at 105, O’Byrne AJA agreeing at 105), affd (2005) 223 CLR 251 (‘Agrack’); *Brannock v Jetstar Airways Pty Ltd* (2010) 241 FLR 218, 228 (White JA, Fraser JA agreeing at 222) (Queensland Court of Appeal). Cf *Povey* (2005) 223 CLR 189, 205 (Gleeson CJ, Gummow, Hayne and Heydon JJ, Callinan J agreeing at 250); *GN v ZU* (Court of Justice of the European Union, C-532/18, 19 December 2019) [35].

76 See below Part II(C).

77 *Agrack* (2003) 7 VR 63, 74 (Ormiston JA, Chernov JA agreeing at 105, O’Byrne AJA agreeing at 105). See also *Warsaw Minutes* (n 31) 166–7. Cf *Prescod v AMR Inc*, 383 F 3d 861, 869 (9<sup>th</sup> Cir, 2004); *Singh v North American Airlines*, 426 F Supp 2d 38, 47 (Amon J) (ED NY, 2006).



What exactly constitutes such ‘bodily injury’ has been the subject of considerable debate. In interpreting this composite term, one should always bear in mind that, to be compensable, psychiatric harm must, in addition to being physical in the sense discussed in this article,<sup>78</sup> rise above mere upset to the level of *injury*.<sup>79</sup> The importance of this ‘injury’ requirement in relation to psychiatric injury claims appears most starkly in Shanstrom CJ’s holding in *Weaver v Delta Airlines Inc* (‘*Weaver*’):<sup>80</sup> ‘Fright alone is not compensable, but brain *injury* from fright is’.<sup>81</sup> Although mere emotional upsets thus fall outside article 17,<sup>82</sup> the requirement should pose no difficulty for claimants suffering PTSD, which modern psychiatry qualifies as an injury.<sup>83</sup>

As this article shows, more significant problems have arisen in interpreting the word ‘bodily’.<sup>84</sup>

### (b) *Exclusive Application*

The exclusivity of claims under article 17 of both *Warsaw* and *Montreal* is well established.<sup>85</sup> In addition to the express provision for the principle in both Conventions,<sup>86</sup> courts in the United States of America,<sup>87</sup> the United Kingdom,<sup>88</sup>

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78 See below Part II(C).

79 See *Montreal Minutes* (n 30) 115, 167. See also especially *Walton v MyTravel Canada Holdings Inc* [2006] SKQB 231 (16 May 2006) [49]–[50] (Dovell J) (‘*Walton*’); *Vumbaca*, 859 F Supp 2d 343, 365–6, 372 (Weinstein J) (ED NY, 2012); *Ojide v Air France* (SD NY, 17-cv-3224 (KBF), 2 October 2017) slip op 2 (Forrest J).

80 56 F Supp 2d 1190 (D Mont, 1999) (‘*Weaver*’). See also below n 180 ff and accompanying text.

81 *Ibid* 1192 (emphasis added).

82 *Morris* [2002] 2 AC 628, 633 (Lord Nicholls of Birkenhead), 648 (Lord Hope of Craighead, Lord Mackay of Clashfern agreeing at 633, Lord Steyn agreeing at 645), 675, 682 (Lord Hobhouse of Woodborough).

83 See, eg, Jonathan Shay, ‘Casualties’ (2011) 140(3) *Daedalus* 179, 181.

84 See below Part II(B).

85 But see *Daddon* (1984) 7 S&B Av R 141 [tr (1988) 23 *European Transport Law* 87, 93 (Lewin J, Bach and Netanyahu JJ agreeing at 110)]; *Nelson v Lufthansa*; *TUI Travel v Civil Aviation Authority* (Court of Justice of the European Union, joined C-581/10; C-629/10, 23 October 2012) [40], [56]; *Cosgrove-Goodman v UAL Corporation* (ND Ill, 10-cv-1908, 2 June 2010); *Dawson v Thomas Airways Ltd* [2015] 1 WLR 883; Jorn J Wegter, ‘The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention’ (2006) 31(2) *Air and Space Law* 133, 135.

86 *Warsaw* (n 9) art 24; *Montreal* (n 5) art 29. See also *Montreal Minutes* (n 30) 111; Wegter (n 85) 136–7.

87 *Tseng*, 525 US 155, 161, 176 (Ginsburg J for the Court) (1999). See also *Carey v United Airlines*, 255 F 3d 1044, 1048 (Nelson J for the Court) (9<sup>th</sup> Cir, 2001) (‘*Carey*’); *Jacob v Korean Air Lines Co Ltd*, 606 F Appx 478, 480 (11<sup>th</sup> Cir, 2015) (‘*Jacob*’).

88 *Sidhu* [1997] AC 430, 447, 453–4 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434); *Morris* [2002] 2 AC 628, 637 (Lord Steyn), 653 (Lord Hope of Craighead); *Deep Vein Thrombosis* [2006] 1 AC 495, 500 (Lord Scott of Foscote); *Stott* [2014] AC 1347, 1369, 1377 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363).

Canada,<sup>89</sup> Australia,<sup>90</sup> New Zealand,<sup>91</sup> Singapore,<sup>92</sup> Hong Kong,<sup>93</sup> South Africa,<sup>94</sup> Ireland,<sup>95</sup> France,<sup>96</sup> Germany,<sup>97</sup> and Tonga<sup>98</sup> have all accepted that chapter III of the Conventions forms an exhaustive code governing carriers' liability, excluding resort to domestic actions.<sup>99</sup> Accordingly, any claim for psychiatric injury in international civil aviation depends wholly on whether *Montreal* allows such an action.<sup>100</sup>

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- 89 *Thibodeau* [2014] 3 SCR 340, 356, 365–6, 370 (Cromwell J for the Court). See also *Gal v Northern Mountain Helicopters* (1999) 177 DLR (4<sup>th</sup>) 249, 252–3 (Huddart JA, Cumming JA agreeing at 256, Finch JA agreeing at 256) (British Columbia Court of Appeal); *Connaught Laboratories* (2002) 61 OR (3d) 204, 213 (Molloy J); *McDonald v Korean Air* (2003) 26 CCLT (3d) 275, 275 (Ontario Court of Appeal), affirming *McDonald v Korean Air* (2002) 26 CCLT (3d) 271, 271–3 (Hermiston J) (Ontario Superior Court of Justice). Cf *Naval-Torres* (1998) 159 DLR (4<sup>th</sup>) 67, 73–4, 76 (Sharpe J).
- 90 *Parkes Shire Council* (2019) 266 CLR 212, 226 (Kiefel CJ, Bell, Keane and Edelman JJ), 236–7, 239 (Gordon J). See also *Casey v Pel-Air Aviation Pty Ltd* (2015) 89 NSWLR 707, 717 (Schmidt J) ('*Casey – Trial*'), revd on other grounds *Casey* (2017) 93 NSWLR 438; *Dyczynski v Gibson* [2020] FCAFC 120 (7 July 2020) [33] (Murphy and Colvin JJ); *Civil Aviation (Carriers' Liability) Act 1959* (Cth) s 9E ('*CACL Act 1959*').
- 91 *Emery Air Freight Corporation v Nerine Nurseries Ltd* [1997] 3 NZLR 723, 737 (Blanchard J, Gault J agreeing at 724, Henry J agreeing at 724–5, Thomas J agreeing at 728, Keith J agreeing at 728) (Court of Appeal). Cf *Tasman Pulp* [1981] 2 NZLR 225, 235 (Prichard J).
- 92 *Seagate Technology International v Changi International Airport Services Pte Ltd* [1997] 2 SLR(R) 57, 66 (Karthigesu JA for the Court).
- 93 *Ong v Malaysian Airline System Bhd* [2008] 3 HKC 26, 35 (Rogers V-P, Suffiad J agreeing at 38) (Court of Appeal).
- 94 *Potgieter* [2005] ZAWCHC 5 (25 January 2005) [28] (Davis J).
- 95 *McAuley v Aer Lingus Ltd* [2014] 3 IR 383, 393 (Hedigan J) ('*McAuley*'); *Hennessey v Aer Lingus Ltd* [2012] IEHC 124 (13 March 2012) [6.5] (Hedigan J) ('*Hennessey*').
- 96 Arrêt 05-17.248, 14 June 2007 reported in (2007) Bull civ 6 no 230. Cf Cour de Cassation [French Court of Cassation], 97-10.268, 15 July 1999 reported in (1999) Bull civ I no 242, 156.
- 97 Bundesgerichtshof [German Federal Court of Justice], X ZR 99/10, 15 March 2011 [23].
- 98 *Cauchi v Air Fiji* [2005] Tonga LR 154, 176–7 (Ford J) ('*Cauchi*').
- 99 The Conventions' exclusive application has yielded perverse results. Provided no 'bodily injury' occurs, decided cases and the reasoning deployed in them indicate that airlines or their employees can, with impunity, discriminate against passengers racially: *King v American Airlines Inc*, 284 F 3d 352, 358–60 (Sotomayor J for the Court) (2<sup>nd</sup> Cir, 2002); religiously: see *Elnajjar v Northwest Airlines Inc* (SD Tex, Civ A H-04-680, Civ A H-04-681, 15 August 2005) slip op 1, 4 (Werlein J); and linguistically: see *Thibodeau* [2014] 3 SCR 340, 356 (Cromwell J); deliberately terrorise them: *Carey*, 255 F 3d 1044, 1053 (Nelson J for the Court) (9<sup>th</sup> Cir, 2001); humiliate disabled passengers: *Stott* [2014] AC 1347, 1377 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363), 1377 (Baroness Hale of Richmond DPSC); and occupy a 'defamation free zone' on international flights: *McAuley* [2014] 3 IR 383, 386, 389 (Hedigan J); while drunken men can wilfully urinate into two-year-old girls' faces on board and get away with it: *Li v Quraishi*, 780 F Supp 117, 118, 120 (Bartels J) (ED NY, 1992). See also *Dazo v Globe Airport Security Services*, 295 F 3d 934, 940 (Tashima J for the Court) (9<sup>th</sup> Cir, 2002); *Atia v Delta Airlines Inc*, 692 F Supp 2d 693, 702 (Bunning J) (ED Ky, 2010) ('*Atia*'). Cf *Turturro v Continental Airlines Inc*, 128 F Supp 2d 170, 173 (Knapp J) (SD NY, 2001) ('*Turturro*'); *Brandt v American Airlines* (ND Cal, C 98-2089 SI, 13 March 2000) slip op 3–4 (Illston J); *Stokes v Southwest Airlines* 887 F 3d 199, 6 (Fish J) (ND Tex, 2017). In *Stott* [2014] AC 1347, Baroness Hale of Richmond DPSC discussed whether there 'may or may not be something' in the argument that peremptory norms of international law might invalidate provisions of *Montreal* enabling racial discrimination or inhuman or degrading treatment: at 1378. The implications of such behaviours' impunity for passengers' psychiatric health should be evident.
- 100 See *Sidhu* [1997] AC 430, 448 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434); *Parkes Shire Council* (2019) 266 CLR 212, 239 (Gordon J).

Yet, despite the Conventions' exclusivity, nothing prevents domestic courts from '[trying], as carefully as they may, to apply the wording of article 17 to the facts to enable the passenger to obtain a remedy under the Convention'.<sup>101</sup> It is submitted that, although article 17(1) excludes domestic psychiatric injury claims, national courts may nevertheless recognise psychiatric injury as bodily injury compensable under *Montreal* on the basis of evidence in particular cases.

## B Bodily Injury Jurisprudence under the Conventions

A substantial but not wholly uniform body of transnational case law has held that psychiatric injury falls outside the definition of 'bodily injury' in both *Warsaw* and *Montreal*.<sup>102</sup> Bearing in mind law reporting's variations and the 'dangers inherent in trying to assess a balance of foreign judicial opinion from available cases',<sup>103</sup> the following analysis of this case law is chiefly confined to the common law world.

### 1 Warsaw

Although this article argues only that psychiatric injury is compensable under article 17(1) of *Montreal*, *Warsaw* jurisprudence nevertheless provides a utile interpretative backdrop to the new Convention.<sup>104</sup> One commentator in 1949 observed that it was 'not clear if mental injury [was] covered' by article 17 of *Warsaw*,<sup>105</sup> and the following discussion confirms the special difficulties of construing the term 'bodily injury' ('*lésion corporelle*' in the authentic French)<sup>106</sup> in that article with which courts have grappled for decades.<sup>107</sup> Yet if it is established that, medically, psychiatric injury is indeed physical injury,<sup>108</sup> arguably the contentious debates running through the following cases, climaxing in *Eastern Airlines Inc v Floyd* ('*Floyd*'),<sup>109</sup> and continuing thereafter, will fall away.<sup>110</sup> The analysis of *Warsaw* cases decided subsequently to *Floyd* will present a new categorisation of

101 *Sidhu* [1997] AC 430, 454 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434).

102 See *South West Helicopters Pty Ltd v Stephenson* (2017) 327 FLR 110, 188 (Leeming JA) (New South Wales Court of Appeal) ('*Stephenson*').

103 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 275–6 (Lord Wilberforce, Lord Diplock agreeing at 279, Lord Scarman agreeing at 289) ('*Fothergill*').

104 *Thibodeau* [2014] 3 SCR 340, 363 (Cromwell J); *Etiad*, 870 F 3d 406, 411 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017); *Casey – Trial* (2015) 89 NSWLR 707, 725 (Schmidt J); *Lukács v United Airlines Inc* [2009] MBCA 111 (18 November 2009) [10] (Chartier JA) ('*Lukács*'); *Baah v Virgin Atlantic Airways Ltd*, 473 F Supp 2d 591, 596 (Stein J) (SD NY, 2007) ('*Baah*'); *Re Air Crash at Lexington, Kentucky, August 27, 2006*, 501 F Supp 2d 902, 913 (Forester J) (ED Ky, 2007) ('*Air Crash at Lexington*'); *Omwuteaka v Northwest Airlines Inc* (SD Tex, H-07-0363, 10 May 2007) slip op 1 n 2 (Atlas J); *Vumbaca*, 859 F Supp 2d 343, 361–2 (Weinstein J) (ED NY, 2012).

105 KM Beaumont, 'Need for Revision and Amplification of the Warsaw Convention' (1949) 16(4) *Journal of Air Law and Commerce* 395, 402, 411–12.

106 *Warsaw* (n 9) art 17.

107 See *Magnus* (1998) 87 FCR 301, 333 (Sackville J).

108 See below Part II(C).

109 499 US 530 (1991). See further below Part II(B)(1)(b).

110 See Ruwantissa IR Abeyratne, 'Some Issues of the Warsaw Convention: Still Some Debate Left' (1995) 44(4) *Zeitschrift für Luft- und Weltraumrecht* [Journal of Air and Space Law] 396, 403 ('Some Issues').

divergent dualist and physicalist judicial approaches to psychiatric injury, which have informed the recent reassertion of dualism in decisions interpreting article 17(1) of *Montreal*.

(a) *Pre-Floyd*

*Warsaw* has been called ‘probably the most litigated treaty in US courts’,<sup>111</sup> and it is appropriate to begin by considering American authorities, as other jurisdictions’ case law has largely developed against the background of American jurisprudence, which has from the start dominated private international aviation law.<sup>112</sup>

The effect of early decisions interpreting article 17 of *Warsaw* was to hold that ‘bodily injury’ encompassed psychiatric and psychosomatic injury.<sup>113</sup> The case of *American Airlines Inc v Ulen*<sup>114</sup> has gone largely unnoticed, but an unreported portion of the Court’s opinion unequivocally supports the compensability of psychiatric injury under *Warsaw*, holding that the plaintiff could recover under article 17 for the ‘mental and nervous shock’ she suffered,<sup>115</sup> and for injuries ‘to her mental and nervous system’.<sup>116</sup>

The period of the 1970s was notable for a series of psychiatric injury claims following international hijacking incidents. In one such case,<sup>117</sup> a plane was hijacked *en route* from Israel to New York and diverted to the Jordanian desert, where passengers were held captive for seven days.<sup>118</sup> Construing article 17, the Court held that ‘*lésion corporelle*’ encompassed all ‘damage’, ‘prejudice’, ‘wrong’ or ‘hurt’,<sup>119</sup> and accordingly that the plaintiff could recover for her psychosomatic injuries.<sup>120</sup>

In another hijacking case,<sup>121</sup> the plaintiff alleged that she suffered ‘mental and psychosomatic injuries ... [involving] demonstrable, physiological manifestations’, despite suffering no external impact.<sup>122</sup> In a carefully reasoned opinion, the Court observed that there was no evidence that *Warsaw*’s drafters intended to preclude recovery for any particular type of injury,<sup>123</sup> and held that ‘mental and psychosomatic injuries’ were within the ambit of article 17.<sup>124</sup> In reaching this conclusion, the Court considered that the term ‘bodily injury’ was ‘particularly significant’.<sup>125</sup>

111 David J Bederman, ‘Revivalist Canons and Treaty Interpretation’ (1994) 41(4) *University of California, Los Angeles Law Review* 953, 981 n 155.

112 See International Civil Aviation Organization, *Cases on the Warsaw Convention (1929–1955)* (International Civil Aviation Organization, 1955) i (‘*ICAO Cases*’).

113 But see *Rosman*, 314 NE 2d 848, 855, cf 856 (Rabin J, Breitel CJ, Jasen, Gabrielli, Jones and Wachtler JJ agreeing at 859) (NY, 1974).

114 186 F 2d 529 (DC Cir, 1949).

115 *ICAO Cases* (n 112) 87 (Clark J for the Court).

116 *Ibid*.

117 *Herman v Trans World Airlines Inc*, 69 Misc 2d 642 (NY Sup Ct, 1972).

118 *Ibid* 642 (Rubin J).

119 *Ibid* 644–5.

120 *Ibid* 642, 645.

121 *Husserl v Swiss Air Transport Co Ltd*, 388 F Supp 1238 (SD NY, 1975).

122 *Ibid* 1242 (Tyler J).

123 *Ibid* 1250.

124 *Ibid*.

125 *Ibid*.

It becomes increasingly evident that the mind is part of the body. Today, it is commonly recognized that mental reactions and functions are merely more subtle and less well understood physiological phenomena.<sup>126</sup>

The same conclusion was reached in other cases,<sup>127</sup> one of which undertook careful examination of the scholarship of aviation law experts, including two of *Warsaw*'s principal drafters,<sup>128</sup> Georges Ripert and Otto Riese,<sup>129</sup> which the Court concluded made it very clear that the term '*lésion corporelle*' included psychiatric damage.<sup>130</sup> Commentary also approved this interpretation as cohering with the intention of *Warsaw*'s drafters.<sup>131</sup>

(b) *Floyd*

The seminal case of *Floyd* marked a turning point, validating the dualist somatic–psychic distinction which has overshadowed article 17 jurisprudence globally ever since.

*Floyd*'s unsettling facts may be stated briefly. During a flight from the Bahamas to Miami, an aeroplane's three engines failed, and passengers were informed that it would ditch in the ocean.<sup>132</sup> That did not eventuate, but several passengers, including Floyd, sued the airline under article 17 of *Warsaw* for 'mental distress',<sup>133</sup> notably without alleging any specific physical injury. The Court of Appeals for the Eleventh Circuit carefully reviewed the jurisprudence and scholarship treating article 17 and concluded that it permitted recovery for 'purely mental injuries unaccompanied by physical injury'.<sup>134</sup>

Eastern Airlines appealed to the Supreme Court of the United States. There Floyd argued that 'mental injury is an injury to the brain, and the brain is certainly an organ of the body. The current view of the human life form is ... that a "mental injury" is, in fact, a "bodily injury"'.<sup>135</sup> Inscrutably, the Supreme Court did not directly address this submission and took almost for granted a distinction between

126 Ibid.

127 *Krystal v British Overseas Airways Corporation*, 403 F Supp 1322, 1324 (Whelan J) (CD Cal, 1975) ('*Krystal*'); *Karfunkel v Cie Nationale Air France*, 427 F Supp 971, 977 (Wyatt J) (SD NY, 1977); *Palagonia v Trans World Airlines*, 110 Misc 2d 478, 479 (Marbach J) (NY Sup Ct, 1978) ('*Palagonia*'); *Borham v Pan American World Airways Inc* (SD NY, No 85 Civ 6922 (CBM), 5 March 1986) slip op 3 (Motley CJ) ('*Borham*'). See also the decision of the Supreme Court of Israel in *Daddon* (1984) 7 S&B Av R 141 [tr (1988) 23 *European Transport Law* 87, 101 (Lewin J, Bach and Netanyahu JJ agreeing at 110)].

128 *Palagonia*, 110 Misc 2d 478, 480–1 (Marbach J) (NY Sup Ct, 1978).

129 *Warsaw Minutes* (n 31) 6–7.

130 *Palagonia*, 110 Misc 2d 478, 482 (Marbach J) (NY Sup Ct, 1978).

131 See, eg, Dana Stanculescu, 'Recovery for Mental Harm under Article 17 of the Warsaw Convention: An Interpretation of *Lésion Corporelle*' (1985) 8(3) *Hastings International and Comparative Law Review* 339, 359–61.

132 *Floyd v Eastern Airlines Inc*, 872 F 2d 1462, 1466 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989) ('*Floyd – Intermediate*'); *Floyd*, 499 US 530, 533 (Marshall J for the Court) (1991).

133 *Floyd – Intermediate*, 872 F 2d 1462, 1466 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989); *Floyd*, 499 US 530, 533 (Marshall J for the Court) (1991).

134 *Floyd – Intermediate*, 872 F 2d 1462, 1480 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989).

135 *Floyd*, 499 US 530 (1991) Brief for Respondents, 5–6.

‘physical’ and ‘psychic’ injuries,<sup>136</sup> ultimately holding that carriers ‘cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury or physical manifestation of injury’.<sup>137</sup>

*Floyd* has not escaped criticism. In *American Airlines Inc v Georgeopoulos* (‘*Georgeopoulos*’),<sup>138</sup> Ireland J at first instance, in ‘a carefully reasoned judgment’,<sup>139</sup> called *Floyd*’s reasoning ‘seriously flawed’,<sup>140</sup> while commentators have excoriated its analysis.<sup>141</sup> Given *Warsaw*’s drafters never discussed the possibility of recovery for psychiatric injury,<sup>142</sup> and given numerous civil and common law jurisdictions recognised the compensability of such injury at the time of *Warsaw*’s conclusion in 1929,<sup>143</sup> it is conceivable that psychiatric injury was indeed intended to fall within the meaning of ‘*lésion corporelle*’ under that Convention.<sup>144</sup> There is therefore force in the assessment that *Floyd* engineered a narrow interpretation of that term’s scope in *Warsaw*, ‘motivated by traditional objections to allowing plaintiffs to recover for purely mental disturbances’.<sup>145</sup>

The world has felt *Floyd*’s consequences and litigants have often assumed its correctness.<sup>146</sup> American courts applied *Floyd* in several subsequent decisions,<sup>147</sup> but some recognised that plaintiffs could recover for psychiatric injury when

136 See Jeffrey J Immel, ‘The Montreal Convention and Recovery for Free-Standing Emotional Distress under Article 17’ (2013) 13(1) *Issues in Aviation Law and Policy* 75, 76.

137 *Floyd*, 499 US 530, 552 (Marshall J for the Court) (1991). See also *Tseng*, 525 US 155, 165 n 9 (Ginsburg J for the Court) (1999).

138 [1996] NSWCA 13 (26 September 1996) (‘*Georgeopoulos*’).

139 *Ibid* [6] (Sheller JA, Clarke JA agreeing at [1], Simos AJA agreeing at [30]).

140 *Georgeopoulos v American Airlines Inc* (New South Wales Supreme Court, Ireland J, 10 December 1993), quoted in *Georgeopoulos* [1996] NSWCA 13 (26 September 1996) [14].

141 See, eg, Chester (n 54) 233; Cunningham (n 54) 1079; M Veronica Pastor, ‘Absolute Liability under Article 17 of the Warsaw Convention: Where Does it Stop?’ (1993) 26(3) *George Washington Journal of International Law and Economics* 575, 594; Alldredge (n 42) 1360; Dale M Eaton, ‘Recovery for Purely Emotional Distress under the Warsaw Convention: Narrow Construction of *Lésion Corporelle* in *Eastern Airlines Inc v Floyd*’ [1993] (2) *Wisconsin Law Review* 563, 583; Yoran (n 47) 831.

142 *Warsaw Minutes* (n 31) 205–6; Andreas F Lowenfeld, ‘Hijacking, Warsaw, and the Problem of Psychic Trauma’ (1973) 1(2) *Syracuse Journal of International Law and Commerce* 345, 347.

143 See below Part III(B)(2)(b)–(c).

144 See *Floyd – Intermediate*, 872 F 2d 1462, 1466 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989); Alldredge (n 42) 1361. See also Lisa M Fromm, ‘*Eastern Airlines v Floyd*: Airline Passengers Denied Recovery for Emotional Distress under the Warsaw Convention’ (1991) 25(2) *Akron Law Review* 425, 434, 437.

145 Eaton (n 141) 565, 586–7. See also Yoran (n 47) 841.

146 See, eg, *Magnus* (1998) 87 FCR 301, 341 (Sackville J). Cf *Sidhu* [1997] AC 430, 440–1 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434).

147 See, eg, *Tseng*, 525 US 155, 172 (Ginsburg J for the Court) (1999); *Croucher v Worldwide Flight Services Inc*, 111 F Supp 2d 501, 506–7 (Bassler J) (D NJ, 2000); *Lee v American Airlines Inc*, 355 F 3d 386, 387 (Garza J for the Court) (5<sup>th</sup> Cir, 2004).

manifesting externally,<sup>148</sup> as in the form of cramps,<sup>149</sup> exhaustion,<sup>150</sup> and diarrhoea.<sup>151</sup> In *Kotsambasis v Singapore Airlines Ltd* ('*Kotsambasis*'),<sup>152</sup> the New South Wales Court of Appeal followed *Floyd* 'for reasons of international comity'<sup>153</sup> in holding that 'bodily injury' excluded 'purely psychological injury'.<sup>154</sup> The House of Lords in *Morris* also followed *Floyd*,<sup>155</sup> but did not accept its dualist implications.<sup>156</sup> In Canada it has been accepted that article 17 of *Warsaw* 'does not permit recovery for purely mental or psychological injuries',<sup>157</sup> a position adopted also in other jurisdictions.<sup>158</sup> What *Floyd* and its offspring therefore clarify is the necessity for plaintiff passengers themselves to eschew unscientific dualist distinctions by particularly pleading their psychiatric injuries as *physical*, rather than mental, to succeed in an article 17 claim.<sup>159</sup>

### (c) *Post-Floyd*

American decisions post-*Floyd* involving passenger compensation claims for PTSD display two fundamentally opposite approaches: first, dualist denial on principle of psychiatric injury's compensability; and, secondly, physicalist recognition of its compensability provided sufficient evidence exists. The second category displays the more persuasive reasoning; yet, alarmingly, the New South Wales Court of Appeal's decision in *Casey* has given the first approach renewed validation.

As the following review makes plain, dualist authorities applying article 17 of *Warsaw*, exhibiting questionable reasoning, have blanketly denied recovery for PTSD even whilst accepting that it may involve physical alterations to the brain.

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- 148 See, eg, *Re Aircrash Disaster near Roselawn, Indiana*, 954 F Supp 175, 178–9 (Castillo J) (ND Ill, 1997). See also *Hunt v Taca International Airlines Inc* (ED La, CIV A 96-3064, 17 November 1997) slip op 3 (Porteous J). But see *Tseng*, 525 US 155, 172 (Ginsburg J for the Court) (1999); *Carey*, 255 F 3d 1044, 1053 n 51 (Nelson J for the Court) (9<sup>th</sup> Cir, 2001); *Re Air Crash at Little Rock, Arkansas, on June 1, 1999*, 291 F 3d 503, 512 (Beam J for the Court) (8<sup>th</sup> Cir, 2002) ('*Little Rock*'); *Hernando v United Airlines* (ND Cal, C 99-0105 SI, 21 December 1999) slip op 4 (Illston J); *Turturro*, 128 F Supp 2d 170, 176 (Knapp J) (SD NY, 2001). Cf *Jack v Trans World Airlines Inc*, 854 F Supp 654, 664 (Caulfield J) (ND Cal, 1994); *Morris* [2002] 2 AC 628, 664 (Lord Hope of Craighead, Lord Mackay of Clashfern agreeing at 633, Lord Steyn agreeing at 645).
- 149 *Chendrimada v Air-India*, 802 F Supp 1089, 1092 (Sand J) (SD NY, 1992). But see *Barrett v United Airlines Inc* (ND Ill, 92 C 5578, 5 August 1994) slip op 3 (Zagel J).
- 150 See *Daniel v Virgin Atlantic Airways Ltd*, 59 F Supp 2d 986, 992 (Orrick J) (ND Cal, 1998).
- 151 *Ratnaswamy v Air Afrique* (ND Ill, 95 C 7670, 3 March 1998) slip op 6 (Marovich J).
- 152 (1997) 42 NSWLR 110.
- 153 *Magnus* (1998) 87 FCR 301, 316 (Beaumont J).
- 154 *Kotsambasis* (1997) 42 NSWLR 110, 114–15 (Meagher JA, Powell JA agreeing at 120, Stein JA agreeing at 120–2).
- 155 *Morris* [2002] 2 AC 628, 668 (Lord Hope of Craighead, Lord Mackay of Clashfern agreeing at 633, Lord Steyn agreeing at 645).
- 156 See below Part II(B)(1)(d).
- 157 *Chau v Delta Air Lines Inc* (2003) 67 OR (3d) 108, 112 (Nordheimer J) (Superior Court of Justice).
- 158 See, eg, *Cauchi* [2005] Tonga LR 154, 174 (Ford J).
- 159 See, eg, *Tseng*, 525 US 155, 160, 172 (Ginsburg J for the Court) (1999); *Morris* [2002] 2 AC 628, 692 (Lord Hobhouse of Woodborough); *Halime v Singapore Airlines Ltd* [2018] NSWCA 155 (16 July 2018) [9], [13] (White JA, Sackville AJA agreeing at [15]) ('*Halime*').

The Court in *Re Air Crash at Little Rock, Arkansas* ('Little Rock'),<sup>160</sup> reasoning that *Floyd* had drawn 'a clear line between physical injuries and mental injuries',<sup>161</sup> held that even '*physical changes in the brain* resulting from chronic PTSD are not compensable under [*Warsaw*]',<sup>162</sup> on the basis that they constitute merely 'physical manifestation of mental injuries'.<sup>163</sup>

In *Bobian v Czech Airlines* ('*Bobian*'),<sup>164</sup> the plaintiffs alleged that, as a consequence of flying through severe turbulence, they suffered PTSD '[resulting] in physical injury and damage to brain cells resulting in physical change and atrophy to the hippocampus'.<sup>165</sup> Adducing evidence to this effect,<sup>166</sup> the plaintiffs submitted that PTSD 'is physically based in the neurochemical and neurophysiologic[al] reactions in critical brain areas',<sup>167</sup> and that 'excessive release of excitatory neurotransmitters that produce a local excitotoxic reaction and over-abundant release of glucocorticoids' causes physical brain damage.<sup>168</sup> The trial Court, notwithstanding its own admission that 'mental' functions are 'connected to brain activity, and therefore at some level "physical"',<sup>169</sup> held as a blanket rule that 'PTSD is not a compensable injury under [*Warsaw*]',<sup>170</sup> glibly declaring that 'no expert recharacterization of emotional injury – or correlation of it with physical manifestations – will permit recovery for such injury'.<sup>171</sup> On appeal, the Court of Appeals for the Third Circuit affirmed the decision at trial.<sup>172</sup>

*Doe v United Airlines Inc* ('*Doe*')<sup>173</sup> concerned the sexual molestation of a minor, Doe, on board a flight and her alleged consequent PTSD.<sup>174</sup> Doe's clinical psychologist gave evidence that 'PTSD has a physical basis which includes alteration in brain chemistry, physiology and the neurologic[al] system'.<sup>175</sup> However, finding in the defendant airline's favour,<sup>176</sup> the Court held, apparently as a matter of law, that

alterations in an individual's body and behaviour intrinsically or characteristically associated with mental distress do not constitute bodily injury under [*Warsaw*]. ... This rule encompasses *alterations or changes in an individual's brain and nervous system* characteristically tied to PTSD.<sup>177</sup>

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160 291 F 3d 503 (8<sup>th</sup> Cir, 2002).

161 Ibid 512 (Beam J for the Court).

162 Ibid (emphasis added).

163 Ibid.

164 93 F Appx 406 (3<sup>rd</sup> Cir, 2004) ('*Bobian*').

165 *Bobian v CSA Czech Airlines*, 232 F Supp 2d 319, 320–1 (Debevoise J) (D NJ, 2002) ('*Bobian – Trial*').

166 Ibid 322.

167 *Bobian*, 93 F Appx 406, 407 (Becker J for the Court) (3<sup>rd</sup> Cir, 2004).

168 Ibid. See also below Part II(C).

169 *Bobian – Trial*, 232 F Supp 2d 319, 326 (Debevoise J) (D NJ, 2002).

170 Ibid 324.

171 Ibid.

172 *Bobian*, 93 F Appx 406, 407 (Becker J for the Court) (3<sup>rd</sup> Cir, 2004).

173 160 Cal App 4<sup>th</sup> 1500 (Ct App, 2008) ('*Doe*').

174 Ibid 1503, 1508 (Manella J, Willhite APJ and Suzukawa J agreeing at 1516).

175 Ibid 1508.

176 Ibid 1516.

177 Ibid 1512 (emphasis added).



With respect, the ‘rule’ imagined in these cases turns a factual medical question – whether a bodily injury has occurred – into a legal one and constitutes naked judicial amendment to article 17’s plain text.<sup>178</sup> By asserting that even *physical* alterations to the brain cannot constitute ‘bodily injury’, it also erroneously expounds authorities’ prevailing view,<sup>179</sup> as the following discussion illustrates.

*Weaver*,<sup>180</sup> a decision which broke new ground,<sup>181</sup> and which may ‘best stand up to the passage of time’,<sup>182</sup> was the first important aviation case affirming the physical nature of PTSD. In *Weaver*, the plaintiff sued her carrier for PTSD,<sup>183</sup> claiming that it ‘arose from the physical changes in her brain brought on during the extreme stress of [an] emergency landing’.<sup>184</sup> The Court, acknowledging that recovery would only be available if Weaver proved bodily injury,<sup>185</sup> found that she had presented evidence of physical injury<sup>186</sup> in the form of affidavits from medical practitioners swearing that ‘PTSD has a physical basis’,<sup>187</sup> and that the traumatic incident caused ‘biochemical reactions which had physical impacts upon her brain and neurologic[al] system’.<sup>188</sup> Reasoning that the central factor in the case was not legal, but medical,<sup>189</sup> the Court held that the plaintiff’s PTSD evidenced ‘an injury to her brain, and the only reasonable conclusion is that it is, in fact, a bodily injury’.<sup>190</sup>

*Weaver* was, as it has been called, ‘wholly unexceptionable’.<sup>191</sup> As Lord Hobhouse remarked in *Morris*, ‘[i]t is hard to see any basis for disagreeing with [*Weaver*’s] conclusion that, if the passenger can prove that his or her brain was damaged as a result of the accident, the passenger has suffered a *bodily injury*’.<sup>192</sup>

The Court in *Turturro v Continental Airlines* (*Turturro*),<sup>193</sup> although reaching a result different from that in *Weaver*, also emphasised that evidence could show the bodily nature of psychiatric injury. The plaintiff in *Turturro* alleged she suffered PTSD from discovering after boarding that her medication had been stolen.<sup>194</sup> Despite concluding that bodily injury was not established in her case,<sup>195</sup> the Court observed that

178 See *Morris* [2002] 2 AC 628, 634 (Lord Mackay of Clashfern), 669 (Lord Hope of Craighead).

179 Cf *Doe*, 160 Cal App 4<sup>th</sup> 1500, 1512 (Manella J, Willhite APJ and Suzukawa J agreeing at 1516) (Ct App, 2008).

180 *Weaver*, 56 F Supp 2d 1190 (D Mont, 1999).

181 *Morris* [2002] 2 AC 628, 667 (Lord Hope of Craighead).

182 Field, ‘Accidents and Injuries’ (n 54) 82.

183 *Weaver*, 56 F Supp 2d 1190, 1190 (D Mont, 1999).

184 *Ibid* 1191.

185 *Ibid* (Shanstrom CJ).

186 *Ibid*.

187 *Ibid*.

188 *Ibid*.

189 *Ibid* 1192.

190 *Ibid*.

191 *Morris* [2002] 2 AC 628, 690 (Lord Hobhouse of Woodborough, Lord Nicholls of Birkenhead agreeing at 633).

192 *Ibid* 689 (emphasis in original).

193 128 F Supp 2d 170 (SDNY, 2001).

194 *Ibid* 173–4 (Knapp J).

195 *Ibid* 179.

extreme stress, such as a near-death experience or being taken hostage, can actually change brain cell structure ... objective evidence exists in some cases that brain damage has ensued [as] ... the brain's physical architecture can transform during PTSD.<sup>196</sup>

Accordingly, the Court concluded that 'a diagnosis of chronic PTSD may fall within the Convention's definition of "bodily injury"'.<sup>197</sup> Other decisions followed this reasoning.<sup>198</sup>

Some may characterise these decisions as 'courts [scrambling] to find a physical injury'.<sup>199</sup> Yet ultimately they reflect no more or less than the need for evidence of physical injury in individual cases, which, if furnished, may sustain a bodily injury claim, a position equally evident in the Anglo-Australian jurisprudence considering PTSD's compensability under *Warsaw*.

#### (d) *Anglo-Australian Jurisprudence*

Australia and the United Kingdom have produced a relatively substantial jurisprudence considering article 17 of *Warsaw*.<sup>200</sup>

In *Georgeopoulos*,<sup>201</sup> the question arose for decision whether 'bodily injury' in article 17 embraced injury pleaded by passengers as 'nervous shock and/or mental suffering'.<sup>202</sup> Applying *Bell v Great Northern Railway Co of Ireland* ('*Bell*'),<sup>203</sup> the New South Wales Court of Appeal held that the nature of the injury was a matter for expert evidence,<sup>204</sup> and observed that the nervous shock of which the plaintiff passengers complained 'might or might not have caused an *injury to [each] passenger's body tissues*'.<sup>205</sup> Although the further factual findings in *American Airlines Inc v Georgeopoulos [No 2]* ('*Georgeopoulos [No 2]*')<sup>206</sup> were that the evidence could not establish that the passengers' 'mild post traumatic stress disorder' caused '[a]ny structural alteration to bodily tissues or alteration in the function of an organ or neurochemical change or any other form of damage to tissues or organs',<sup>207</sup> these two decisions together recognised that 'nervous shock' might constitute 'bodily injury' under *Warsaw*, if sufficient evidence of this were present.

196 Ibid 178–9.

197 Ibid 179.

198 See, eg, *Ligeti v British Airways plc* (SDNY, 00 CIV 2936(FM), 5 November 2001) slip op 5 (Magistrate Maas).

199 Cunningham (n 54) 1058.

200 In addition to the cases discussed in detail in this article, for Australian examples see, eg, *Magnus* (1998) 87 FCR 301; *Halime* [2018] NSWCA 155 (16 July 2018); *Parkes Shire Council* (2019) 266 CLR 212.

201 *Georgeopoulos* [1996] NSWCA 13 (26 September 1996).

202 Ibid [12] (Sheller JA, Clarke JA agreeing at [1], Simos AJA agreeing at [30]).

203 (1890) 26 LR Ir 428 ('*Bell*'). See also below Part III(B)(2)(c)(i).

204 *Georgeopoulos* [1996] NSWCA 13 (26 September 1996) [19], [27]–[29] (Sheller JA, Clarke JA agreeing at [1], Simos AJA agreeing at [30]).

205 Ibid [19] (emphasis added). Sheller JA said as a general proposition that '[n]ervous shock as a condition or a cause of a condition for which a defendant may be liable in negligence describes a non-impact injury which may or may not give rise to body tissue alteration': at [26].

206 [1998] NSWCA 273 (5 August 1998) ('*Georgeopoulos [No 2]*').

207 Ibid [10] (Sheller JA, Meagher JA agreeing at [1], Beazley JA agreeing at [2]).

In *Kotsambasis*,<sup>208</sup> a passenger on an international flight claimed for ‘psychological injuries’ allegedly suffered from seeing smoke coming from the aircraft’s engine shortly after take-off.<sup>209</sup> Although agreeing with Meagher JA in denying the plaintiff relief,<sup>210</sup> Stein JA noted that ‘if the psychological injury is proven to be a species of bodily injury, then it would constitute “bodily injury” within the article’.<sup>211</sup> The New South Wales Court of Appeal in *Georgeopoulos [No 2]* expressly approved this dictum,<sup>212</sup> and Schmidt J applied it in the trial decision in *Casey*,<sup>213</sup> stating that ‘psychiatric injury may in a particular case itself be proven on the evidence to be “a species of bodily injury”, compensable under Art 17’.<sup>214</sup>

Lord Hobhouse and Nicholls in *Morris* considered the decisions in *Kotsambasis* and *Georgeopoulos [No 2]* authority for the proposition that ‘an accident may cause a “psychological” injury which may be proved to be a *bodily injury*’.<sup>215</sup> *Morris*<sup>216</sup> was a joined Scottish<sup>217</sup> and English<sup>218</sup> appeal wherein the House of Lords itself gave detailed consideration to psychiatric injury’s compensability under *Warsaw*.

The Scottish case concerned a helicopter’s crash-landing on an oil platform, causing the pursuer to suffer PTSD, precipitating peptic ulcer disease.<sup>219</sup> Only the peptic ulcer disease was pleaded as physical injury.<sup>220</sup> The House of Lords denied recovery for PTSD<sup>221</sup> but permitted recovery for the peptic ulcer disease as a ‘physical manifestation of injury’ caused by the accident,<sup>222</sup> consistent with *Floyd*.<sup>223</sup> The English case concerned the indecent assault of a 15-year-old girl by a passenger on board a flight and consequent clinical depression,<sup>224</sup> she alleged no physical injury and did not claim that her psychiatric condition involved physiological alteration to her brain.<sup>225</sup> Their Lordships held that no action was available under the Convention.<sup>226</sup> Ultimately, both outcomes in *Morris* reflected the fact that neither the pursuer nor the plaintiff ever claimed their psychiatric

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208 *Kotsambasis* (1997) 42 NSWLR 110.

209 *Ibid* 111 (Meagher JA, Powell JA agreeing at 120, Stein JA agreeing at 120–1).

210 *Ibid* 122.

211 *Ibid* 121.

212 *Georgeopoulos [No 2]* [1998] NSWCA 273 (5 August 1998) [20] (Sheller JA, Meagher JA agreeing at [1], Beazley JA agreeing at [2]).

213 *Casey – Trial* (2015) 89 NSWLR 707.

214 *Ibid* 727 (Schmidt J).

215 *Morris* [2002] 2 AC 628, 687 (Lord Hobhouse of Woodborough, Lord Nicholls of Birkenhead agreeing at 633) (emphasis in original).

216 *Morris* [2002] 2 AC 628.

217 See *King v Bristow Helicopters Ltd* 2001 SLT 126 (Court of Session – Inner House).

218 See *Morris v KLM Royal Dutch Airlines* [2002] QB 100 (Court of Appeal) (‘*Morris – Intermediate*’).

219 *Morris* [2002] 2 AC 628, 645–6 (Lord Hope of Craighead).

220 *Ibid* 647 (Lord Hope of Craighead).

221 *Ibid* 629.

222 *Ibid* 641 (Lord Steyn), 670 (Lord Hope of Craighead), 691 (Lord Hobhouse of Woodborough).

223 *Floyd*, 499 US 530, 552 (Marshall J for the Court) (1991). Cf *Jacob*, 606 F Appx 478, 482 (11<sup>th</sup> Cir, 2015). See also above n 137 and accompanying text.

224 *Morris* [2002] 2 AC 628, 646–7 (Lord Hope of Craighead).

225 *Ibid* 647 (Lord Hope of Craighead).

226 *Ibid* 629 (Lord Hope of Craighead).

injuries constituted physical injuries,<sup>227</sup> but the case nevertheless bears careful analysing for their Lordships' discussion of the meaning of 'bodily injury'.

The argument before the Lords was extraordinary. Counsel for both the defendant airline and the defendant helicopter company submitted tritely that somatic–psychic distinctions are 'to be found in philosophy, religion and literature',<sup>228</sup> referring to Cartesian writings and the Book of Common Prayer,<sup>229</sup> as if such sources could somehow create a legal distinction dispositive of passengers' rights under an international convention concluded centuries later, or substitute for modern psychiatry which has long abandoned Cartesian dualism.<sup>230</sup>

Their Lordships expressed different views regarding what injuries would be actionable under article 17 of *Warsaw*. To Lords Nicholls and Mackay, the legal question was straightforward. Lord Nicholls doubted that article 17 involved any 'antithesis between bodily injury and mental injury',<sup>231</sup> and considered psychiatric injury to be a 'type of bodily injury',<sup>232</sup> the existence of which was 'essentially a question of medical evidence'.<sup>233</sup> Expressing a view he considered consistent with *Floyd* and other leading cases,<sup>234</sup> his Lordship stated: 'The brain is part of the body. Injury to a passenger's brain is an injury to a passenger's body'.<sup>235</sup> Lord Mackay for his part proposed '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?'<sup>236</sup> and, like Lord Nicholls, doubted that the term 'bodily injury' was directed to any distinction between bodily and mental injury.<sup>237</sup>

Lord Steyn delivered a speech which was, with respect, regressive and unimpressive. Projecting onto *Warsaw*'s drafters – without foundation, as article 17 of *Warsaw* was approved without discussion<sup>238</sup> – bald 'floodgates' fears<sup>239</sup> that recognising psychiatric injury's compensability 'would have opened the door to an avalanche of intangible claims',<sup>240</sup> his Lordship spectacularly asserted that the aviation industry was, in 2002, fragile as it was in 1929,<sup>241</sup> and, on that basis, concluded that 'the world was not ready to include mental injuries ... within the scope of article 17'.<sup>242</sup> Lord Steyn accepted that in depression and PTSD 'there is a physical connection between the illness of the mind and the body inasmuch

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227 Ibid 680, 692 (Lord Hobhouse of Woodborough).

228 Ibid 631.

229 Ibid 631, 681 (Lord Hobhouse of Woodborough).

230 See Schoenberg, Miller and Schoenberg (n 3).

231 *Morris* [2002] 2 AC 628, 633.

232 Ibid.

233 Ibid.

234 Ibid.

235 Ibid.

236 Ibid 634 (Lord Hope of Craighead agreeing at 669).

237 Ibid.

238 Ibid 659 (Lord Hope of Craighead); *Warsaw Minutes* (n 31) 166–7, 205–6.

239 See further below Part III(C).

240 *Morris* [2002] 2 AC 628, 638.

241 Ibid 644.

242 Ibid.

as ... the nervous tissue of the brain is involved',<sup>243</sup> yet declared, it is submitted erroneously,<sup>244</sup> that 'scientifically and in common sense there is a real distinction between physical injuries and mental injury'.<sup>245</sup> This dictum is especially strange given Lord Steyn's observation only three years earlier, in another context, that 'there is no rigid distinction between body and mind'.<sup>246</sup>

Lord Hope noted that it was not possible to maintain such a rigid distinction between the body and the mind in the law of negligence,<sup>247</sup> and questioned the extent to which it could be maintained at all in other contexts.<sup>248</sup> Holding that 'injury' or '*lésion*' was used in its medical sense in article 17,<sup>249</sup> his Lordship considered that in determining its application to particular cases, '[t]he proper approach is to make use of the best current medical and scientific knowledge',<sup>250</sup> and that '[i]t would be wrong to regard article 17 as limited by the state of medical and scientific knowledge that was current in the 1920s'.<sup>251</sup> The test Lord Hope adopted was that bodily injury should be 'capable of being demonstrated by an examination of the body of the passenger, making the best use of the most sophisticated means that are now available',<sup>252</sup> such means surely including current neuroimaging technology.<sup>253</sup>

Lord Hobhouse delivered, with respect, the most enlightened speech. Beginning by adverting to the dangers of 'a reductionist anachronism of mind/body dualism',<sup>254</sup> His Lordship gave a simple,<sup>255</sup> encompassing definition of bodily injury:

There must be an injury to the body. ... [*B*]odily injury simply and unambiguously means a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury.<sup>256</sup>

Lord Hobhouse considered that this test most truly reflected the American authorities,<sup>257</sup> which, his Lordship stated, did *not* exclude more than mere emotional upset,<sup>258</sup> but rather supported the proposition that 'proved brain damage and its sequelae would be compensable' under article 17 of *Warsaw*.<sup>259</sup> Accordingly, his Lordship concluded that psychiatric injury could fall within the definition of

243 Ibid 643.

244 See below Part II(C).

245 *Morris* [2002] 2 AC 628, 643.

246 *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 492.

247 *Morris* [2002] 2 AC 628, 648.

248 Ibid 649.

249 Ibid 659.

250 Ibid 657.

251 Ibid 669.

252 Ibid.

253 See below Part II(C)(2).

254 *Morris* [2002] 2 AC 628, 672, quoting *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 4<sup>th</sup> ed, 2000) xxx.

255 *Morris* [2002] 2 AC 628, 674.

256 Ibid 674–5 (emphasis in original).

257 Ibid 676 (Lord Nicholls of Birkenhead agreeing at 633).

258 Ibid 682.

259 Ibid 676.

‘bodily injury’ for the purposes of article 17, provided a passenger were prepared to prove this.<sup>260</sup>

The speeches in *Morris*, consistent with the prevailing weight of *Warsaw* jurisprudence, show a clear majority of their Lordships rejecting the somatic–psychic distinction and accepting psychiatric injury’s compensability as bodily injury under article 17 of *Warsaw* when pleaded as such and supported by sufficient evidence.<sup>261</sup> This approach coheres entirely with the trial decision in *Casey*,<sup>262</sup> properly understood.

## 2 *Montreal and Casey*

Although *Montreal*’s entry into force provided an opportunity for bodily injury jurisprudence to develop,<sup>263</sup> unfortunately, most courts have simply followed *Warsaw* jurisprudence in interpreting article 17(1) of *Montreal*.<sup>264</sup> The New South Wales Court of Appeal’s decision in *Casey* exhibits a similar attitude,<sup>265</sup> yet demands attention as the most significant case to date, arguably globally, and certainly in Australia, concerning pure psychiatric injury’s recoverability as bodily injury under *Montreal*.<sup>266</sup>

### (a) *Trial*

The case concerned an accident which occurred when the plaintiff nurse, Casey, was on board an evacuation flight from Samoa to Melbourne. The plane was scheduled to refuel at Norfolk Island, but inclement weather made landing

260 Ibid 675.

261 See *Wettlaufer v Air Transat AT Inc* [2013] BCSC 1245 (15 July 2013) [75] (Funt J) (‘*Wettlaufer*’).

262 *Casey – Trial* (2015) 89 NSWLR 707. See below Part II(B)(2)(a).

263 See below Part III(A), (B)(1)(b)–(c). See also *Delaney v Jet2.com Ltd* 2019 Rep LR 56, 59 [18]–[19] (Sheriff Braid) (All-Scotland Sheriff Personal Injury Court).

264 See, eg, *Stott* [2014] AC 1347, 1368 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363). See also *Thibodeau* [2014] 3 SCR 340, 372–4 (Cromwell J for the Court); *Walton* [2006] SKQB 231 (16 May 2006) [43], [85] (Dovell J); *Lukács* [2009] MBCA 111 (18 November 2009) [10]–[11] (Chartier JA for the Court); *Plourde v Service Aérien FBO Inc (Skyservice)* [2007] QCCA 739 (28 May 2007) [30], [56]–[57] (Thibault JA, Chamberland and Giroux JJA agreeing at [3]) (‘*Plourde*’); *Croteau v Air Transat AT Inc* [2007] QCCA 737 (28 May 2007) [42] (Thibault JA, Chamberland and Giroux JJA agreeing at [3]); *Gontcharov* (2012) 111 OR (3d) 135, 146–8 (Wilson J); *O’Mara* (2013) 115 OR (3d) 673, 683, 685–6 (Perell J); *Narayanan*, 747 F 3d 1125, 1127 n 2 (Nguyen J for Fletcher and Nguyen JJ) (9<sup>th</sup> Cir, 2014): ‘[I]n interpreting ... [*Montreal*], courts have routinely relied upon [*Warsaw*] ... precedent’; *Bandurin v Aeroflot Russian Airlines* (ND Ill, No 19 CV 255, 22 January 2020) slip op 6 (Shah J). Cf *Air Crash at Lexington*, 501 F Supp 2d 902, 907–8; *Wettlaufer* [2013] BCSC 1245 (15 July 2013) [62] (Funt J). It may of course be admitted that ‘interpretations of ... [*Warsaw*] have at least some persuasive value in interpreting parallel provisions of ... [*Montreal*]’: *Etihad*, 870 F 3d 406, 411 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017). Yet that is not to say that courts may simply import old interpretations of provisions in *Montreal*’s predecessor treaty without grounding their analysis in the text of the new Convention itself, or ignore the very different circumstances of the new Convention’s conclusion and the plentiful sources revealing the intention behind it: see below Part III(A)–(B)(1).

265 See *Casey* (2017) 93 NSWLR 438, 444 (Macfarlan JA, Ward JA agreeing at 458, Gleeson JA agreeing at 458).

266 See Delphine Defossez, ‘Only Bodily Injury Recoverable for Aviation Accidents: How Is That Still Possible?’ (2017) 17(1) *Issues in Aviation Law and Policy* 113, 115, 135.

impossible and the pilot ditched the aircraft at sea.<sup>267</sup> Casey suffered significant physical injuries and PTSD resulting from her ‘terrifying’ experience,<sup>268</sup> and sued the carrier under article 17(1) of *Montreal*, incorporated by statute into Australian law.<sup>269</sup> Pel-Air denied that Casey’s PTSD amounted to bodily injury.<sup>270</sup> The primary judge, Schmidt J, in what was swiftly called a ‘carefully reasoned decision’,<sup>271</sup> concluded that PTSD could, if sufficient evidence were present, constitute bodily injury compensable under *Montreal*.<sup>272</sup>

No neurologist gave evidence and no motor resonance imaging (‘MRI’)<sup>273</sup> of Casey’s brain was presented.<sup>274</sup> However, reports were given in evidence of Casey’s treating psychiatrists<sup>275</sup> to the effect that ‘persons suffering from PTSD ... can suffer from *physical changes to specific areas of the brain*’,<sup>276</sup> and that ‘brain malfunction is a chemical issue, in that the brain is effectively an electrochemical computer’ using ‘chemical pathways as a way of [one cell] communicating ... with the next’.<sup>277</sup> One psychiatrist’s report stated that ‘complex traumatic experiences cause *chemical changes* in the brain which result in *structural changes* ... and physical defects in [the] brain’,<sup>278</sup> placed PTSD ‘categorically’ among ‘chronic physical disorders with significant physical and psychological impairment’<sup>279</sup> and called ‘the physical changes that occur in ... [PTSD] similar to any chronic physical disease’.<sup>280</sup> Another psychiatrist gave evidence<sup>281</sup> of the importance of ‘chemical neurotransmitting agents’ in brain functioning.<sup>282</sup>

On the basis of the evidence, Schmidt J found that Casey’s PTSD involved both organic and chemical brain alterations, constituting ‘injury to her brain’<sup>283</sup> and therefore bodily injury compensable under article 17(1) of *Montreal*.<sup>284</sup> Her Honour found that ‘Ms Casey’s failure to respond to the treatment she [had] received ... [was] consistent with Ms Casey having suffered *organic damage to her brain* and

267 *Casey* (2017) 93 NSWLR 438, 439–40 (Macfarlan JA).

268 *Ibid*; *Casey – Trial* (2015) 89 NSWLR 707, 709, 730 (Schmidt J).

269 *CACL Act 1959* (Cth) s 9B. The question whether the *CACL Act 1959* permits non-passenger relatives of passengers killed as a result of aviation accidents to recover for their own psychiatric injury in any circumstances is outside the scope of this article, but has occupied Australian courts and continues to do so: see, eg, *McKenna v Avior Pty Ltd* [1981] WAR 255; *Jones v Airlines of Tasmania Pty Ltd* (2020) 31 Tas R 311.

270 *Casey – Trial* (2015) 89 NSWLR 707, 711, 724 (Schmidt J); *Casey* (2017) 93 NSWLR 438, 441.

271 Ian Freckelton, ‘Compensability for PTSD under the Montreal Convention: Psychiatric Injury as a Bodily Injury’ (2015) 22(5) *Psychiatry, Psychology and Law* 639, 639.

272 *Casey – Trial* (2015) 89 NSWLR 707, 724.

273 See further below Part II(C)(2).

274 *Casey – Trial* (2015) 89 NSWLR 707, 736.

275 *Ibid*.

276 *Casey* (2017) 93 NSWLR 438, 443 (emphasis added).

277 *Ibid*.

278 *Casey – Trial* (2015) 89 NSWLR 707, 738 (emphasis added).

279 *Ibid*.

280 *Ibid*.

281 *Ibid* 711, 739.

282 *Ibid* 741. See also below Part II(C)(1).

283 *Casey – Trial* (2015) 89 NSWLR 707, 741 (Schmidt J).

284 *Ibid* 742.

other parts of her body on which its normal functioning depends',<sup>285</sup> and that her brain's ongoing dysfunction was 'consistent with *chemical changes in her brain* and body and alterations in her brain's neurotransmitter pathways'.<sup>286</sup> Schmidt J's decision was quickly heralded as 'a further example of Anglo-Australian courts expressing reservations about the distinction between physical and psychiatric injuries'<sup>287</sup> in the context of medical science's developing acceptance that 'the bright-line distinction between physical and psychiatric injuries is clinically fallacious'.<sup>288</sup>

(b) *Appeal*

The New South Wales Court of Appeal allowed an appeal by the carrier. Macfarlan JA (Ward and Gleeson JJA agreeing) concluded that 'whilst Ms Casey's PTSD *might* reflect physical (as distinct from chemical or other) changes that had occurred to her brain, there was no evidence ... that such changes had in fact occurred'.<sup>289</sup> After reviewing the authorities, Macfarlan JA formulated the following general proposition:

The expression '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.<sup>290</sup>

This threshold of 'destruction' reflects Macfarlan JA's view of 'bodily' as a limiting adjective which 'draws a distinction between bodily and mental injuries',<sup>291</sup> covering the latter only when they are 'a manifestation of' or 'result from' physical injuries.<sup>292</sup> *Casey* highlights that article 17(1) presents no blanket bar to recovery for pure psychiatric injury,<sup>293</sup> yet unfortunately the decision indicates that 'the law is lagging far behind the developments in neuroscience'<sup>294</sup> by embracing a legal distinction between (supposedly aphysical) 'functional' or 'chemical' or 'psychological' impairment on the one hand and (undeniably physical) 'organic' or 'structural' or 'biological' impairment on the other.

Although evidence supported the conclusion that Casey's brain 'was malfunctioning as a result of biochemical changes',<sup>295</sup> Macfarlan JA held that

it is insufficient for a claimant to prove that the function of his or her brain has changed or even that chemical changes have occurred in it. In the absence of

285 Ibid 730 (emphasis added). See also generally below Part II(C)(1).

286 *Casey – Trial* (2015) 89 NSWLR 707, 742 (Schmidt J) (emphasis added).

287 Freckelton (n 271) 648.

288 Ibid 647–8.

289 *Casey* (2017) 93 NSWLR 438, 449 (emphasis in original).

290 Ibid 448 (emphasis added).

291 Ibid 449. Cf *Stott* [2014] AC 1347, 1368 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363); *Morris* [2002] 2 AC 628, 633 (Lord Nicholls of Birkenhead), 634 (Lord Mackay of Clashfern), 668 (Lord Hope of Craighead).

292 *Casey* (2017) 93 NSWLR 438, 449.

293 See *ibid*; Defossez (n 266) 136.

294 Defossez (n 266) 115–16.

295 *Casey* (2017) 93 NSWLR 438, 449 (Macfarlan JA, Ward JA agreeing at 458, Gleeson JA agreeing at 458).



compelling medical evidence to the contrary, such malfunctioning or chemical changes cannot fairly be described as ‘injuries’ to the body.<sup>296</sup>

In the result, his Honour held that the biochemical changes in Casey’s brain did not constitute bodily injury.<sup>297</sup>

This holding erects a new barrier to recovery and is, with respect, open to criticism. Macfarlan JA reached his conclusion on the basis of what he considered a majority rejection of *Weaver* in *Morris*,<sup>298</sup> and on the basis of the decisions in *Little Rock*, *Bobian* and *Doe*.<sup>299</sup> This is troubling, as although only a minority in *Morris* expressly accepted *Weaver* as authoritative,<sup>300</sup> Lord Steyn considered it ‘necessary to revisit the *Weaver* case’ in future,<sup>301</sup> while Lord Hope’s equivocal view of *Weaver* bespoke at best the necessity of sufficient evidence in article 17 claims,<sup>302</sup> and at worst regression into dualist distinctions.<sup>303</sup> The three latter decisions in *Little Rock*, *Bobian* and *Doe*, denying that even physical changes associated with PTSD constitute bodily injury,<sup>304</sup> are inconsistent with *Kotsambasis*, *Georgeopoulos [No 2]* and *Morris*,<sup>305</sup> and, respectfully adapting Lord Hobhouse’s words in the last case, ‘invoke primitive and patently unscientific dualist theories’.<sup>306</sup> Further, intermediate appellate authority has dismissed *Bobian*’s reasoning as ‘profoundly superficial and contrived’,<sup>307</sup> and Macfarlan JA himself acknowledged that its discredited<sup>308</sup> requirement of ‘palpable, conspicuous physical injury’<sup>309</sup> establishes too high a threshold.<sup>310</sup>

Macfarlan JA accepted that neither the Australian authorities nor *Floyd* ever pronounced on the compensability of cerebral dysfunction resulting from biochemical changes.<sup>311</sup> Indeed, Lords Hobhouse and Nicholls in *Morris* noted that these authorities ‘do not criticise the criteria “structural alteration in bodily tissues”, “alteration in the function of an organ or neurochemical change” and “any other form of damage to tissues or organs”’ for establishing relevant bodily injury.<sup>312</sup> This interpretation of the authorities, it is submitted, demands deference

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296 Ibid.

297 Ibid 448.

298 Ibid 449.

299 Ibid 448–9. See above nn 160–179 and accompanying text.

300 *Morris* [2002] 2 AC 628, 633 (Lord Nicholls of Birkenhead), 688–9 (Lord Hobhouse of Woodborough).

301 Ibid 642.

302 Ibid 669.

303 See *ibid* 667.

304 See above Part II(B)(1)(c).

305 *Morris* [2002] 2 AC 628, 687 (Lord Hobhouse of Woodborough). See also *Casey – Trial* (2015) 89 NSWLR 707, 726 (Schmidt J). See also generally above Part II(B)(1)(d).

306 *Morris* [2002] 2 AC 628, 681.

307 *Allen v Bloomfield Hills School District*, 760 NW 2d 811, 816 (Markey J, Servitto PJ agreeing at 817) (Mich Ct App, 2008), application for leave to appeal dismissed 779 NW 2d 793 (Mich, 2010) (*‘Allen’*).

308 *Morris* [2002] 2 AC 628, 634 (Lord Mackay of Clashfern), 669 (Lord Hope of Craighead), 684 (Lord Hobhouse of Woodborough).

309 *Bobian*, 93 F Appx 406, 407 (Becker J for the Court) (3<sup>rd</sup> Cir, 2004), applying *Rosman*, 314 NE 2d 848, 855 (Rabin J, Breitel CJ, Jasen, Gabrielli, Jones and Wachtler JJ agreeing at 859) (NY, 1974).

310 *Casey* (2017) 93 NSWLR 438, 448.

311 Ibid 448–9.

312 *Morris* [2002] 2 AC 628, 687 (emphasis added). See also above n 207 and accompanying text.

given those criteria formed the basis of the factual findings in *Georgeopoulos [No 2]*,<sup>313</sup> and in view of Lord Hobhouse's informed discussion of the science of psychiatric injury in *Morris*.<sup>314</sup> That science now falls to be considered.

### C 'Pure' Nonsense: Psychiatric Injury Is Physical Injury

As the physical nature of psychiatric injury becomes increasingly understood, including by the general public,<sup>315</sup> the somatic–psychic distinction is increasingly accepted as artificial,<sup>316</sup> even by lawyers trained in the jargon of 'pure mental harm'.<sup>317</sup> This article, and its analysis of 'bodily injury' in article 17(1) of *Montreal*, proceeds on the assumption that the current accepted neuroscientific and medical position regards pure psychiatric injuries as physical.<sup>318</sup> This assumption is well-founded and may be supported by considering the anxiety disorder PTSD, arguably still the most controversial psychiatric injury,<sup>319</sup> but known to involve both organic and functional impairment.<sup>320</sup> It is hardly surprising that PTSD presents itself in so many article 17 cases, given international aviation's inherent risks of exposure to actual or threatened death or serious injury, which the American Psychiatric Association relevantly specifies, alongside subsequent functional disturbance exceeding one month, as diagnostic criteria for PTSD.<sup>321</sup>

It is important – especially for lawyers<sup>322</sup> – to understand basic psycho-physiological principles in order to understand what PTSD is and how it affects the body. Although detailed exposition of PTSD's physiology exceeds the scope of this article,<sup>323</sup> a brief explanation of how PTSD operates is appropriate to underscore that extreme traumatic stressors, such as hostage situations or witnessing

313 See *Georgeopoulos [No 2]* [1998] NSWCA 273 (5 August 1998) [10] (Sheller JA, Meagher JA agreeing at [1], Beazley JA agreeing at [2]). See also above Part II(B)(1)(d).

314 See below Part II(C)(1)–(2).

315 See, eg, Robert F Worth, 'What if PTSD Is More Physical than Psychological?', *The New York Times Magazine* (online, 10 June 2016) <<https://www.nytimes.com/2016/06/12/magazine/what-if-ptsd-is-more-physical-than-psychological.html>>.

316 Andrews and Nase (n 3) 4, 47–8, 73. See also Hannah Chouet, 'Dualism, Science, and the Law: The Treatment of the Mind-Body Dichotomy under Article 17 of the Montreal Convention' (2009) 9(1) *Issues in Aviation Law and Policy* 141, 155–6; Don G Rushing and William D Janicki, 'Treatment of Posttraumatic Stress Disorder Claims under the Warsaw Convention' (2005) 70(3) *Journal of Air Law and Commerce* 429, 432, 465 n 274; Immel (n 136) 76; John F Easton et al, 'Post Traumatic "Lésion Corporelle": A Continuum of Bodily Injury under the Warsaw Convention' (2003) 68(4) *Journal of Air Law and Commerce* 665, 672.

317 See above n 22 and accompanying text.

318 See generally Handford (n 11) ch 5.

319 See Roger K Pitman et al, 'Biological Studies of Post-Traumatic Stress Disorder' (2012) 13(11) *Nature Reviews: Neuroscience* 769, 769 ('Biological Studies of PTSD'); Handford (n 11) 150–1.

320 See *DSM-5* (n 7) 278–9, 310.

321 *Ibid* 271–2, 274.

322 See *Morris* [2002] 2 AC 628, 681 (Lord Hobhouse of Woodborough).

323 But see generally Pitman et al, 'Biological Studies of PTSD' (n 319); Alexander C McFarlane, 'The Long-Term Costs of Traumatic Stress: Intertwined Physical and Psychological Consequences' (2010) 9(1) *World Psychiatry* 3. See also Edgar Garcia-Rill and Erica Beecher-Monas, 'Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder' (2001) 24(1) *University of Arkansas at Little Rock Law Review* 9, 11.

disasters,<sup>324</sup> affect the brain significantly, both biochemically and structurally. Nor is this understanding especially new: for at least three decades, and well before *Montreal's* drafting, scientific opinion has affirmed the physical nature of PTSD.<sup>325</sup>

### 1 Physical Changes

The exclusion of biochemical brain changes in *Casey* is significant given that neuropsychiatry has for decades criticised as outmoded and confused the apparent dichotomy between the organic, or biological, and the functional, or psychological,<sup>326</sup> and has long recognised that the processes involved in the aetiology, symptomatology and treatment of psychiatric disorders are complex and dynamic, and escape simplistic categorisation into organicity and functionality.<sup>327</sup> In reality, all functional alterations in the brain, like organic alterations, are *physical*.<sup>328</sup> as the United States Surgeon General's Report stated in 1999, the year of *Montreal's* conclusion, '[t]he brain is the organ of . . . mental function',<sup>329</sup> 'mental functions are physical'<sup>330</sup> and 'involve structural changes in the neurons and neuronal circuits'.<sup>331</sup>

Courts have understood this for decades, even before *Warsaw*. In the early case of *McNally v City of Regina*,<sup>332</sup> the Saskatchewan Court of Appeal held that the plaintiff, despite undergoing 'no organic destruction or symptoms of any organic

324 DSM-5 (n 7) 274.

325 See, eg, Pitman et al, 'Biological Studies of PTSD' (n 319) 769; Roger K Pitman et al, 'Psychophysiological Assessment of Posttraumatic Stress Disorder Imagery in Vietnam Combat Veterans' (1987) 44(11) *Archives of General Psychiatry* 970, 973; Rachel Yehuda et al, 'Dose-Response Changes in Plasma Cortisol and Lymphocyte Glucocorticoid Receptors Following Dexamethasone Administration in Combat Veterans with and without Posttraumatic Stress Disorder' (1995) 52(7) *Archives of General Psychiatry* 583, 583.

326 See, eg, Leon Eisenberg, 'Mindlessness and Brainlessness in Psychiatry' (1986) 148 *British Journal of Psychiatry* 497, 500, 502–3; Robert L Spitzer et al, 'A Proposal for DSM-IV: Solving the "Organic/Nonorganic Problem"' (1989) 1(2) *Journal of Neuropsychiatry* 126; Robert L Spitzer et al, 'Now Is the Time To Retire the Term "Organic Mental Disorders"' (1992) 149(2) *American Journal of Psychiatry* 240; KS Kendler, 'The Dappled Nature of Causes of Psychiatric Illness: Replacing the Organic-Functional/Hardware-Software Dichotomy with Empirically Based Pluralism' (2012) 17 *Molecular Psychiatry* 377, 377–9, 384–5. See also Rushing and Janicki (n 316) 465 n 274. Criticisms of the organic-functional distinction long predate *Floyd*. In 1914, Sigmund Freud wrote that '[a]ll our provisional ideas will some day be based on an organic substructure': quoted in Eisenberg (n 326) at 500. In 1940, the neurologist SA Kinnier Wilson said that the 'antithesis between "organic" and "functional" disease states still lingers at the bedside and in medical literature, though it is transparently false and has been abandoned long since by all contemplative minds': *Neurology* (Arnold, 1940), quoted in EH Reynolds, 'Structure and Function in Neurology and Psychiatry' (1990) 157(4) *British Journal of Psychiatry* 481, 481.

327 Eisenberg (n 326) 503; Reynolds (n 326) 481–2, 484–5, 487–8.

328 See generally Handford (n 11) 140–8. See also Morton F Reiser, *Mind, Brain, Body: Toward a Convergence of Psychoanalysis and Neurobiology* (Basic Books, Inc, 1984) 15, 165: 'the brain simultaneously subserves and coordinates mental functions and behaviour, via physiologic[al] processes that regulate bodily functions'. The proposition has been expressed in the aphorism, 'for every twisted thought, there is a twisted molecule': Eisenberg (n 326) 502.

329 United States Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (Report, 1999) 50.

330 Ibid 6.

331 Ibid 50. Fifteen years earlier, in 1984, Reiser (n 328) wrote that 'structural changes in transmitter regions of the synaptic nerve terminals may be induced by learning and experience': at 106.

332 [1924] 2 DLR 1211 ('*McNally*').

change',<sup>333</sup> still 'suffered physical injuries' in the form of nervous shock.<sup>334</sup> In the later case of *Federal Broom Co Pty Ltd v Semlitch*,<sup>335</sup> the High Court of Australia held that an applicant was entitled to workers' compensation for 'injury' in the form of a 'functional not organic' psychiatric condition.<sup>336</sup> Windeyer J called 'impossible' any 'rigid separation of disease from its symptoms ... [i]n the field of purely functional mental disorders',<sup>337</sup> yet the New South Wales Court of Appeal's requirement in *Casey* that psychiatric injuries be 'a manifestation of physical injuries' to be compensable<sup>338</sup> arguably embraces just such a separation.

In the more recent context of international civil aviation law, Lord Hobhouse's speech in *Morris* stands out for its significant engagement with the science of psychiatric injury. His Lordship clearly considered that structural *or* functional changes in the brain could constitute bodily injury, stating that

the glands which secrete the hormones which enable the brain and the rest of the central nervous system to operate are all integral parts of the body ... susceptible to ... change in the structure *or* ability to function of the organ. If the change ... is properly described as an injury, it is a *bodily* injury.<sup>339</sup>

As a general proposition, his Lordship considered that 'physical changes in the brain and its hormonal chemistry ... are capable of amounting to an *injury* and, if they do, they are on any ordinary usage of language *bodily* injuries'.<sup>340</sup>

What are these changes? Biochemically speaking, PTSD involves significant change to hormonal neurocircuitry and the synaptic neurotransmission fundamental to all observable human behaviour.<sup>341</sup> When traumatic stress occurs, it dysregulates the hypothalamic-pituitary-adrenal axis, releasing cortisol, adrenaline and noradrenaline, hormones fundamental to the stress response,<sup>342</sup> or 'fight-or-

333 Ibid 1219 (Martin JA), 1215 (Lamont JA).

334 Ibid 1216 (Lamont JA). See also below nn 579–86 and accompanying text.

335 (1964) 110 CLR 626.

336 Ibid 635, 647 (Windeyer J), considering *Workers' Compensation Act 1926–1960* (NSW) s 6(1).

337 *Semlitch* (1964) 110 CLR 626, 636.

338 *Casey* (2017) 93 NSWLR 438, 449 (emphasis added).

339 *Morris* [2002] 2 AC 628, 674–5 (emphasis added).

340 Ibid 681 (emphasis in original).

341 Pitman et al, 'Biological Studies of PTSD' (n 319) 773. See also generally E Ronald De Kloet, Melly S Oitzl and Eric Vermetten (eds), *Stress Hormones and Post Traumatic Stress Disorder: Basic Studies and Clinical Perspectives* (Elsevier, 2008). See also Shigeo Okabe, 'Molecular Dynamics of the Excitatory Synapse' in Michael R Kreutz and Carlo Sala (eds), *Synaptic Plasticity: Dynamics, Development and Disease* (Springer, 2012) 131, 132.

342 See Jaideep S Bains, 'Stress Induced Metaplasticity at GABA Synapses' in Maurizio Popoli, David Diamond and Gerard Sanacora (eds), *Synaptic Stress and Pathogenesis of Neuropsychiatric Disorders* (Springer, 2014) 125, 126; Piray Atsak, Benno Roozendaal and Patrizia Campolongo, 'Role of Endocannabinoids in Regulating Glucocorticoid Effects on Memory for Emotionally Arousing Experiences' in Maurizio Popoli, David Diamond and Gerard Sanacora (eds), *Synaptic Stress and Pathogenesis of Neuropsychiatric Disorders* (Springer, 2014) 71, 72; Anke Karl et al, 'A Meta-Analysis of Structural Brain Abnormalities in PTSD' (2006) 30(7) *Neuroscience and Biobehavioral Reviews* 1004, 1018; Guillaume Vaiva et al, 'Immediate Treatment with Propranolol Decreases Posttraumatic Stress Disorder Two Months after Trauma' (2003) 54(9) *Biological Psychiatry* 947, 947. See also Ute Krügel, 'Purinergic Receptors in Psychiatric Disorders' (2016) 104 *Neuropharmacology* 212, 216; Roel H DeRijk, Efthimia Kitraki and E Ronald De Kloet, 'Corticosteroid Hormones in Stress and Anxiety: Role of Receptor Variants and Environmental Inputs' in Hermona Soreq, Alon Friedman and Daniela Kaufer (eds), *Stress: From Molecules to Behavior* (Wiley-Blackwell, 2010) 119, 120, 137.

flight'.<sup>343</sup> Evidently, this response is beneficial in one-off cases.<sup>344</sup> But *chronic* post-traumatic stress response impairs formation of new neural synaptic connections which, ordinarily, would extinguish traumatic memories,<sup>345</sup> thereby consolidating traumatic experiences and functionally conditioning fear.<sup>346</sup>

The physicality of this functional expression of neurochemical and neurotransmissional alterations becomes clear when one recalls that psychiatric injuries, including PTSD, are treated, as evidence in *Casey* indicated,<sup>347</sup> by medications altering neurotransmitter pathways and better regulating neurochemicals.<sup>348</sup> Such evidence confirms Lord Hobhouse's observation in *Morris* that these treatments 'are prescribed on the basis that there is a *physical* condition which can be reversed or alleviated by *physical* means'.<sup>349</sup>

Yet it has long been known that PTSD sufferers may endure an organic problem, and not merely a psychological one,<sup>350</sup> and today PTSD has become one of the better biologically understood psychiatric disorders.<sup>351</sup> Organically speaking, as the plaintiffs in *Bobian* maintained,<sup>352</sup> abnormal glucocorticoid circulation involved in chronic post-traumatic stress response can cause structural alterations to the brain<sup>353</sup> and affect several bodily systems.<sup>354</sup>

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343 Handford (n 11) 143; Garcia-Rill and Beecher-Monas (n 323) 12.

344 Handford (n 11) 143–4.

345 Pitman et al, 'Biological Studies of PTSD' (n 319) 770; Mohammed R Milad et al, 'Neurobiological Basis of Failure to Recall Extinction Memory in Posttraumatic Stress Disorder' (2009) 66(12) *Biological Psychiatry* 1075, 1075, 1078–9. See also Alan N Simmons and Scott C Matthews, 'Neural Circuitry of PTSD with or without Mild Traumatic Brain Injury: A Meta-Analysis' (2012) 62(2) *Neuropharmacology* 598, 599.

346 See generally Dominique JF de Quervain, 'Glucocorticoid-Induced Reduction of Traumatic Memories: Implications for the Treatment of PTSD' in E Ronald De Kloet, Melly S Oitzl and Eric Vermetten (eds), *Stress Hormones and Post Traumatic Stress Disorder: Basic Studies and Clinical Perspectives* (Elsevier, 2008) 239; Pitman et al, 'Biological Studies of PTSD' (n 319) 770, 773, 775; Lisa M Shin and Israel Liberzon, 'The Neurocircuitry of Fear, Stress, and Anxiety Disorders' (2010) 35(1) *Neuropsychopharmacology* 169.

347 *Casey* – Trial (2015) 89 NSWLR 707, 741.

348 Pitman et al, 'Biological Studies of PTSD' (n 319) 775; Sara R Britnell et al, 'Aripiprazole for Post-Traumatic Stress Disorder: A Systematic Review' (2017) 40(6) *Clinical Neuropharmacology* 273, 273–4. See also Vaiva et al (n 342) 949; Gaowen Li et al, 'Trans-Resveratrol Ameliorates Anxiety-Like Behaviors and Fear Memory Deficits in a Rat Model of Post-Traumatic Stress Disorder' (2018) 133 *Neuropharmacology* 181, 185–7.

349 *Morris* [2002] 2 AC 628, 675 (emphasis added). See also *Yates v South Kirkby, & Co Collieries Ltd* [1910] 2 KB 538, 542–3 (Farwell LJ), 543 (Kennedy LJ) ('*Yates*').

350 Garcia-Rill and Beecher-Monas (n 323) 24. See also Handford (n 11) 144, 162.

351 Pitman et al, 'Biological Studies of PTSD' (n 319) 775.

352 See above Part II(B)(1)(c).

353 See generally Pitman et al, 'Biological Studies of PTSD' (n 319); J Douglas Bremner et al, 'Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder' in E Ronald De Kloet, Melly S Oitzl and Eric Vermetten (eds), *Stress Hormones and Post Traumatic Stress Disorder: Basic Studies and Clinical Perspectives* (Elsevier, 2008) 171. Well before *Floyd* had it been said that 'functional activity shapes and reshapes synaptic architecture': Eisenberg (n 326) 500; and that 'problems in living [including depression, panic disorder and schizophrenia] necessarily influence brain state and structure – unless of course, one believes that [the] mind floats about in an incorporeal ectoplasm': at 503.

354 See Reiser (n 328) 168; Handford (n 11) 143; Patricia Andreski, Howard Chilcoat and Naomi Breslau, 'Post-Traumatic Stress Disorder and Somatization Symptoms: A Prospective Study' (1998) 79(2) *Psychiatry Research* 131, 136–7: bodily systems affected include the coronary, immune and digestive systems. See also McFarlane (n 323) 3–4.

It may be stated generally, on the basis of substantial meta-analytical literature and numerous empirical studies employing both functional MRI ('fMRI') and structural MRI ('sMRI'),<sup>355</sup> that PTSD can hyperactivate the amygdala<sup>356</sup> and diminish the volume of the hippocampus,<sup>357</sup> ventromedial prefrontal cortex<sup>358</sup> and dorsal anterior cingulate cortex.<sup>359</sup> Functionally, these structural brain changes can impair critical problem-solving, judgment and decision-making,<sup>360</sup> and potentiate cognitive, motivational, emotional, spatial and attentional dysfunction.<sup>361</sup>

## 2 Demonstrating Physical Changes through Neuroimaging Technologies

Although it may be accepted, then, that functional impairment diagnosable as PTSD may result from both neurochemical and structural alterations to the brain, nevertheless, as the authorities discussed above demonstrate, '[i]t is all a question of medical evidence' whether a passenger has suffered bodily injury in a particular case.<sup>362</sup> Lord Hobhouse in *Morris* referred to scientific developments that have 'changed ... the ability of certain plaintiffs to bring their cases within [article

355 Pitman et al, 'Biological Studies of PTSD' (n 319) 771. See below Part II(C)(2).

356 See *Ibid* 773; Su Xiaorui et al, 'Abnormal Metabolite Concentrations and Amygdala Volume in Patients with Recent-Onset Posttraumatic Stress Disorder' (2018) 241 *Journal of Affective Disorders* 539, 539–40, 542; Vaiva et al (n 342) 949.

357 See Robert M Sapolsky et al, 'Hippocampal Damage Associated with Prolonged Glucocorticoid Exposure in Primates' (1990) 10(9) *Journal of Neuroscience* 2897, 2898–9, 2902; J Douglas Bremner et al, 'MRI-Based Measurement of Hippocampal Volume in Patients with Combat-Related Posttraumatic Stress Disorder' (1995) 152(7) *American Journal of Psychiatry* 973, 973–9; Noriyuki Kitayama et al, 'Magnetic Resonance Imaging (MRI) Measurement of Hippocampal Volume in Posttraumatic Stress Disorder: A Meta-Analysis' (2005) 88(1) *Journal of Affective Disorders* 79, 79–80, 83; Michael E Smith, 'Bilateral Hippocampal Volume Reduction in Adults with Post-Traumatic Stress Disorder' (2005) 15(6) *Hippocampus* 798, 798, 803–5; Zhen Wang et al, 'Magnetic Resonance Imaging of Hippocampal Subfields in Posttraumatic Stress Disorder' (2010) 67(3) *Archives of General Psychiatry* 296, 299–302; Fu Lye Woon, Shabnam Sood and Dawson W Hedges, 'Hippocampal Volume Deficits Associated with Exposure to Psychological Trauma and Posttraumatic Stress Disorder in Adults: A Meta-Analysis' (2010) 34(7) *Progress in Neuro-Psychopharmacology and Biological Psychiatry* 1181, 1183–7; Pitman et al, 'Biological Studies of PTSD' (n 319) 771, 773–4, 776; Karl et al (n 342) 1018.

358 See Pitman et al, 'Biological Studies of PTSD' (n 319) 771–2; Victor G Carrion et al, 'Decreased Prefrontal Cortical Volume Associated with Increased Bedtime Cortisol in Traumatized Youth' (2010) 68(5) *Biological Psychiatry* 491, 491–3; AL Gold et al, 'Decreased Regional Cerebral Blood Flow in Medial Prefrontal Cortex During Trauma-Unrelated Stressful Imagery in Vietnam Veterans with Post-Traumatic Stress Disorder' (2011) 41(12) *Psychological Medicine* 2563, 2563, 2567; Lisa M Shin et al, 'Regional Cerebral Blood Flow in the Amygdala and Medial Prefrontal Cortex During Traumatic Imagery in Male and Female Vietnam Veterans with PTSD' (2004) 61(2) *Archives of General Psychiatry* 168, 168, 174–5; Karl et al (n 342) 1005–6, 1018. For early understanding of the role of the prefrontal cortex, see Reiser (n 328) 118 ff.

359 See Pitman et al, 'Biological Studies of PTSD' (n 319) 772–3; Lisa M Shin et al, 'An fMRI Study of Anterior Cingulate Function in Posttraumatic Stress Disorder' (2001) 50(12) *Biological Psychiatry* 932, 932–3, 937–40.

360 See Garcia-Rill and Beecher-Monas (n 323) 20; Betsy J Grey, 'Neuroscience, PTSD, and Sentencing Mitigation' (2012) 34(1) *Cardozo Law Review* 53, 89.

361 See Pitman et al, 'Biological Studies of PTSD' (n 319) 773; Israel Liberzon and Chandra Sekhar Sripada, 'The Functional Neuroanatomy of PTSD: A Critical Review' in E Ronald De Kloet, Melly S Oitzl and Eric Vermetten (eds), *Stress Hormones and Post Traumatic Stress Disorder: Basic Studies and Clinical Perspectives* (Elsevier, 2008) 151, 157. See also Reiser (n 328) 153–7.

362 *Morris* [2002] 2 AC 628, 633 (Lord Nicholls of Birkenhead).

17]’,<sup>363</sup> including ‘techniques for investigating the *functioning* of the living brain ... together with the roles played by *neurotransmitters, hormones and electrical impulses*’<sup>364</sup> and technologies able to detect ‘alterations in the normal chemistry of the brain’.<sup>365</sup> The years since *Morris* ‘have seen real and durable progress’ in neuroimaging,<sup>366</sup> and today psychiatric injury’s functionality – previously knowable only by subjective experience<sup>367</sup> – is indeed objectively observable.

Neuroimaging technologies, emergent in various legal contexts,<sup>368</sup> provide a powerful new aid in the factual inquiry whether bodily injury has occurred, by measuring how a brain functions, as opposed to showing only its structure.<sup>369</sup> By combining fMRI<sup>370</sup> (which visually represents a brain’s underlying neuronal activity)<sup>371</sup> with sMRI (which visually represents structural anomalies in a brain’s anatomy),<sup>372</sup> brain function – and alterations thereto<sup>373</sup> – can be measured over time and matched to neural activity in specific brain areas.<sup>374</sup>

Leaving evidential difficulties aside,<sup>375</sup> and assuming that neuroimaging technologies can indeed demonstrate the organic and functional reality of psychiatric injury,<sup>376</sup> it is submitted that neuroimaging may provide the ‘compelling medical evidence’ that Macfarlan JA demanded in *Casey*,<sup>377</sup> and thus assist courts to catch up to a medical community ‘already a long way down the road’.<sup>378</sup> However, as we

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363 Ibid 681.

364 Ibid 679 (emphasis added).

365 Ibid.

366 *DSM-5* (n 7) 5. See also Handford (n 11) 162.

367 See Pitman et al, ‘Biological Studies of PTSD’ (n 319) 783.

368 See, eg, *United States v Hammer*, 404 F Supp 2d 676 (MD Pa, 2005); *Washington v Marshall*, 27 P 3d 192 (Wash, 2001); *Roper v Simmons*, 543 US 551 (2005); Semir Zeki and Oliver R Goodenough, ‘Law and the Brain: Introduction’ (2004) 359 (November) *Philosophical Transactions of the Royal Society: Biological Sciences* 1661, 1662–3; Erin Ann O’Hara, ‘How Neuroscience Might Advance the Law’ (2004) 359 (November) *Philosophical Transactions of the Royal Society: Biological Sciences* 1677, 1677, 1680–2; Terrence Chorvat and Kevin McCabe, ‘The Brain and the Law’ (2004) 359 (November) *Philosophical Transactions of the Royal Society: Biological Sciences* 1727, 1733–5; Betsy J Grey, ‘Implications of Neuroscience Advances in Tort Law: A General Overview’ (2015) 12(2) *Indiana Health Law Review* 671, 671; Owen Jones et al, ‘Brain Imaging for Legal Thinkers: A Guide for the Perplexed’ [2009] *Stanford Technology Law Review* 5:1–11, 1 [1] (‘Brain Imaging for Legal Thinkers’); Shaun Cassin, ‘Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?’ (2013) 50(3) *Houston Law Review* 929, 932.

369 Cassin (n 368) 931 n 6.

370 See generally *ibid* (n 368) 941–2; Jean Macchiaroli Eggen and Eric J Laury, ‘Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine’ (2012) 13(2) *Columbia Science and Technology Law Review* 235, 239, 241.

371 Jones et al, ‘Brain Imaging for Legal Thinkers’ (n 368) 4–5 [17], 10 [43]; Cassin (n 368) 942.

372 Jones et al, ‘Brain Imaging for Legal Thinkers’ (n 368) 4 [13]; Cassin (n 368) 944.

373 Cassin (n 368) 944.

374 *Ibid* 941. See also William Bechtel, ‘Mechanisms in Cognitive Psychology: What Are the Operations?’ (2008) 75(5) *Philosophy of Science* 983, 984; Teneille Brown and Emily Murphy, ‘Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States’ (2010) 62(4) *Stanford Law Review* 1119, 1127–8.

375 But see Eggen and Laury (n 370) 242–4.

376 See Jones et al, ‘Brain Imaging for Legal Thinkers’ (n 368) 8 [31]; Eggen and Laury (n 370) 246.

377 *Casey* (2017) 93 NSWLR 438, 449.

378 *Allen*, 760 NW 2d 811, 816 (Markey J, Servitto PJ agreeing at 817) (Mich Ct App, 2008).

near a reality where this objective ‘biomarker may be the gold standard for PTSD diagnosis against which the accuracy of subjective measures will be judged’,<sup>379</sup> it is to be lamented that *Casey* has revalidated dualist distinctions by excluding, as a general rule, biochemical alterations in the brain from the scope of ‘bodily injury’ in article 17(1) of *Montreal*.

### III NEW WINESKINS FOR NEW WINE: RETHINKING BODILY INJURY CLAIMS UNDER *MONTREAL*

Is *Montreal*, as it has been called, merely ‘old wine presented in a new bottle’?<sup>380</sup> Although article 17 of *Warsaw* and article 17(1) of *Montreal* do not appear materially different,<sup>381</sup> this does not mean that they should be interpreted identically,<sup>382</sup> given their divergent purposes.<sup>383</sup> Yet, regrettably, the highest courts of both the United Kingdom and Canada have assumed, without analysis, that *Warsaw*’s and *Montreal*’s purposes are the same,<sup>384</sup> and consequently that article 17(1) of *Montreal* operates like article 17 of *Warsaw* to bar recovery for psychiatric injury.<sup>385</sup> Although some commentators similarly contend that the significant changes brought about by *Montreal* to passenger injury claims do not permit the conclusion that psychiatric injury qualifies as ‘bodily injury’ under article 17(1),<sup>386</sup> this Part argues that the term in *Montreal*, properly understood, does encompass recovery for pure psychiatric injury.

#### A *Montreal* Is a New Treaty

Legislators, courts and commentators have not failed to note the significance of *Montreal*’s novelty.<sup>387</sup> Courts have rightly observed that *Montreal* is ‘an entirely new treaty that unifies and replaces [*Warsaw*’s] system of liability’,<sup>388</sup> and which

379 Pitman et al, ‘Biological Studies of PTSD’ (n 319) 783.

380 Batra (n 56) 443.

381 See *Stott* [2014] AC 1347, 1368 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363).

382 See *Ethad*, 870 F 3d 406, 431 n 17 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

383 See above Part II(A)(1)–(2), below Part III(A)–(B).

384 *Stott* [2014] AC 1347, 1368 (Lord Toulson JSC, Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreeing at 1363); *Thibodeau* [2014] 3 SCR 340, 363–4, 367, 370 (Cromwell J for the Court).

385 *Stott* [2014] AC 1347, 1368. See also *Thibodeau* [2014] 3 SCR 340, 372–4.

386 See Rushing and Janicki (n 316) 465; Chouest (n 316) 171–2. Cf Field, ‘Turbulence Ahead’ (n 54) 64, 66, 72, 85; Andrew Field, ‘International Air Carriage, The Montreal Convention and the Injuries for Which There Is No Compensation’ (2006) 12(2) *Canterbury Law Review* 237, 245.

387 See, eg, *Joint Standing Committee Report* (n 42) 25 [5.11]; *Stephenson* (2017) 327 FLR 110, 187 (Leeming JA); *Plourde* [2007] QCCA 739 (28 May 2007) [52], [57] (Thibault JA, Chamberland and Giroux JJA agreeing at [3]); *Atia*, 692 F Supp 2d 693, 699 (Bunning J) (ED Ky, 2010); *Schopenhauer v Cie Nationale Air France*, 255 F Supp 2d 81, 87 (Sand J) (ED NY, 2003); Immel (n 136) 78; Bin Cheng, ‘A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)’ (2004) 53(4) *International and Comparative Law Quarterly* 833, 844.

388 *Ehrlich v American Airlines Inc*, 360 F 3d 366, 371 n 4 (Meskill J for the Court) (2<sup>nd</sup> Cir, 2004) (‘*Ehrlich*’). [*Montreal*] is not an amendment to [*Warsaw*]; it entirely replaces the earlier treaty’s regime:



should be interpreted independently of *Warsaw*.<sup>389</sup> The correct approach to interpreting article 17(1) of *Montreal* is therefore not blindly to follow *Warsaw* jurisprudence, but rather to

grapple with the text of [*Montreal*] itself, and then, to the extent that we find any ambiguity therein, look to relevant persuasive authority – which may include evidence of the purpose of [*Montreal*], but almost certainly not the nearly century-old purpose of [*Warsaw*] to assist ... in resolving that ambiguity.<sup>390</sup>

This modernising purpose of *Montreal*, a treaty which favours passengers over airlines,<sup>391</sup> was clearly indicated by the President of the Montreal Conference, who opened it by saying that the ‘law must evolve in accordance with technical, social and commercial developments’.<sup>392</sup>

*Montreal*’s novelty prompted even Lord Steyn in *Morris* (who most strongly rejected compensation for psychiatric injury under *Warsaw*) to indicate that the position might well be different under the new Convention, stating that ‘progress towards the admission of claims for mental injury ... must await [*Montreal*]’s coming into operation’.<sup>393</sup> Dicta such as these arguably bring the assumption that recovery for psychiatric injury is excluded from passengers’ claims under the new Convention into considerable doubt,<sup>394</sup> and support a modern interpretation of the term ‘bodily injury’ in *Montreal*, unshackled from restrictive *Warsaw* precedent.

## **B *Montreal* Permits Claims for Pure Psychiatric Injury**

While perhaps it is regrettable that, by retaining *Warsaw*’s language, claims under article 17(1) of *Montreal* remain ‘based in the archaic terms of a bygone age’,<sup>395</sup> this section argues that *Montreal* nevertheless permits recovery for passengers’ psychiatric injury within the meaning of ‘bodily injury’. This argumentation proceeds on the basis of fundamental principles of treaty interpretation and analysis of municipal jurisprudence addressing the inclusion of psychiatric injury within the meaning of ‘bodily injury’.

### **1 *First Principles of Treaty Interpretation***

#### **(a) *General Rule***

It is trite law that a treaty should be interpreted according to the ordinary meaning of its terms read in their context and in the light of the treaty’s object

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*Etihad*, 870 F 3d 406, 436 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

389 *Etihad*, 870 F 3d 406, 419 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

390 *Ibid* 417. See also Boggs J’s remark that ‘[i]n light of the great difference between the purpose of [*Warsaw*] and the purpose of [*Montreal*], then, it hardly seems appropriate for us to look to the purpose of the [*Warsaw*] ... in order to arrive at a different conclusion from one compelled by the plain text of [*Montreal*]’: at 423.

391 *Ehrlich*, 360 F 3d 366, 371 n 4 (Meskill J for the Court) (2<sup>nd</sup> Cir, 2004).

392 *Montreal Minutes* (n 30) 37.

393 *Morris* [2002] 2 AC 628, 644–5.

394 See Andrews and Nase (n 3) 74.

395 Field, ‘Turbulence Ahead’ (n 54) 87.

and purpose.<sup>396</sup> *Montreal*, like *Warsaw* and other international conventions, should be construed broadly to ensure a result that is generally acceptable,<sup>397</sup> avoiding anachronistic interpretations as if it were a document ‘frozen in time’,<sup>398</sup> and purposively,<sup>399</sup> having regard to the problems which it was intended to solve<sup>400</sup> and the parties’ shared expectations.<sup>401</sup>

Turning first to article 17(1)’s ordinary meaning, it is submitted that ‘bodily injury’ signifies simply injury to the body or any part thereof, naturally including damage to the brain.<sup>402</sup> In a domestic American case,<sup>403</sup> where the relevant statute under consideration – like *Montreal* – left ‘bodily injury’ undefined,<sup>404</sup> the majority of the Court accorded the term its plain and ordinary meaning,<sup>405</sup> reasoning that ‘[t]he brain is a part of the human body’<sup>406</sup> and concluding that ‘injury to the brain [is] within the common meaning of “bodily injury”’.<sup>407</sup> With respect, a like interpretation correctly construes article 17(1) of *Montreal*, and gives the words ‘bodily injury’ their natural meaning, ‘without imposing any artificial or restrictive gloss upon them’.<sup>408</sup> Applying this definition, it becomes apparent that PTSD, involving damage to the brain,<sup>409</sup> may be compensable under article 17(1).

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396 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) (‘*VCLT*’); *Povey* (2005) 223 CLR 189, 202 (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Kotsambasis* (1997) 42 NSWLR 110, 114 (Meagher JA).

397 See *Morris* [2002] 2 AC 628, 656 (Lord Hope of Craighead), citing *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350 (Lord Macmillan) (‘*Stag Line*’); *James Buchanan & Co v Babco Forwarding & Shipping (UK) Ltd* [1977] AC 141, 152 (Lord Wilberforce) (‘*James Buchanan*’); *Saks*, 470 US 392, 396 (O’Connor J for the Court) (1985); *Stratis v Eastern Air Lines Inc*, 682 F 2d 406, 412 (Oakes J for the Court) (2<sup>nd</sup> Cir, 1982). See also *Todok v Union State Bank of Harvard, Nebraska*, 281 US 449, 452, 454 (Hughes CJ for the Court) (1930).

398 *Morris* [2002] 2 AC 628, 669 (Lord Hope of Craighead), 678 (Lord Hobhouse of Woodborough); *Eck*, 203 NE 2d 640, 643 (Burke J, Desmond CJ agreeing at 644, Fuld, Van Voorhis and Scileppi JJ agreeing at 645) (NY, 1964).

399 See *Grein v Imperial Airways Ltd* [1937] 1 KB 50, 74–6, 89 (Greene LJ), approved in *Sidhu* [1997] AC 430, 442 (Lord Hope of Craighead, Lord Browne-Wilkinson agreeing at 434, Lord Jauncey of Tullichettle agreeing at 434, Lord Mustill agreeing at 434, Lord Steyn agreeing at 434); *AHP Manufacturing BV v DHL Worldwide Network NV* [2001] 4 IR 531, 541 (Fennelly J, Denham J agreeing at 533, Murphy J agreeing at 533, Murray J agreeing at 533, Hardiman J agreeing at 533) (‘*AHP Manufacturing*’). See also *Fothergill* [1981] AC 251, 279 (Lord Diplock).

400 See *Eck*, 203 NE 2d 640, 642 (Burke J, Desmond CJ agreeing at 644, Fuld, Van Voorhis and Scileppi JJ agreeing at 645) (NY, 1964).

401 See *Saks*, 470 US 392, 399 (O’Connor J for the Court) (1985).

402 See *Morris* [2002] 2 AC 628, 675 (Lord Hobhouse of Woodborough). See also Field, ‘Turbulence Ahead’ (n 54) 71.

403 *Allen*, 760 NW 2d 811 (Mich Ct App, 2008).

404 *Ibid* 814.

405 *Ibid* (Markey J, Servitto PJ agreeing at 817).

406 *Ibid* 815 (Markey J, Servitto PJ agreeing at 817).

407 *Ibid*.

408 See *Morris* [2002] 2 AC 628, 689 (Lord Hobhouse of Woodborough) (emphasis in original), 633 (Lord Nicholls of Birkenhead), 634 (Lord Mackay of Clashfern). See also Defossez (n 266) 127. Cf *Casey* (2017) 93 NSWLR 438, 440 (Macfarlan JA, Ward JA agreeing at 458, Gleeson JA agreeing at 458).

409 See above Part III(C).

*Montreal*'s context, object and purpose impel towards the same conclusion. *Montreal* 'modernised' and 'revolution[ised]' *Warsaw*'s compensation scheme,<sup>410</sup> in order to ensure 'protection of the interests of consumers in international carriage by air and ... equitable compensation based on the principle of restitution'.<sup>411</sup> In this sense, *Montreal*'s purpose was to elevate the position of passengers and their consumer rights,<sup>412</sup> and courts have affirmed that *Montreal* 'represents a significant shift away from a treaty that primarily favored airlines to one that ... shows increased concern for the rights of passengers'.<sup>413</sup>

Although uniformity among signatories is, in addition to being generally desirable,<sup>414</sup> admittedly also one of *Montreal*'s purposes,<sup>415</sup> such uniformity is often elusive in the domain of treaty interpretation.<sup>416</sup> Notably, judicial remarks have accepted that uniformity in respect of *Montreal*'s predecessor was 'not always attainable',<sup>417</sup> and had 'not been shown to be necessary or even possible'.<sup>418</sup> These observations should reassure courts tempted to perpetuate *Floyd*'s holding for the sake of uniformity that they may indeed recognise psychiatric injury's compensability whilst still remaining faithful to *Montreal*'s purposes. Indeed, to continue to apply *Floyd*'s dualist distinction to claims under *Montreal* would embody what has been condemned as a distorted approach to interpretation of the Convention that interprets 'not the language of the Convention but instead the language of the leading judgment interpreting the Convention'.<sup>419</sup> To purchase uniformity at the expense of the psychiatrically injured would also subvert the declared intention of *Montreal*'s drafters to permit national jurisprudential development regarding recovery for psychiatric injury within the meaning of 'bodily injury'.<sup>420</sup> As Schmidt J stated in

410 *Casey – Trial* (2015) 89 NSWLR 707, 712, 714 (Schmidt J); *Etihad*, 870 F 3d 406, 422–3 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017). See also *Joint Standing Committee Report* (n 42) 25 [5.11]; *Montreal Minutes* (n 30) 37, 46–8; Cheng (n 387) 844; Immel (n 136) 78.

411 *Montreal* (n 5) Preamble para 3.

412 *Montreal Minutes* (n 30) 50. See also Chouest (n 316) 169; Batra (n 56) 443; Chester (n 54) 228; Whalen (n 43) 14.

413 *Weiss*, 433 F Supp 2d 361, 365 (Lynch J) (SD NY, 2006). See also *Baah*, 473 F Supp 2d 591, 595 (Stein J) (SD NY, 2007); *Sompo Japan*, 522 F 3d 776, 781 (Ripple J for the Court) (7<sup>th</sup> Cir, 2008); *Bassam v American Airlines*, 287 F Appx 309, 312 (5<sup>th</sup> Cir, 2008); *Etihad*, 870 F 3d 406, 423 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

414 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Bhd* (1998) 196 CLR 161, 176 (Gaudron, Gummow and Hayne JJ), 186 (McHugh J), 213 (Kirby J) ('*Great China Metal*'); *Connaught Laboratories* (2002) 61 OR (3d) 204, 221 (Molloy J); *T v Secretary of State for the Home Department* [1996] AC 742, 779 (Lord Lloyd of Berwick); *James Buchanan* [1977] AC 141, 161 (Lord Salmon), 168 (Lord Edmund-Davies); *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, 471 (Viscount Simonds); *Stag Line* [1932] AC 328, 350 (Lord Macmillan); *Ulster-Swift Ltd v Taunton Meat Ltd* [1977] 1 WLR 625, 632 (Megaw LJ).

415 See above n 51 and accompanying text.

416 *Great China Metal* (1998) 196 CLR 161, 213 (Kirby J).

417 *Deep Vein Thrombosis* [2006] 1 AC 495, 509 (Lord Steyn). Cf *Montreal Minutes* (n 30) 37, 71.

418 *Re Inflight Explosion on Trans World Airlines Inc Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F Supp 625, 640 (Weinstein J) (ED NY, 1991).

419 *Deep Vein Thrombosis* [2006] 1 AC 495, 506 (Lord Scott of Foscote, Baroness Hale of Richmond agreeing at 512).

420 See United States Department of State, *Article-by-Article Analysis of the Convention for the Unification of Certain Rules for International Carriage by Air* (Senate Treaty Doc No 105–45, 6 September 2000) 9

*Casey*, the fact that cases decided in other signatory countries have resulted in PTSD claims failing ‘is not a basis upon which it may be concluded, without an analysis of the evidence ... that such an injury is not compensable’.<sup>421</sup>

(b) *Supplementary Means of Interpretation*

Although article 17(1)’s ordinary meaning embraces psychiatric injury, nevertheless, a plausible alternative construction is that the adjective ‘bodily’ was intended to qualify only ‘non-mental’ injuries as compensable. Several authorities have acknowledged this ambiguity in the term ‘bodily injury’.<sup>422</sup> Assuming that the term is indeed ambiguous, additional aids to construction may be invoked to clarify its meaning, including *Montreal’s travaux préparatoires* and the circumstances of the treaty’s conclusion.<sup>423</sup>

Numerous States’ highest courts have confirmed the legitimacy of considering these sources in aid of *Warsaw’s* interpretation,<sup>424</sup> and, as a canon of treaty construction, this approach is equally legitimate in respect of *Montreal*.<sup>425</sup> Given what these sources say, it is remarkable that they have received relatively little judicial attention; indeed, they were not considered at all in the judgments in *Casey*, either at trial or on appeal.<sup>426</sup>

Minutes of the Montreal Conference show that ‘bodily injury’ in article 17(1) dominated discussion,<sup>427</sup> and delegates expressly foresaw their recorded intentions informing article 17(1)’s judicial interpretation.<sup>428</sup> The Chairman of the Conference’s Commission of the Whole emphasised that ‘it could not be left to the Courts to subsequently interpret the text of [article 17(1)] independently of the Conference’s “travaux préparatoires”’,<sup>429</sup> while Australia’s delegate affirmed that ‘the records of the proceedings should make it clear what was and what was not encompassed’ by that article.<sup>430</sup> These records, it is submitted, reveal participants’ intention to expand passengers’ ability to recover for psychiatric injury.<sup>431</sup>

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(‘US State Department Explanatory Note’). See also below Part III(B)(1)(b).

421 *Casey – Trial* (2015) 89 NSWLR 707, 725.

422 *Krystal*, 403 F Supp 1322, 1324 (Whelan J) (CD Cal, 1975); *Floyd*, 499 US 530, 542 (Marshall J for the Court) (1991); *Kotsambasis* (1997) 42 NSWLR 110, 114 (Meagher JA, Powell JA agreeing at 120, Stein JA agreeing at 120–1). Cf *Rogers v Indiana*, 396 NE 2d 348, 352 (Hunter J, Givan CJ, DeBruler, Prentice and Pivarnik JJ agreeing at 355) (Ind, 1979).

423 *VCLT* (n 396) art 32(a).

424 *Povey* (2005) 223 CLR 189, 202 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Fothergill* [1981] AC 251, 276–7 (Lord Wilberforce), 294 (Lord Scarman); *Saks*, 470 US 392, 400 (O’Connor J for the Court) (1985). See also *Floyd*, 499 US 530, 542 (Marshall J for the Court) (1991); *Tseng*, 525 US 155, 167 (Ginsburg J for the Court) (1999); *Ehrlich*, 360 F 3d 366, 373 (Meskill J for the Court) (2<sup>nd</sup> Cir, 2004).

425 *VCLT* (n 396) art 32. See also generally James Allsop, ‘Statutes: Some Comments on Context and Meaning, with Particular Regard to Enactment and Pre-Enactment History’ (Paper, NSW Bar Association, 18 March 2005).

426 Cf *Wettlaufer* [2013] BCSC 1245 (15 July 2013) [62] (Funt J).

427 See generally *Montreal Minutes* (n 30).

428 *Ibid* 111–14.

429 *Ibid* 116.

430 *Ibid* 114.

431 But see *Ehrlich*, 360 F 3d 366, 391–3 (Meskill J for the Court) (2<sup>nd</sup> Cir, 2004).

From the Conference's beginning, the President noted that views concerning the 'balance of interests'<sup>432</sup> between limiting carriers' liability and providing for injured passengers' restitutionary rights needed to acknowledge that the aviation industry had matured,<sup>433</sup> and the United States of America declared that an 'essential element' of the new Convention must include 'separate recovery [for] mental injury in the absence of accompanying physical injury'.<sup>434</sup> Numerous Conference delegates and observers supported permitting recovery for psychiatric injury under what became article 17(1).<sup>435</sup>

Swedish and Norwegian delegates proposed expressly inserting the words 'or mental' after 'bodily' in the article,<sup>436</sup> receiving support on various grounds from many States and observers.<sup>437</sup> While different opinions were expressed regarding this proposal<sup>438</sup> (including some which considered that 'bodily injury' already comprehended psychiatric injury),<sup>439</sup> no delegate supported psychiatric injury's total exclusion from the article.<sup>440</sup> Indeed, several delegates emphasised the impossibility of distinguishing 'mental' from 'bodily' injury,<sup>441</sup> leading the President in summarising the discussion to note 'the indivisibility of the nature of the injuries sustained'.<sup>442</sup> Chile's delegate, for instance, declared it impossible 'to divide human beings up into purely physical or mental elements',<sup>443</sup> while Russia's delegate noted 'the difficulty of separating the body from the psyche'<sup>444</sup> and Britain's observed that '[o]ne could not sensibly distinguish between passengers who had suffered solely a physical injury from those who had suffered solely a mental injury'.<sup>445</sup> Such extensive discussion regarding the nature of bodily injury, and whether to refer expressly to 'mental injury' in article 17(1),<sup>446</sup> indicates that its drafters did not intend to limit recovery for psychiatric injury to that which would have been available under *Warsaw*.<sup>447</sup>

However, the version ultimately adopted retained the term 'bodily injury' without alteration or addition.<sup>448</sup> Although the significance of this is debatable,<sup>449</sup> the final version appears to have been adopted because many States believed

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432 *Montreal Minutes* (n 30) 37.

433 *Ibid.*

434 *Ibid* 44.

435 *Ibid* 45, 47, 49, 51, 67–8, 70–3, 112–13.

436 *Ibid* 67.

437 *Ibid* ff.

438 See *ibid* 70, 72, 112–15.

439 See *ibid* 70.

440 *Ibid* 72.

441 See especially *ibid* 67–8, 72, 112.

442 *Ibid* 68.

443 *Ibid* 67.

444 *Ibid* 112, 117.

445 *Ibid* 68.

446 See *ibid* 41–9, 67 ff; *US State Department Explanatory Note* (n 420) 9.

447 *Eithad*, 870 F 3d 406, 419 n 11 (Boggs J for the Court) (6<sup>th</sup> Cir, 2017).

448 *Montreal* (n 5) art 17(1).

449 See Ruwantissa IR Abeyratne, 'Mental Distress in Aviation Claims: Emergent Trends' (2000) 65(2) *Journal of Air Law and Commerce* 225, 227 ('Mental Distress in Aviation Claims'); Allredge (n 42) 1369–70; Field, 'Accidents and Injuries' (n 54) 79; Vernon Nase and Nick Humphrey, 'Three Steps

that the term already encompassed psychiatric injury,<sup>450</sup> and because Conference participants acknowledged that ‘[*Warsaw*] precedents currently allow the recovery of mental injury in certain situations and *that the law in this area will continue to develop in the future*’.<sup>451</sup> Conference participants expressly intended the definition of ‘bodily injury’ to evolve from judicial precedent developed under article 17 of *Warsaw*;<sup>452</sup> indeed, the Chairman’s summary contained the following clarification ‘[f]or the purpose of interpretation of [*Montreal*]’:<sup>453</sup>

[T]he expression ‘bodily injury’ is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air.<sup>454</sup>

Commentators immediately took this summary to mean that national courts could interpret ‘bodily injury’ to include pure psychiatric injury,<sup>455</sup> and States immediately construed the reference to ‘areas other than international carriage by air’ as meaning that jurisprudence interpreting ‘bodily injury’ in article 17(1) of *Montreal* ‘should continue to develop in a manner consistent with ... jurisprudence in other areas’ of participants’ municipal law.<sup>456</sup> The Chairman noted that this envisaged development was to address the needs of contemporary society.<sup>457</sup>

In any event, numerous delegates, and, importantly, the Chairman, declared several times that participants had reached ‘consensus’ that psychiatric injury was recoverable under the finally adopted wording of article 17(1).<sup>458</sup> The hermeneutical significance of such declarations of consensus cannot be understated, as ‘an agreed conference minute of the understanding upon the basis of which the draft of an article of the convention was accepted may well be of great [interpretative] value’.<sup>459</sup> Existence of consensus on this point should also allay fears expressed

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Forward, Two Steps Back: Reflections on Air Carriers’ Liability and Australia’s Accession to Montreal 99’ (2006) 55(3) *Zeitschrift für Luft- und Weltraumrecht* [Journal of Air and Space Law] 364, 376.

450 *Montreal Minutes* (n 30) 70–1, 110–16, 201; United Kingdom, *Parliamentary Debates*, House of Commons, 3 July 2000, vol 353, col 88W (Keith Hill) (‘*House of Commons Hansard*’). Cf Abeyratne, ‘Mental Distress in Aviation Claims’ (n 449) 227.

451 Clinton (n 45) x (emphasis added). See also *House of Commons Hansard* (n 450) col 88W (Keith Hill).

452 *Montreal Minutes* (n 30) 201. See also Cheng (n 387) 850.

453 *Montreal Minutes* (n 30) 243.

454 *Ibid*.

455 See, eg, Sean Gates, ‘The Montreal Convention of 1999: A Report on the Conference and on What the Convention Means for Air Carriers and Their Insurers’ [1999] (October) *Aviation Quarterly* 186, 189–90; Ruwantissa I Abeyratne, ‘Mental Injury Caused in Accidents During International Air Carriage: A Point of View’ [1999] (December) *Aviation Quarterly* 206, 207–10; Wolf Müller-Rostin, ‘Die Internationale Luftrechtskonferenz von Montreal zur Reform des Warschauer Abkommens (10–28 Mai 1999) [The International Air Law Conference of Montreal on the Reform of the Warsaw Treaty (10–28 May 1999)]’ (2000) 49(1) *Zeitschrift für Luft- und Weltraumrecht* [Journal of Air and Space Law] 36, 40 [tr author].

456 *US State Department Explanatory Note* (n 420) 9. See also *House of Commons Hansard* (n 450) col 88W (Keith Hill).

457 *Montreal Minutes* (n 30) 201.

458 *Ibid* 72, 117, 167, 186. Cf *Hosaka v United Airlines Inc*, 305 F 3d 989, 1000–1 (Fisher J) (9<sup>th</sup> Cir, 2002) (‘*Hosaka*’); Ehrlich, 360 F 3d 366, 391 (Meskill J for the Court) (2<sup>nd</sup> Cir, 2004).

459 *Fothergill* [1981] AC 251, 295 (Lord Scarman).

in judgments interpreting *Warsaw* of adopting expansive constructions of ‘bodily injury’ that might be controversial for certain signatories.<sup>460</sup>

*Montreal’s travaux préparatoires* thus confirm the meaning resulting from applying the general rule of interpretation, namely, that the requirement of ‘bodily injury’ in article 17(1) of *Montreal* permits recovery for psychiatric injury.<sup>461</sup> As Australia’s delegate at the Montreal Conference stressed, it is ‘absolutely essential ... that courts not conclude that the drafters’ intention [on] this issue was to exclude altogether liability for mental injury of any kind’.<sup>462</sup>

### (c) *Montreal is Multilingual*

As courts have noted,<sup>463</sup> *Montreal’s* Arabic, Chinese, English, French, Russian and Spanish texts are all equally authentic.<sup>464</sup> In interpreting *Montreal*, linguistic difficulties plaguing interpretation of article 17 of *Warsaw*, due to the French text’s prevailing authenticity, thus no longer arise.<sup>465</sup> Critically, in every authentic version of *Montreal* – even, for argument’s sake, leaving the English to one side<sup>466</sup> – ‘bodily injury’ may extend to include psychiatric injury. Germany’s delegate to the Montreal Conference stated this explicitly,<sup>467</sup> and declared that the French term ‘*lésion corporelle*’ embraced psychiatric injury,<sup>468</sup> an interpretation German-speaking countries had accepted ‘from the very beginning’.<sup>469</sup> Significantly, France’s delegate confirmed that this interpretation of the French was, and always had been, correct,<sup>470</sup> seriously undermining the conclusion in *Floyd* that the term ‘*lésion corporelle*’ excluded psychiatric injury.<sup>471</sup>

Spain’s delegate likewise accepted that psychiatric injury was included within the meaning of ‘*lésion corporelle*’,<sup>472</sup> and Argentina’s instrument of accession even contained an interpretative declaration to similar effect in respect of the cognate Spanish term ‘*lesión corporal*’,<sup>473</sup> providing additional contextual support for an

460 Cf *Floyd*, 499 US 530, 552 (Marshall J for the Court) (1991). See also *Hosaka*, 305 F 3d 989, 998 (Fisher J) (9<sup>th</sup> Cir, 2002).

461 See Alldredge (n 42) 1370–1, 1374.

462 *Montreal Minutes* (n 30) 76.

463 See, eg, *Wettlaufer* [2013] BCSC 1245 (15 July 2013) [86] (Funt J).

464 *Montreal* (n 5) Factum.

465 *Casey – Trial* (2015) 89 NSWLR 707, 717 (Schmidt J). See also *Hosaka*, 305 F 3d 989, 996 (Fisher J) (9<sup>th</sup> Cir, 2002).

466 Note, however, early discussion of whether the English term ‘bodily injury’ might ‘already cover the same ground’ as the French: International Civil Aviation Organization, ‘International’ (1952) 19(1) *Journal of Air Law and Commerce* 66, 79.

467 *Montreal Minutes* (n 30) 68.

468 *Ibid.*

469 *Morris* [2002] 2 AC 628, 661 (Lord Hope of Craighead). The term is usually translated into German as ‘Körperverletzung [body-injury]’ [tr author].

470 *Montreal Minutes* (n 30) 68. See also *Palagonia*, 110 Misc 2d 478, 481, 488 (Marbach J) (NY Sup Ct, 1978); *Floyd – Intermediate*, 872 F 2d 1462, 1472 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989).

471 Cf *Floyd*, 499 US 530, 542 (Marshall J for the Court) (1991).

472 *Montreal Minutes* (n 30) 74.

473 *Instrumento de Adhesión* [Instrument of Accession] (Argentine Republic), deposited 16 December 2009 [tr author]. The relevant text of the interpretative declaration is: ‘*Para la República Argentina, la expresión “lesión corporal” contenida en el artículo 17 de este tratado comprende asimismo la*

expansive meaning.<sup>474</sup> Uzbekistan's delegate confirmed that in Russian the relevant term<sup>475</sup> encompassed both physical and psychiatric injury.<sup>476</sup> Saudi Arabia<sup>477</sup> and Egypt<sup>478</sup> confirmed that the Arabic term 'اصابة جسدية' [bodily injury/damage]<sup>479</sup> did likewise, and Syria's delegate also stated that the term encompassed psychiatric injury in Syrian jurisprudence.<sup>480</sup> Although the Montreal Conference featured no specific discussion of the term's meaning in Chinese, China's highest court has recognised '精神上的痛苦 [mental pain]' as compensable under article 17 of *Warsaw*,<sup>481</sup> appearing to equate the term '人身伤害 [personal injury]' with '身体伤害 [bodily injury]',<sup>482</sup> the latter term appearing in *Montreal*'s authentic Chinese text.<sup>483</sup>

The significance of these interpretations of 'bodily injury' in *Montreal*'s other authentic versions crystallises when principles of multilingual treaty interpretation are applied. Terms are presumed to share one meaning across authentic texts,<sup>484</sup> where a term's meaning is doubtful in one authentic language, assistance may be drawn from another,<sup>485</sup> and a broad interpretation should be adopted which best reconciles the texts, having regard to the treaty's purpose.<sup>486</sup> Given these principles, it would be seriously anomalous for courts interpreting *Montreal*'s English text to maintain an interpretation excluding psychiatric injury from 'bodily injury' which diverges from that term's meaning in *Montreal*'s other five authentic texts, ignores the interpretative assistance those texts offer, and dislocates rather than reconciles them in defiance of *Montreal*'s key purposes.

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*lesión mental relacionada con la lesión corporal, u otra lesión mental que afecte de forma tan grave y perjudicial a la salud del pasajero que su capacidad para realizar actividades cotidianas de una persona común esté muy debilitada* [For the Argentine Republic, the expression "bodily injury" in article 17 of this treaty includes mental injury related to bodily injury or other mental injury which affects a passenger in a manner so grave and prejudicial to his or her health that his or her capacity to carry out the daily activities of an ordinary person is significantly weakened] [tr author].

474 See *VCLT* (n 396) art 31(2)(b).

475 The term in the authentic Russian version is 'телесного повреждения [bodily injury]': *Montreal* (n 5) art 17(1) [tr author]. The Minutes of the Montreal Conference, recorded in English, render the relevant Russian term as 'injury to health': *Montreal Minutes* (n 30) 74.

476 *Montreal Minutes* (n 30) 74. See also the Russian delegate's amenability to 'including both bodily and mental injury as components of liability': at 112.

477 *Ibid* 69.

478 *Ibid* 112.

479 *Montreal* (n 5) art 17(1) [tr author].

480 *Montreal Minutes* (n 30) 115.

481 «陆红诉美国联合航空公司国际航空旅客运输损害赔偿纠纷案» [Lu Hong v United Airlines – International Air Passenger Tort Damages Claim] [2002] 4 中华人民共和国最高人民法院公报 [Gazette of the Supreme People's Court of the People's Republic of China] 141, 142 [tr author].

482 *Ibid* 141–2 [tr author]. Cf *Montreal Minutes* (n 30) 70.

483 *Montreal* (n 5) art 17(1).

484 *VCLT* (n 396) art 33(3).

485 *James Buchanan* [1977] AC 141, 161 (Lord Salmon).

486 *VCLT* (n 396) art 33(4); *James Buchanan* [1977] AC 141, 153 (Lord Wilberforce).



## 2 Antecedent Municipal Law

### (a) A Special Interpretative Role for National Courts

Although it has been said that principles of domestic law are of little importance in interpreting *Warsaw*'s provisions,<sup>487</sup> there are important contrary indications, especially in respect of *Montreal*.

Seriously considered dicta of Justices of the High Court of Australia in *The Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd*, a case considering another comprehensive international convention,<sup>488</sup> strongly indicate that national courts should have regard to their own domestic jurisprudence in interpreting treaty terms. Mason and Wilson JJ (Gibbs and Aickin JJ agreeing) said that the principle of uniformity should not 'exclude from our consideration of ... an international convention *the meaning which has been consistently assigned by a national court to words and expressions commonly used*',<sup>489</sup> nor 'exclude recourse to the *antecedent municipal law of nations* for the purpose of elucidating the meaning and effect of the convention'.<sup>490</sup> These dicta have been frequently approved, including in relation to *Montreal*'s predecessor,<sup>491</sup> and are borne out by the interpretative approaches taken by national courts.

In *Morris*, Lord Hope considered it 'helpful' when examining 'bodily injury' in article 17 of *Warsaw* 'to examine the present state of [Britain's] own jurisprudence as to how similar words in domestic legislation are interpreted'.<sup>492</sup> In another English case, *Re Deep Vein Thrombosis and Air Travel Group Litigation*,<sup>493</sup> Lord Scott, interpreting 'accident' in article 17, similarly drew upon domestic decisions' understanding of what 'accident' meant in the ordinary use of the English language.<sup>494</sup> The Supreme Court of Ireland has likewise considered notions existing at common law relevant to interpreting the same notions in *Warsaw*.<sup>495</sup>

The utility of domestic bodily injury jurisprudence is *a fortiori* in respect of *Montreal*'s interpretation. In *Morris*, Lord Phillips MR, comparing the meaning of 'bodily injury' in each Convention, stated:

[W]hen [*Montreal*] comes into force there may be scope for argument, on the basis of the *travaux préparatoires* evidencing the consideration that was given to mental injury, that those who drafted the Convention intended the meaning of the phrase

487 *Connaught Laboratories* (2002) 61 OR (3d) 204, 221 (Molloy J). Cf *Kotsambasis* (1997) 42 NSWLR 110, 113–14 (Meagher JA).

488 (1980) 147 CLR 142, considering the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 157 (entered into force 2 June 1931) ('*India Shipping*').

489 *India Shipping* (1980) 147 CLR 142, 159 (emphasis added).

490 *Ibid* (emphasis added).

491 *Merck Sharpe & Dohme* (1999) 47 NSWLR 696, 704 (Mason P, Sheller JA agreeing at 709).

492 *Morris* [2002] 2 AC 628, 650 (Lord Mackay of Clashfern agreeing at 633, Lord Steyn agreeing at 645).

493 [2006] 1 AC 495.

494 *Ibid* 503.

495 *AHP Manufacturing* [2001] 4 IR 531, 541 (Fennelly J, Denham J agreeing at 533, Murphy J agreeing at 533, Murray J agreeing at 533, Hardiman J agreeing at 533). See also *Hennessey* [2012] IEHC 124 (13 March 2012) [6.4] (Hedigan J).

‘bodily injury’ to turn on the jurisprudence of the individual state applying that Convention.<sup>496</sup>

This approach comports entirely with the intention of *Montreal*’s drafters that national jurisprudence in respect of ‘bodily injury’ in article 17(1) should evolve consistently with ‘jurisprudence in other areas in such States’,<sup>497</sup> and vindicates Mason and Wilson JJ’s suggestion that common terms in conventions will ‘have been incorporated with knowledge of the meaning ... given to them by national courts’.<sup>498</sup> At the Montreal Conference, numerous States supported leaving the meaning of ‘bodily injury’ to the determination of municipal tribunals:<sup>499</sup> Norway, for instance, believed that the pertinent issue would be how the term ‘bodily injury’ would be interpreted in the legal system of each individual signatory,<sup>500</sup> while the Republic of Korea declared that psychiatric injury’s actionability under article 17(1) ‘should be left to each State Party’s legal system to decide’.<sup>501</sup>

Accordingly, consideration now follows of national courts’ jurisprudence concerning psychiatric injury’s compensability and comprehension within the term ‘bodily injury’. This jurisprudence seriously undermines *Floyd*’s reasoning that ‘the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in [*Warsaw*]’,<sup>502</sup> and vindicates the Chairman’s statement at the Montreal Conference that ‘in many domestic jurisdictions, there was indeed liability arising in respect of mental injury’.<sup>503</sup>

### (b) *Psychiatric Injury in Civil Law Jurisdictions*

As *Warsaw* was a creation of civil lawyers,<sup>504</sup> it was never permissible to impose on article 17 a common law distinction (if such exists)<sup>505</sup> between ‘mental’ and ‘physical’ injuries.<sup>506</sup> Unfortunately, decisions interpreting article 17 of *Warsaw* tended to do exactly that,<sup>507</sup> even though it was acknowledged ante-*Warsaw* that

496 *Morris – Intermediate* [2002] QB 100, 128 (Lord Phillips of Worth Matravers MR), cited approvingly in *Morris* [2002] 2 AC 628, 644–5.

497 See above Part III(B)(1)(b); *US State Department Explanatory Note* (n 420) 9.

498 *India Shipping* (1980) 147 CLR 142, 159 (Mason and Wilson JJ)

499 See especially *Montreal Minutes* (n 30) 71, 73, 115.

500 *Ibid* 71.

501 *Ibid*.

502 *Floyd*, 499 US 530, 544–5 (Marshall J for the Court) (1991). Cf *Morris* [2002] 2 AC 628, 637 (Lord Steyn).

503 *Montreal Minutes* (n 30) 110.

504 *Floyd – Intermediate*, 872 F 2d 1462, 1478 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989). Cf *Gatewhite* [1990] 1 QB 326, 334 (Gatehouse J).

505 See generally below Part III(B)(2)(c).

506 See *Warsaw Minutes* (n 31) 19, 185–6; *Fothergill* [1981] AC 251, 281–2 (Lord Diplock); *Floyd – Intermediate*, 872 F 2d 1462, 1478 (Anderson J for the Court) (11<sup>th</sup> Cir, 1989); *Naval-Torres* (1998) 159 DLR (4<sup>th</sup>) 67, 74 (Sharpe J); *Connaught Laboratories* (2002) 61 OR (3d) 204, 220–1 (Molloy J); *Allredge* (n 42) 1361. See also *James Buchanan* [1977] AC 141, 152 (Lord Wilberforce); *Fromm* (n 144) 434.

507 See Abeyratne, ‘Some Issues’ (n 110) 403.

even Roman law in a way equated psychiatric suffering with ‘bodily injury’.<sup>508</sup> Although a thorough treatment of the subject exceeds the scope of this article, it may be briefly and simply stated that the civil actionability of psychiatric harm has long been recognised in both French<sup>509</sup> and Roman-Dutch law,<sup>510</sup> as has the actionability of moral prejudice in Belgian<sup>511</sup> and Scottish law,<sup>512</sup> and that the civil law generally has long declined to separate ‘mental’ from ‘physical’ damage.<sup>513</sup>

The Supreme Court of Canada considered this issue shortly before the Montreal Conference in a civil law case on appeal from Québec concerning a claim for *solatium doloris*,<sup>514</sup> and declared ‘the general civil law rule’ to be that ‘any prejudice, whether moral or material ... is compensable if proven’.<sup>515</sup>

(c) *Bodily Injury in Common Law Jurisdictions’ Jurisprudence*

(i) *Pre-Warsaw*

In *Floyd*,<sup>516</sup> the Supreme Court of the United States said that ‘in common-law jurisdictions mental distress generally was excluded from recovery in 1929’.<sup>517</sup> The following analysis casts serious doubt upon this statement, at least in so far as it purports to extend to psychiatric injury. Concentrating on tort law as the closest analogue to the article 17(1) cause of action,<sup>518</sup> this section illustrates that the common law world had by the time of *Warsaw* recognised an action, albeit in early stages of development,<sup>519</sup> for wrongly inflicted psychiatric injury and had largely repudiated the dualist distinction between ‘physical’ and ‘mental’ injuries.<sup>520</sup> Given the preponderance of the term ‘shock’ in early cases, for clarity it is here worth noting that, as Devlin J explained in a judgment parsing earlier decisions,<sup>521</sup> ‘[w]hen the word “shock” is used in [the authorities], it is not in the sense of a mental reaction *but in a medical sense*’.<sup>522</sup>

508 See Max Radin, ‘Fundamental Concepts of the Roman Law’ (Pt 2) (1924) 12(6) *California Law Review* 481, 486–7.

509 *Floyd*, 499 US 530, 539 (Marshall J for the Court) (1991); *Augustus v Gosset* [1996] 3 SCR 268, 288 (L’Heureux-Dubé J) (‘*Augustus*’); *Palagonia*, 110 Misc 2d 478, 482 (Marbach J) (NY Sup Ct, 1978); *Daddon* (1984) 7 S&B Av R 141 [tr (1988) 23 *European Transport Law* 87, 100 (Lewin J, Bach and Netanyahu JJ agreeing at 110)].

510 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* [1973] 1 SA 769, 776–7 (Botha JA, Ogilvie Thompson CJ, Holmes, Jansen and Trollip JJA agreeing at 782) (Appellate Division) (‘*Bester*’).

511 *Augustus* [1996] 3 SCR 268, 289 (L’Heureux-Dubé J).

512 *Ibid.*

513 See *Palagonia*, 110 Misc 2d 478, 482 (Marbach J) (NY Sup Ct, 1978).

514 *Augustus* [1996] 3 SCR 268.

515 *Ibid* 285 (L’Heureux-Dubé J).

516 See generally above Part II(B)(1)(b).

517 *Floyd*, 499 US 530, 545 n 10 (Marshall J for the Court) (1991).

518 *Lockerie*, 928 F 2d 1267, 1279 (Cardamone J for the Court) (2<sup>nd</sup> Cir, 1991). Cf *Parkes Shire Council* (2019) 266 CLR 212, 225–6 (Kiefel CJ, Bell, Keane and Edelman JJ).

519 See *Parkes Shire Council* (2019) 266 CLR 212, 223 (Kiefel CJ, Bell, Keane and Edelman JJ).

520 Cf *Mulder v South British Insurance Co Ltd* [1957] 2 SA 444, 449–50 (De Wet J).

521 *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1 (England and Wales High Court).

522 *Ibid* 28 (Devlin J) (emphasis added).

Just as claims under article 17(1) require there to be a sufficient *injury*,<sup>523</sup> the common law has long distinguished mere emotional upset from ‘nervous shock producing physiological injury’,<sup>524</sup> a distinction that endures to this day.<sup>525</sup> The common law position has for a century or more been that while ‘mere fright’ is not actionable, physical injury *is*, ‘whether the injury be to the nerves or to some other part of the body’.<sup>526</sup>

Although the actionability of psychiatric harm was arguably recognised at least as early as in 1348,<sup>527</sup> in a case described as ‘the great-great-grandparent of all actions for negligent infliction of emotional distress’,<sup>528</sup> it is true that in large measure ‘[t]he early common law’s posture towards claims for ... mental harm was one of suspicion and sometimes outright hostility’,<sup>529</sup> as embodied in Lord Wensleydale’s famous declaration: ‘Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone’.<sup>530</sup>

This hostility reached its zenith in the Privy Council’s decision in *Victorian Railways Commissioners v Coultas* (‘*Coultas*’).<sup>531</sup> Medical evidence in that case established that the plaintiff, Coultas, fearing she was about to be killed by a fast-approaching train, suffered ‘severe nervous shock’.<sup>532</sup> Deciding her damages were too remote,<sup>533</sup> the Board stated that permitting recovery for ‘[d]amages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock’,<sup>534</sup> might lead ‘in every case’<sup>535</sup> to ‘a claim for damages on account of mental injury’.<sup>536</sup> Almost immediately, *Coultas* was criticised as

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523 See above Part II(A)(3)(a).

524 *Yates* [1910] 2 KB 538, 541 (Cozens-Hardy MR, Farwell LJ agreeing at 542, Kennedy LJ agreeing at 542). See also *Dulieu* [1901] 2 KB 669, 673 (Kennedy J); *Hickey v Welch*, 91 Mo App 4, 9 (Goode J for the Court) (St Louis Ct App, 1901) (‘*Hickey*’); *Kimberly v Howland*, 55 SE 778, 780 (Brown J for the Court) (NC, 1906) (‘*Kimberly*’).

525 See, eg, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 393–4 (Windeyer J) (‘*Pusey*’); *Benson v Lee* [1972] VR 879, 880 (Lush J) (‘*Benson*’); *McLoughlin* [1983] 1 AC 410, 431 (Lord Bridge of Harwich); *Page* [1996] 1 AC 155, 167 (Lord Keith of Kinkel), 171 (Lord Jauncey of Tullichettle); *Rhodes Estate v Canadian National Railway* (1990) 75 DLR (4<sup>th</sup>) 248, 264 (Wallace JA) (British Columbia Court of Appeal); *New South Wales v Thomas* [2004] NSWCA 52 (9 March 2004) [59] (Handley JA, Beazley JA agreeing at [73], Stein AJA agreeing at [74]); *Mustapha v Culligan of Canada Ltd* [2008] 2 SCR 114, 119 (McLachlin CJ for the Court) (‘*Mustapha*’). Cf *Chan-Fook* [1994] 1 WLR 689, 694–6 (Hobhouse LJ for the Court); *Tame* (2002) 211 CLR 317, 382 (Gummow and Kirby JJ). See also generally Handford (n 11) 138–9.

526 Archibald Throckmorton, ‘Damages for Fright’ (1921) 34(3) *Harvard Law Review* 260, 268.

527 *I de S et Uxor v W de S* (1348) 22 Liber Assisarum Edw III 99, 99 (Thorpe CJ).

528 Eric E Johnson, *Torts: Cases and Context* (CALI eLangdell Press, 2016) vol 2, 170–1.

529 *Saadati* [2017] 1 SCR 543, 556 (Brown J for the Court), citing *McLoughlin* [1983] 1 AC 410, 433 (Lord Bridge of Harwich). See also Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, 2009) 40, quoted in *Saadati* [2017] 1 SCR 543, 556 (Brown J for the Court).

530 *Lynch v Knight* (1861) 9 HLC 577, 598.

531 (1888) 13 App Cas 222 (‘*Coultas*’).

532 *Ibid* 223–4 (Sir Richard Couch for the Board).

533 *Ibid* 226.

534 *Ibid* 225.

535 *Ibid*.

536 *Ibid* 225–6.

unsound and, despite isolated instances where similar reasoning was adopted,<sup>537</sup> by the year in which *Warsaw* entered into force it had been widely repudiated by courts all across the common law world.<sup>538</sup>

In *Bell*,<sup>539</sup> decided just two years after *Coultas*, medical evidence established that the plaintiff, Bell, suffered nervous shock due to the defendant's negligence.<sup>540</sup> In argument, Bell's counsel submitted that it was 'hardly possible to conceive any kind of nervous or mental shock which would not ... deleteriously affect the physical frame or functions'.<sup>541</sup> The Irish Court of Appeal expressly accepted that Bell's nervous shock was 'bodily injury',<sup>542</sup> and expressly refused to qualify it as 'mental'.<sup>543</sup> In declining to follow *Coultas*,<sup>544</sup> Palles CB (Andrews and Murphy JJ agreeing) condemned as an error pervading the Privy Council's entire judgment

537 See, eg, *The Rigel* [1912] P 99, 101, 107 (Bargrave Deane J) (England and Wales High Court – Probate, Divorce and Admiralty Division). Cf *Mitchell v Rochester Railway Co*, 30 Abb N Cas 362, 370 (Rumsey J) (NY, 1893), revd 45 NE 354, 355 (Martin J for the Court) (NY, 1896) ('*Mitchell*'); *Geiger v Grand Trunk Railway Co* (1905) 10 OLR 511, 520 (Clute J) (Supreme Court – Appellate Division).

538 For examples of such repudiation, see especially *Bell* (1890) 26 LR Ir 428, 440–1 (Palles CB, Andrews J agreeing at 442, Murphy J agreeing at 443); *Pugh v London, Brighton & South Coast Railway Co* [1896] 2 QB 248, 250 (Lord Esher MR) ('*Pugh*'); *Canada Atlantic Railway Co v Henderson* (1898) 25 OAR 437, 444 (Moss JA), affd on other grounds (1899) 29 SCR 632, 635 (Sir Henry Strong CJ, Taschereau J agreeing at 636, King J agreeing at 636, Girouard J agreeing at 636); *Dulieu* [1901] 2 KB 669, 671, 677 (Kennedy J); *Cooper v Caledonian Railway Co* (1902) 4 F 880, 882 (Lord Stormonth-Darling) (Scotland Court of Session – Inner House) ('*Cooper*'); *Toms v Toronto Railway Co* (1910) 22 OLR 204, 209 (Garrow JA) (Court of Appeal), affd (1911) 44 SCR 268; *Coyle or Brown v John Watson Ltd* [1915] AC 1, 13 (Lord Shaw of Dunfermline) ('*Coyle*'); *Janvier v Sweeney* [1919] 2 KB 316, 323–4 (Banks LJ, Duke LJ agreeing at 326, AT Lawrence LJ agreeing at 328), 327 (Duke LJ); *Stevenson v Basham* [1922] NZLR 225, 231, 233 (Herdman J) (Supreme Court); *Hambrook v Stokes Bros* [1924] 1 KB 141, 148–50 (Banks LJ), 154–6 (Atkin LJ) ('*Hambrook*'); *Bielitski v Obadiak* (1922) 65 DLR 627, 635–6 (Turgeon JA) (Saskatchewan Court of Appeal); *Hogan v City of Regina* [1923] 3 WWR 769, 772 (Taylor J) (Saskatchewan Supreme Court) ('*Hogan*'); *McNally* [1924] 2 DLR 1211, 1214 (Lamont JA); *Currie v Wardrop* 1927 SC 538, 549–50 (Lord Hunter) ('*Currie*'); *Walker v Pitlochry Motor Co* 1930 SC 565, 568 (Lord Mackay), 576 (Lord President Clyde, Lord Blackburn) (Scotland Court of Session – Inner House); *Negro v Pietro's Bread Co* [1933] 1 DLR 490, 496 (Middleton JA for the Court) (Ontario Court of Appeal) ('*Pietro's Bread*'). See also *Taylor v British Columbia Electric Railway Co Ltd* (1911) 16 BCR 109, 110 (Macdonald CJA) (Court of Appeal); *Chester v Waverley Corporation* (1939) 62 CLR 1, 47 (Evatt J) ('*Chester*'), cited approvingly in *Horne v New Glasgow* [1954] 1 DLR 832, 843 (MacQuarrie J) (Nova Scotia Supreme Court) ('*Horne*'); *Owens* [1939] 1 KB 394, 398 (MacKinnon LJ); *Purdy v Woznesensky* [1937] 2 WWR 116, 123–4 (Mackenzie JA), 126 (Gordon JA) (Saskatchewan Court of Appeal) ('*Purdy*'); *Austin v Mascarin* [1942] OR 165, 166–9 (Hogg J) (High Court of Justice); *Hay or Bourhill v Young* [1943] AC 92, 110 (Lord Wright) ('*Bourhill*'); *Guay v Sun Publishing Co Ltd* [1953] 2 SCR 216, 225 (Cartwright J), approving [1952] 2 DLR 479, 496 (O'Halloran J) (British Columbia Court of Appeal) ('*Guay*'); *Pollard v Makarchuk* (1958) 16 DLR (2d) 225, 229 (Johnson JA) (Alberta Supreme Court) ('*Pollard*'); *Storm v Geeves* [1965] Tas SR 252, 255 (Burbury CJ) ('*Storm*'); *Pusey* (1970) 125 CLR 383, 395 (Windeyer J); *McLoughlin* [1983] 1 AC 410, 422 (Lord Wilberforce); *Jaensch* (1984) 155 CLR 549, 587, 590 (Deane J), 611 (Dawson J); *Page* [1996] 1 AC 155, 191 (Lord Lloyd of Berwick); JP McGregor, 'Case and Comment' (1933) 11(7) *Canadian Bar Review* 506, 517.

539 *Bell* (1890) 26 LR Ir 428.

540 *Ibid* 437 (Palles CB, Andrews J agreeing at 442, Murphy J agreeing at 443).

541 *Ibid* 434 (The Mac Dermot QC during argument).

542 *Ibid* 437–8 (Palles CB, Andrews J agreeing at 442, Murphy J agreeing at 443), 443 (Murphy J).

543 *Ibid* 438 (Palles CB, Andrews J agreeing at 442, Murphy J agreeing at 443).

544 Following instead *Byrne v Great Southern & Western Railway Co of Ireland* (Ireland Court of Appeal, Sir Edward Sullivan, February 1884).

its assumption ‘that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body’.<sup>545</sup>

By contrast, the Court observed that nervous shock is ‘physical injury ... in the generality of, if not indeed in all, cases’,<sup>546</sup> and held that ‘the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony’.<sup>547</sup> Once it is acknowledged – as the physicalist judgments interpreting *Warsaw* and *Montreal* acknowledge<sup>548</sup> – that the particular nature of any human injury is a factual question, it becomes, as Andrews J remarked in 1890, ‘immaterial whether the injuries may be called nervous shock, brain disturbance, mental shock, or bodily injury’.<sup>549</sup>

Courts and commentators around the world were swift and explicit in approving the Court’s reasoning in *Bell*.<sup>550</sup>

Scottish decisions predating *Warsaw* permitted pursuers to prove that their ‘nervous shock’ constituted physical injury,<sup>551</sup> and in several cases such proof was accepted.<sup>552</sup> Pre-*Warsaw* English decisions also permitted recovery for psychiatric injury. In one such case, *Pugh v London, Brighton & South Coast Railway Co*,<sup>553</sup> Lord Esher MR observed that nervous shock operated physically, qualifying it as a ‘physical disease’.<sup>554</sup> In another case at the turn of the 20<sup>th</sup> century,<sup>555</sup> wherein the plaintiff presented evidence of actual physical illness,<sup>556</sup> Kennedy J remarked that ‘terror operates through ... the physical organism to produce bodily illness’,<sup>557</sup> and said it would come as no surprise if ‘the physiologist told us that nervous shock is ... in itself an injurious affection of the physical organism’.<sup>558</sup> Strikingly,

545 *Bell* (1890) 26 LR Ir 428, 441.

546 *Ibid* 440.

547 *Ibid* 442.

548 See generally above Part II(B).

549 *Bell* (1890) 26 LR Ir 428, 443.

550 See, eg, *Sloane v Southern California Railway Co*, 44 P 320, 323 (Harrison J, Van Fleet and Garoutte JJ agreeing at 325) (Cal, 1896) (‘*Sloane*’); *Mack v South-Bound Railroad Co*, 29 SE 905, 909–10 (Gary J for the Court) (SC, 1898) (‘*Mack*’); *Dulieu* [1901] 2 KB 669, 677, 682 (Kennedy J), see also 682 (Phillimore J); *Watkins v Kaolin Manufacturing Co*, 42 SE 983, 985 (Cook J for the Court) (NC, 1902) (‘*Watkins*’); *Coyle* [1915] AC 1, 13–14 (Lord Shaw of Dunfermline); *Pietro’s Bread* [1933] 1 DLR 490, 492–3 (Middleton JA for the Court). See also *Simone v Rhode Island Co*, 66 A 202, 206, 209 (Parkhurst J for the Court) (RI, 1907) (‘*Simone*’). Cf *Braun v Craven*, 51 NE 657, 663 (Phillips J for the Court) (Ill, 1898) (‘*Braun*’); Theodore Sedgwick, *A Treatise on the Measure of Damages* (Baker, Voorhis & Co, 8<sup>th</sup> ed, 1891) 639–43; George Ainslie, ‘Damages for Physical Injuries from Fright or Nervous Shock, without Impact’ (Pt 2) (1902) 8(5) *Virginia Law Register* 311, 321.

551 See, eg, *Cooper* (1902) 4 F 880, 882–3 (Lord Justice-Clerk Kingsburgh, Lord Young agreeing at 883, Lord Trayner agreeing at 883); *Gilligan v Robb* 1910 SC 856, 858 (Lords Kinnear, Johnston and Salvesen) (Scotland Court of Session – Inner House).

552 See, eg, *Brown v Glasgow Corporation* 1922 SC 527, 528 (Lord Morison), 530 (Lord Justice-Clerk Scott Dickson), 532 (Lord Ormidale, Lord Hunter) (Scotland Court of Session – Inner House) (‘*Brown*’); *Currie* 1927 SC 538, 539 (Lord Murray sitting as Lord Ordinary), 549 (Lord Hunter), 551 (Lord Anderson), 554–5 (Lord Murray).

553 [1896] 2 QB 248.

554 *Ibid* 251, see also 253 (AL Smith LJ).

555 *Dulieu* [1901] 2 KB 669.

556 *Ibid* 678.

557 *Ibid* 672–3.

558 *Ibid* 677.

Kennedy J stated: ‘I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury’.<sup>559</sup> Shortly before the Montreal Conference, Lord Lloyd of Berwick in the House of Lords applauded Kennedy J’s early awareness that ‘there may be no hard and fast line between physical and psychiatric injury’.<sup>560</sup>

In *Coyle v John Watson Ltd* (‘*Coyle*’),<sup>561</sup> Lord Shaw dealt an emphatic blow to the metaphysical somatic–psychic distinction when he asked, ‘to what avail ... is it to say that there is a distinction between things physical and mental?’<sup>562</sup> answering that there is ‘no principle of legal distinction’.<sup>563</sup> Acknowledging contemporary scientific advances, his Lordship observed that ‘the proposition that [psychiatric] injury ... is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge’<sup>564</sup> and concluded that ultimately psychiatric injury’s compensability was a question not of principle but of evidence.<sup>565</sup>

Atkin LJ in *Hambrook v Stokes Bros* was yet more explicit.<sup>566</sup> Accepting the physical nature of ‘nervous shock’,<sup>567</sup> and dismissing psychology ‘which falsely removed mental phenomena from the world of physical phenomena’,<sup>568</sup> his Lordship entirely disowned dualist distinctions:

At one time the theory was held that damage at law could not be proved ... unless there was some injury which was variously called ‘bodily’ or ‘physical,’ but which necessarily excluded an injury which was only ‘mental.’ There can be no doubt at the present day that this theory is wrong.<sup>569</sup>

This consistently emphatic rejection of the somatic–psychic distinction by British authorities led even counsel for the defendant airline in *Morris* to admit that current legal policy in the United Kingdom favoured interpreting article 17 of *Warsaw* broadly.<sup>570</sup>

Canadian decisions have likewise long declined to deny recovery for psychiatric injury.<sup>571</sup> In *Toronto Railway Co v Toms*,<sup>572</sup> where a plaintiff suffered injuries to his

559 Ibid.

560 *Page* [1996] 1 AC 155, 187.

561 [1915] AC 1.

562 Ibid 14.

563 Ibid.

564 Ibid.

565 Ibid 15. Cf above Part II(B)(1)(c).

566 [1924] 1 KB 141.

567 See *ibid* 157–8.

568 Ibid 154.

569 Ibid 153–4.

570 *Morris* [2002] 2 AC 628, 632.

571 For an early example (admittedly not one involving pure psychiatric injury), see *Fitzpatrick v Great Western Railway Co* (1855) 12 UC QB 645, 646–7 (Draper J for the Court): ‘The demurrer admits the negligence complained of, that the carriage, in which the plaintiff Sarah was riding, was owing to such negligence and a collision with another train driven in, broken and crushed, whereby she was much affrighted, terrified, and alarmed, whereby she became sick, sore, and disordered ... May not the plaintiff prove an inward injury or disorder as well as an external wound or bruise? The only difficulty suggested is the introduction of the statement of alarm and affright, as if preceding and occasioning the sickness and disorder. But, in our opinion, we are not bound to read the declaration in that manner. We may, we think, consider the fright and commencement of the sickness ... to be alleged as simultaneous’.

572 (1911) 44 SCR 268.

nervous system,<sup>573</sup> Sir Charles Fitzpatrick CJ rejected any separate legal treatment of external and internal injuries, provided the fact of physical injury were established.<sup>574</sup> Davies J, calling the nervous system ‘part of man’s physical being’,<sup>575</sup> stated that ‘[b]odily injuries are not necessarily observable’<sup>576</sup> as ‘[m]any of what are called physical injuries are altogether internal’.<sup>577</sup> Ultimately, the Supreme Court of Canada held that questions of physical injury were questions of fact.<sup>578</sup>

In *Hogan v City of Regina*,<sup>579</sup> decided a decade later, the primary judge suggested that injury to the nervous system might be described as ‘bodily injury’.<sup>580</sup> On appeal,<sup>581</sup> Lamont JA called ‘unanswerable’<sup>582</sup> Lord Shaw’s rejection in *Coyle* of any ‘distinction between things physical and mental’,<sup>583</sup> and approved the primary judge’s instruction to the jury that ‘[y]our nervous system is part of your physical being’.<sup>584</sup> Martin JA accepted the nervous system’s physical nature,<sup>585</sup> and said that the relation between fright or shock and the nervous structure of the body was a question determination of which depended upon scientific and medical testimony.<sup>586</sup>

Numerous Canadian cases decided after *Warsaw*’s entry into force also recognised recovery for nervous shock on the basis that it constituted physical injury.<sup>587</sup> These authorities cohere entirely with the Supreme Court of Canada’s recent observation in a common law tort context that the ‘distinction between physical and mental injury is elusive and arguably artificial’,<sup>588</sup> an observation surely no less applicable in the context of international civil aviation law.

Although American authorities are less harmonious than elsewhere,<sup>589</sup> by the time of *Warsaw* many, if not most, American jurisdictions permitted recovery for wrongly inflicted nervous shock even absent external impact.<sup>590</sup> The complex

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573 Ibid 277–8 (Duff J).

574 Ibid 270.

575 Ibid 275.

576 Ibid.

577 Ibid.

578 Ibid.

579 [1923] 3 WWR 769.

580 Ibid 770–1 (Taylor J).

581 *McNally* [1924] 2 DLR 1211.

582 Ibid 1215.

583 See above nn 562–3 and accompanying text.

584 *McNally* [1924] 2 DLR 1211, 1216.

585 Ibid 1220–1.

586 Ibid 1220.

587 See, eg, *Purdy* [1937] 2 WWR 116, 118, 119, 124 (Mackenzie JA), 126 (Gordon JA); *Horne* [1954] 1 DLR 832, 841 (MacQuarrie J); *Smith v Christie Brown & Co Ltd* [1955] OR 301, 302, 310 (Treleaven J) (High Court of Justice). Cf *Guay* [1953] 2 SCR 216, 225 (Cartwright J), approving [1952] 2 DLR 479, 480, 496 (O’Halloran J).

588 *Mustapha* [2008] 2 SCR 114, 118 (McLachlin CJ for the Court).

589 See *Mack*, 29 SE 905, 908 (Gary J for the Court) (SC, 1898); EF Albertsworth, ‘Recognition of New Interests in the Law of Torts’ (1922) 10(6) *California Law Review* 461, 488.

590 Without seeking to be exhaustive, see, eg, *Meagher v Driscoll*, 99 Mass 281, 285 (Foster J for the Court) (1868); *So Relle v Western Union Telegraph Co*, 55 Tex 308, 311 (Watts J for the Court) (1881); *Chicago & Northwestern Railway Co v Hunerberg*, 167 Ill App 387, 390 (McAllister J for the Court) (Ct App, 1885); *Hill v Kimball*, 13 SW 59, 59 (Gaines J for the Court) (Tex, 1890) (‘*Hill*’); *Larson v Chase*, 50 NW 238, 238 (Mitchell J for the Court) (Minn, 1891); *Purcell v St Paul City Railway Co*, 50 NW 1034,



physiology of nervous shock was judicially recognised in numerous cases,<sup>591</sup> and learned authors affirmed that in successful nervous shock cases, the plaintiffs were complaining of a bodily injury.<sup>592</sup> Admittedly, there are American decisions going the other way,<sup>593</sup> yet by the time of *Warsaw* these cases were considered ‘not fairly to be regarded as authority’.<sup>594</sup>

*Sloane v Southern California Railway Co*,<sup>595</sup> wherein the issue presented was ‘whether the ... nervous disturbance of the plaintiff was a suffering of the body or the mind’,<sup>596</sup> offered significant commentary on the somatic–psychic distinction. The Court stated that ‘nervous shock ... is distinct from mental anguish, and *falls*

1034 (Gilfillan CJ for the Court) (Minn, 1892) (*‘Purcell’*); *Yoakum v Kroeger*, 27 SW 953, 954 (Fly J for the Court) (Tex Ct Civ App, 1894); *Warren v Boston & Maine Railroad Co*, 40 NE 895, 896 (Field CJ for the Court) (Mass, 1895); *Gulf, Colorado & Santa Fe Railway Co v Hayter*, 54 SW 944, 945 (Gaines CJ for the Court) (Tex, 1900) (*‘Hayter’*); *Watkins*, 42 SE 983, 985 (Cook J for the Court) (NC, 1902); *Stewart v Arkansas Southern Railroad Co*, 36 So 676, 677–8 (Breaux CJ for the Court) (Lo, 1904); *Engle v Simmons*, 41 So 1023, 1023–4 (Dowdell J, Haralson, Simpson and Denson JJ agreeing at 1024) (Ala, 1906); *Green v T A Shoemaker & Co*, 73 A 688, 691 (Pearce J for the Court) (Md, 1909) (*‘Green’*); *Salmi v Columbia & Nehalem River Railroad Co*, 146 P 819, 821 (Burnett J, Moore CJ, McBride and Benson JJ agreeing at 822) (Or, 1915); *Whitsel v Watts*, 159 P 401, 402 (Johnston CJ for the Court) (Kan, 1916); *Alabama Fuel & Iron Co v Baladoni*, 73 So 205, 207 (Evans J for the Court) (Ala Ct App, 1916) (*‘Baladoni’*); *Memphis Street Railway Company v Kantrovitz*, 194 SW 902, 902–3 (Green J for the Court) (Tenn, 1917); *Central of Georgia Railway Co v Kimber*, 101 So 827, 828 (Gardner J, Anderson CJ, Sayre and Miller JJ agreeing at 828) (Ala, 1924); *Kenney v Wong Len*, 128 A 343, 347 (Allen J for the Court) (NH, 1925); *Hanford v Omaha & Council Bluffs Street Railway Co*, 203 NW 643, 650 (Redick J for the Court) (Neb, 1925); *Clemm v Atchison Topeka & Santa Fe Railway Co*, 268 P 103, 106 (Harvey J, Burch J agreeing at 106) (Kan, 1928); *Sundquist v Madison Railways Co*, 221 NW 392, 393 (Stevens J for the Court) (Wis, 1928). See also *Canning v Inhabitants of Williamstown*, 55 Mass 451, 452 (Metcalf J for the Court) (1848); Throckmorton (n 526) 275; John E Hallen, ‘Damages for Physical Injuries Resulting from Fright or Shock’ (1933) 19(3) *Virginia Law Review* 253, 255; Calvert Magruder, ‘Mental and Emotional Disturbance in the Law of Torts’ (1936) 49(7) *Harvard Law Review* 1033, 1033–4. Cf *Spade v Lynn & Boston Railroad Co*, 47 NE 88, 89 (Allen J for the Court) (Mass, 1897) (*‘Spade’*).

591 See, eg, *Seeger v Town of Barkhamsted*, 22 Conn 290, 298 (Storrs J for the Court) (1853); *East Tennessee, Virginia & Georgia Railroad Co v Lockhart*, 79 Ala 315, 318–19 (Clopton J for the Court) (1885); *Hill*, 13 SW 59, 59 (Gaines J for the Court) (Tex, 1890); *Purcell*, 50 NW 1034, 1035 (Gilfillan CJ for the Court) (Minn, 1892); *Mitchell*, 30 Abb N Cas 362, 371–2 (Rumsey J) (NY, 1893); *Washington & Georgetown Railroad Co v Dashiell*, 7 App DC 507, 514–15 (Alvey CJ for the Court) (1896); *Hayter*, 54 SW 944, 945 (Gaines CJ for the Court) (Tex, 1900). See also *Razzo v Varni*, 22 P 848, 849 (Thornton J, Beatty CJ, McFarland, Works and Sharpstein JJ agreeing at 849) (Cal, 1889); *Kline v Kline*, 64 NE 9, 10 (Gillett J for the Court) (Ind, 1902). Cf *Braun*, 51 NE 657, 664 (Phillips J for the Court) (Ill, 1898).

592 Magruder (n 590) 1033–4.

593 See, eg, *Lehman v Brooklyn City Railroad Co*, 47 Hun 355 (NY, 1888); *Ewing v Pittsburgh, Cincinnati, Chicago & St Louis Railway Co*, 23 A 340, 341 (Pa, 1892); *Haile’s Curator v Texas & Pennsylvania Railway Co*, 60 F 557, 559–60 (Toulmin J for the Court) (5<sup>th</sup> Cir, 1894); *Spade*, 47 NE 88, 89 (Allen J for the Court) (Mass, 1897); *Mahoney v Dankwart*, 79 NW 134, 136 (Waterman J for the Court) (Iowa, 1899); *Smith v Postal Telegraph Cable Co*, 55 NE 380, 380 (Holmes CJ for the Court) (Mass, 1899); *Ward v West Jersey & Seashore Railroad Co*, 47 A 561, 561 (Gummere J) (NJ, 1900); *Sanderson v Northern Pacific Railway Co*, 92 NW 542, 544 (Start CJ for the Court) (Minn, 1902); *Huston v Borough of Freemansburg*, 61 A 1022, 1023 (Mitchell CJ for the Court) (Pa, 1905) (*‘Huston’*); *Corcoran v Postal Telegraph-Cable Co*, 142 P 29, 31–2 (Parker J, Crow CJ, Mount, Morris and Fullerton JJ agreeing at 35) (Wash, 1914). Cf *Driscoll v Gaffey*, 92 NE 1010 (Mass, 1910); *Kisiel v Holyoke Street Railway*, 132 NE 622 (Mass, 1921).

594 *Chiuchiolo v New England Wholesale Tailors*, 150 A 540, 543 (Allen J for the Court) (NH, 1930) (*‘Chiuchiolo’*).

595 44 P 320 (Cal, 1896).

596 *Ibid* 322.

within the physiological, rather than the psychological, branch of the human organism',<sup>597</sup> and accordingly held that such shock 'must be regarded as an injury to the body rather than to the mind'.<sup>598</sup> The Court approved the decision in *Bell*, expressing the latter's ratio to be that 'nervous shock [i]s to be considered as a bodily injury',<sup>599</sup> a proposition supported by abundant further pre-*Warsaw* authority in the United States of America.<sup>600</sup>

*Hickey v Welch*,<sup>601</sup> another nervous shock case (albeit one involving conduct that could be classified as intentional, and more than merely negligent), explicitly recognised psychiatric injuries as physical. Cautioning against 'false pathology',<sup>602</sup> the Court accepted that human emotions are the result of minute physical changes in the nervous system, and accordingly stated that nervous shock 'is as much due to physical injury as that which results from an open wound'.<sup>603</sup> The Court's emphatic conclusion was that nervous injuries, 'like all others, have their origin in a physical lesion, not a metaphysical state',<sup>604</sup> and in the result the Court held that the plaintiff's 'nervousness' was 'unquestionably a physical injury'.<sup>605</sup>

From the start, judicial criticism of *Coultas* and support for permitting recovery for psychiatric injury under domestic law was matched by a chorus of 'almost unanimous opinion' among learned authors,<sup>606</sup> who, on the basis of medical knowledge current by the time of *Warsaw*, affirmed the physical nature of nervous shock as *bodily*, rather than mental, injury.<sup>607</sup> As one such author stated, the 'fallacy' of *Coultas* and its offspring 'lay in supposing that "bodily" or "physical" injury must exclude "mental" injury'.<sup>608</sup>

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597 Ibid (Harrison J, Van Fleet and Garoutte JJ agreeing at 325) (emphasis added).

598 Ibid.

599 Ibid 323.

600 See, eg, *Mack*, 29 SE 905, 909–10 (Gary J for the Court) (SC, 1898); *Watson v Dilts*, 89 NW 1068, 1069 (Sherwin J for the Court) (Iowa, 1902); *Kimberly*, 55 SE 778, 780–1 (Brown J for the Court) (NC, 1906); *O'Meara v Russell*, 156 P 550, 552 (Mount J, Morris CJ, Chadwick, Ellis and Fullerton JJ agreeing at 553) (Wash, 1916); *Lindley v Knowlton*, 176 P 440, 440–1 (Melvin J, Wilbur and Lorigan JJ agreeing at 441) (Cal, 1918), affd *Dryden v Continental Baking Co*, 11 Cal 2d 33, 40 (Waste CJ, Shenk, Houser, Seawell, Curtis and Langdon JJ agreeing at 40) (1938).

601 91 Mo App 4 (St Louis Ct App, 1901).

602 Ibid 10 (Goode J for the Court). Cf above n 568 and accompanying text.

603 *Hickey*, 91 Mo App 4, 10 (Goode J for the Court) (St Louis Ct App, 1901).

604 Ibid (emphasis added).

605 Ibid 12–13.

606 Hallen (n 590) 254. See also, eg, Francis H Bohlen, 'Right To Recover for Injury Resulting from Negligence without Impact' (1902) 50(3) *American Law Register* 141, 173; Ainslie (n 550) 242–4; WH Clifton, 'Action for Mental Suffering Unaccompanied by Physical Injury' (1903) 57 *Central Law Journal* 44, 47–8; Francis M Burdick, 'Tort Liability for Mental Disturbance and Nervous Shock' (1905) 5(3) *Columbia Law Review* 179, 186–7; Albertsworth (n 589) 487–8; Lyman P Wilson, 'The New York Rule as to Nervous Shock' (1926) 11(4) *Cornell Law Quarterly* 512, 512–13, 516–18.

607 See, eg, Throckmorton (n 526) 267–8, 277; JFD Meighen, 'May Damages Be Recovered for Physical Injuries Resulting from Fright Caused by Defendant's Wrongful Acts' (1901) 52 *Central Law Journal* 339, 343–4; McGregor (n 538) 516–17; Percy Henry Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell, Ltd, 1937) 86, cited approvingly in *Chester* (1939) 62 CLR 1, 47–8 (Evatt J).

608 Winfield (n 607) 86.

(ii) *Post-Warsaw*

An exhaustive treatment of common law jurisdictions' approaches to nervous shock exceeds the scope of this article; yet, briefly stated, more modern case law generally demonstrates courts' progress towards favouring recovery for psychiatric injury,<sup>609</sup> and regarding such injury as bodily injury.<sup>610</sup>

Regrettably, early Australian decisions denied recovery for wrongly inflicted psychiatric injury established by evidence,<sup>611</sup> displaying regressive and unmedical reasoning influenced by floodgates fears.<sup>612</sup> Evatt J's enlightened dissent in *Chester v Waverley Corporation*<sup>613</sup> stands apart.<sup>614</sup> Alluding to advances in medical knowledge, including that "shock to the nerves" is another name for actual physical disturbance to the nervous system,<sup>615</sup> his Honour stated: 'It [is] always a question of fact whether shock to the nerves causes "actual physical injury." Today it is known that it does'.<sup>616</sup>

English decisions were swifter to recognise the actionability of negligently inflicted psychiatric injury.<sup>617</sup> In the important case of *Hay or Bourhill v Young*,<sup>618</sup> Lord Macmillan, exulting that crude views conditioning recovery for physical injury upon external impact had been discarded,<sup>619</sup> stated: 'The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system'.<sup>620</sup> Lord Wright for his part remarked that modern medical science might show that 'nervous shock' was not necessarily to be associated with any particular mental ideas.<sup>621</sup>

By 1944, it could be said that negligently inflicted psychiatric injury was established in Australia, as in England, as independently and directly actionable at common law,<sup>622</sup> a position subsequent decisions throughout the second half of

609 See *Pusey* (1970) 125 CLR 383, 403 (Windeyer J); *Jaensch* (1984) 155 CLR 549, 552 (Gibbs CJ).

610 *Kotsambasis* (1997) 42 NSWLR 110, 112 (Meagher JA); *Plourde* [2007] QCCA 739 (28 May 2007) [56] (Thibault JA, Chamberland and Giroux JJA agreeing at [3]).

611 See, eg, *Bunyan v Jordan* (1937) 57 CLR 1, 14 (Latham CJ), 15 (Rich J), 16 (Dixon J).

612 See, eg, *Chester* (1939) 62 CLR 1, 7–8 (Latham CJ), 11 (Rich J). Deane J referred to such fears critically in *Jaensch* (1984) 155 CLR 549 at 590, 593. See also below Part III(C).

613 (1939) 62 CLR 1.

614 *Ibid* 14–48, cited approvingly in *Bourhill* [1943] AC 92, 110 (Lord Wright); *Horne* [1954] 1 DLR 832,

843 (MacQuarrie J); *Pollard* (1958) 16 DLR (2d) 225, 229 (Johnson JA); *McLoughlin* [1983] 1 AC

410, 422 (Lord Wilberforce); *Jaensch* (1984) 155 CLR 549, 590 (Deane J). See also generally Barbara

McDonald, 'Justice Evatt and the Lost Child in *Chester v Waverley Corporation* (1939)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 58–9.

615 *Chester* (1939) 62 CLR 1, 47.

616 *Ibid*.

617 See, eg, *Owens* [1939] 1 KB 394, 401 (MacKinnon LJ); *Bourhill* [1943] AC 92, 98 (Lord Thankerton), 103 (Lord MacMillan), 108–9 (Lord Wright), 113 (Lord Porter).

618 [1943] AC 92.

619 *Ibid* 103.

620 *Ibid* 103. For literature from the first half of the 20<sup>th</sup> century, see generally H Flanders Dunbar, *Emotions and Bodily Changes: A Survey of Literature on Psychosomatic Interrelationships, 1910–1953* (Columbia University Press, 4<sup>th</sup> ed, 1954).

621 *Bourhill* [1943] AC 92, 112.

622 *Scala v Mammolitti* (1965) 114 CLR 153, 158–9 (Taylor J, Barwick CJ agreeing at 155, Windeyer J agreeing at 162), considering *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4(1). Cf *Magnus* (1998) 87 FCR 301, 339, 342 (Sackville J).

the 20<sup>th</sup> century confirmed.<sup>623</sup> Numerous Australian and English judges questioned the legal and scientific basis of the somatic–psychic distinction and characterised restrictions on recovery for psychiatric injury as essentially policy-based rather than principled.<sup>624</sup> In *Page v Smith*,<sup>625</sup> for example, Lord Browne-Wilkinson, referring to informed medical opinion,<sup>626</sup> suggested there was ‘a much closer relationship between physical and mental processes than had previously been thought’,<sup>627</sup> while Lord Lloyd warned against distinctions ‘between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded’.<sup>628</sup> Given such jurisprudence, Australia’s delegate to the Montreal Conference stated that ‘Australian courts were quite prepared to recognise and compensate mental injury as a type of bodily injury’.<sup>629</sup>

*Vanoni v Western Airlines*<sup>630</sup> illustrates neatly the unreality of the somatic–psychic distinction in the context of civil aviation law. In that case, passengers on a domestic American flight (admittedly not governed by *Warsaw*), fearing their aircraft was about to crash,<sup>631</sup> alleged they suffered ‘severe shock to [their] nerves’<sup>632</sup> and contended that such was ‘physical injury – something more than emotional or mental suffering’.<sup>633</sup> Following earlier decisions,<sup>634</sup> the Court held that nervous disturbances ‘are classified as physical injuries’.<sup>635</sup>

The recent American decision in *Allen v Bloomfield Hills School District*<sup>636</sup> likewise displays an informed modern approach to bodily injury. There the plaintiff, Allen, claimed under no-fault compensation legislation for PTSD suffered due to an accident.<sup>637</sup> The defendant authority denied that Allen suffered any bodily injury,<sup>638</sup> as required by the relevant statute.<sup>639</sup> Resolving to review the evidence

623 See, eg, *Storm* [1965] Tas SR 252, 270 (Burbury CJ); *Pusey* (1970) 125 CLR 383, 390 (Barwick CJ), 391–2 (McTiernan J), 392–3 (Menzies J), 402 (Windeyer J). See also *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 572 (Dixon CJ). Cf *McLoughlin* [1983] 1 AC 410, 417, 423 (Lord Wilberforce).

624 See, eg, *King v Phillips* [1953] 1 QB 429, 437 (Singleton LJ); *Pusey* (1970) 125 CLR 383, 407 (Windeyer J); *Benson* [1972] VR 879, 881 (Lush J); *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, 503 (Kirby P) (‘*Mackay*’); *Page* [1996] 1 AC 155, 183 (Lord Browne-Wilkinson), 187, 190 (Lord Lloyd of Berwick). See also *Anderson v Liddy* (1949) 49 SR (NSW) 320, 322 (Jordan CJ).

625 [1996] 1 AC 155.

626 *Ibid* 182.

627 *Ibid*.

628 *Ibid* 188.

629 *Montreal Minutes* (n 30) 76.

630 247 Cal App 2d 793 (Ct App, 1967) (‘*Vanoni*’).

631 *Ibid* 794.

632 *Ibid* 796.

633 *Ibid*.

634 *Espinosa v Beverly Hospital*, 249 P 2d 843, 844–5 (Moore PJ, McComb and Fox JJ agreeing at 846) (Cal Ct App, 1952); *Di Mare v Cresci*, 373 P 2d 860, 865 (Gibson CJ, Traynor, Peters and White JJ agreeing at 866) (Cal, 1962).

635 *Vanoni*, 247 Cal App 2d 793, 797 (Elkington J, Molinari PJ and Sims J agreeing at 797) (Ct App, 1967).

636 760 NW 2d 811 (Mich Ct App, 2008). See also above nn 403–7 and accompanying text.

637 *Ibid* 812.

638 *Ibid*.

639 Mich Comp Laws § 691.1405.

‘with cognizance of modern medical science and the human body’,<sup>640</sup> the majority of the Court accepted on appeal that Allen had presented ‘objective evidence that a mental ... trauma can indeed result in physical changes to the brain’,<sup>641</sup> including neuroimaging which ‘demonstrated “decreases in frontal and subcortical activity consistent with depression and post traumatic stress disorder”’<sup>642</sup> as well as pronounced brain abnormalities.<sup>643</sup> The majority concluded that, if believed, ‘this evidence would establish a “bodily injury”’<sup>644</sup> and remanded the matter to trial.<sup>645</sup> The majority’s closing remarks provide a lodestar for all bodily injury cases: ‘[A]s a matter of medicine and law, there should be no difference [in respect of] an objectively demonstrated brain injury ... *A brain injury is a “bodily injury”*’.<sup>646</sup>

Common law jurisdictions’ approaches to criminal,<sup>647</sup> workers’ compensation<sup>648</sup> and insurance law<sup>649</sup> exhibit a similar understanding. The arc of municipal authority thus overwhelmingly favours treating psychiatric injury as bodily injury where evidence supports its physicality, and should leave courts wary today of letting the law, in any context, limp behind medical knowledge<sup>650</sup> or ‘imprison the legal cause of action for psychiatric injury in an outmoded scientific view about [its] nature’.<sup>651</sup>

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640 *Allen*, 760 NW 2d 811, 815 (Markey J, Servitto PJ agreeing at 817) (Mich Ct App, 2008).

641 *Ibid.*

642 *Ibid.*

643 *Ibid* 815–16.

644 *Ibid* 812.

645 *Ibid* 817.

646 *Ibid* 816 (emphasis added).

647 See especially *R v Miller* [1954] 2 QB 282, 292 (Lynskey J); *Chan-Fook* [1994] 1 WLR 689, 694–6 (Hobhouse LJ for the Court); *R v Ireland* [1998] AC 147, 159 (Lord Steyn, Lord Goff of Chieveley agreeing at 152, Lord Slynn of Hadley agreeing at 152, Lord Hope of Craighead agreeing at 163, Lord Hutton agreeing at 167), considering *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, s 47; 18 USC § 1365(h)(4)(D) (2002); Francis Shen, ‘Mind, Body and the Criminal Law’ (2013) 97(6) *Minnesota Law Review* 2036, 2038. Cf *Washington v Van Woerden*, 967 P 2d 14, 16, 19 (Armstrong J, Seinfeld J and Bridgewater ACJ agreeing at 19) (Wash Ct App, 1998).

648 See especially *Yates* [1910] 2 KB 538, 540 (Cozens-Hardy MR, Farwell LJ agreeing at 542, Kennedy LJ agreeing at 542), 542 (Farwell LJ), 542–3 (Kennedy LJ); *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd’s List LR 271, 275 (Donovan J), considering *Shipbuilding Regulations 1931* r 36 pursuant to the *Factories Act 1937*, 1 Edw 8 & 1 Geo 6, c 67, s 60; *Lexington-Fayette Urban County Government v West*, 52 SW 3d 564, 566 (Ky, 2001); *Richard E Jacobs Group Inc v White*, 202 SW 3d 24, 27 (Ky, 2006), cited in James M Inman, ‘Where Are You Hurt? Kentucky Redefines Worker’s Compensation Injury in a Post-Traumatic Stress Disorder World’ (2007) 96(3) *Kentucky Law Journal* 465, 469 ff.

649 See especially *Boyle v Nominal Defendant* [1959] SR (NSW) 413, 417 (Street CJ), 418 (Owen J), 420 (Herron J), considering ‘bodily injury’ in *Motor Vehicles (Third Party Insurance) Act 1942–1951* (NSW) s 30(1) as then in force, cited in *Kotsambasis* (1997) 42 NSWLR 110, 112 (Meagher JA); *Lipsky v State Farm Mutual Automobile Insurance Co*, 41 A 3d 1288 (Pa, 2012). See also *Bester* [1973] 1 SA 769, 779, 782 (Botha JA, Ogilvie Thompson CJ, Holmes, Jansen and Trollip JJA agreeing at 782), considering ‘bodily injury’ in *Motor Vehicle Insurance Act 1942* (South Africa) s 11(1): ‘the brain and nervous system form part of the human body and therefore a psychiatric injury constitutes a “bodily injury”’. See also Shen (n 647) 2038.

650 See *Pusey* (1970) 125 CLR 383, 395 (Windeyer J); *Page* [1996] 1 AC 155, 187 (Lord Lloyd of Berwick).

651 *Mackay* (1989) 15 NSWLR 501, 503 (Kirby P).

### C Assuaging Policy Concerns

This article could not conclude without briefly noting that policy considerations – specifically, floodgates reasoning and a reluctance to burden airlines unduly – cannot weigh against including psychiatric injury within the meaning of ‘bodily injury’ in article 17(1).<sup>652</sup> Floodgates reasoning, grounded in fears of a deluge of litigation,<sup>653</sup> formed a chief basis on which recovery for nervous shock was rejected in *Coultas*,<sup>654</sup> and is resonant in the Court’s reasoning in *Floyd*.<sup>655</sup> Although historically raised in the context of psychiatric injury claims,<sup>656</sup> it has consistently been doubted and dismantled both ante-<sup>657</sup> and post-*Warsaw*,<sup>658</sup> and was considered questionable legal policy by many jurisdictions by the advent of *Montreal*.<sup>659</sup>

Admittedly, PTSD may, if regarded as bodily injury, expand air carriers’ exposure to civil liability,<sup>660</sup> yet fears of unduly burdening carriers through exposing them to indeterminate liability or increased litigation should not materialise, provided recovery is restricted, to quote a leading Australian judgment, to ‘those disorders which are capable of *objective determination*’.<sup>661</sup> Such a ‘control mechanism’ is readily applicable to article 17(1) claims: as the Court in *Weaver* observed, ‘no floodgates of litigation will be opened by allowing for claims ... which are based on a *definite diagnosis* of a disorder that arises from a *physical injury* that is *medically verifiable*’.<sup>662</sup>

652 Cf *Morris* [2002] 2 AC 628, 667 (Lord Hope of Craighead).

653 See, eg, *Brown* 1922 SC 527, 531 (Lord Salvesen).

654 *Coultas* (1888) 13 App Cas 222, 226 (Sir Richard Couch for the Board).

655 See *Floyd*, 499 US 530, 543, 546 (Marshall J for the Court) (1991).

656 See, eg, *Huston*, 61 A 1022, 1023 (Mitchell CJ for the Court) (Pa, 1905). See also Hallen (n 590) 253–4; Bohlen (n 606) 146.

657 *Dulieu* [1901] 2 KB 669, 678, 681 (Kennedy J); *Homans v Boston Elevated Railway Co*, 62 NE 737, 737 (Holmes CJ for the Court) (Mass, 1902); *Mitchell*, 30 Abb N Cas 362, 369 (Rumsey J) (NY, 1893); *Hayter*, 54 SW 944, 945 (Gaines CJ for the Court) (Tex, 1900). See also *Green*, 73 A 688, 692 (Pearce J for the Court) (Md, 1909); *Simone*, 66 A 202, 206 (Parkhurst J for the Court) (RI, 1907); *Chiuchiolo*, 150 A 540, 543 (Allen J for the Court) (NH, 1930); Meighen (n 607) 344; Wilson (n 606) 518; *Baladoni*, 73 So 205, 207–8 (Evans J for the Court) (Ala Ct App, 1916). Cf *Hayter*, 54 SW 944, 945 (Gaines CJ for the Court) (Tex, 1900).

658 See, eg, *Bourhill* [1943] AC 92, 110 (Lord Wright); *Dillon v Legg*, 441 P 2d 912, 917 n 3 (Tobriner J, Peters, Mosk and Sullivan JJ agreeing at 925) (Cal, 1968); *Attia* [1988] 1 QB 304, 312 (Dillon LJ). See also *Jaensch* (1984) 155 CLR 549, 571 (Brennan J); *Stephenson* (2017) 327 FLR 110, 199 (Leeming JA); AL Goodhart, ‘The Shock Cases and Area of Risk’ (1953) 16(1) *Modern Law Review* 14, 23–4, cited approvingly in *Storm* [1965] Tas SR 252, 263 (Burbury CJ); *Jaensch* (1984) 155 CLR 549, 592 (Deane J).

659 See, eg, *McLoughlin* [1983] 1 AC 410, 425 (Lord Edmund-Davies), 429 (Lord Russell of Killowen), 442–3 (Lord Bridge of Harwich), citing [1981] QB 599, 612 (Stephenson LJ); *van Soest* [2000] 1 NZLR 179, 197 (Blanchard J for Gault, Henry, Keith and Blanchard JJ). See also *Page* [1996] 1 AC 155, 190 (Lord Lloyd of Berwick); *Saadati* [2017] 1 SCR 543, 560 (Brown J for the Court).

660 Defossez (n 266) 116.

661 See *Tame* (2002) 211 CLR 317, 382 (Gummow and Kirby JJ) (emphasis added). Cf *Ultramares Corporation v Touche*, 174 NE 441, 444 (Cardozo CJ, Pound, Crane, Lehman, Kellogg, O’Brien and Hubbs JJ agreeing at 450) (NY, 1932); *Allen*, 760 NW 2d 811, 816 (Markey J, Servitto PJ agreeing at 817) (Mich Ct App, 2008).

662 *Weaver* 56 F Supp 2d 1190, 1192 (Shanstrom CJ) (D Mont, 1999) (emphasis added).

#### IV CONCLUSION

If ‘scorn of the law is more widespread among psychiatrists than anatomists’ even today,<sup>663</sup> the chronic dualism infecting judicial interpretations of ‘bodily injury’ in *Warsaw* and *Montreal* must bear part of the blame. This article, affirming the law’s need to keep pace with medical science,<sup>664</sup> has identified dualist and physicalist authorities interpreting ‘bodily injury’ in the Conventions, and diagnosed in *Casey* a new regression denying the physical nature of neurochemical alterations in the brain, inconsistent with both prior jurisprudence and established medical opinion. Focusing on PTSD, it has explained the current neuroscientific understanding of psychiatric injury’s bodily nature, and submitted that neuroimaging technologies may provide the evidence to prove this in particular cases. Most fundamentally, this article has affirmed *Montreal*’s modernising purpose, arguing that the new Convention permits recovery for pure psychiatric injury as ‘bodily injury’ on the basis of that term’s ordinary meaning across authentic texts, *Montreal*’s *travaux préparatoires*, and municipal jurisprudence intended to shape article 17(1)’s interpretation.

The law, language and science of bodily injury together signal the way for national courts to follow as they navigate psychiatric injury claims under *Montreal*. That way, it is submitted, should lead clearly to passenger recovery.

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663 Sir Owen Dixon, *Jesting Pilate* (The Law Book Co of Australasia Pty Ltd, 1965) 18, quoted in *Jaensch* (1984) 155 CLR 549, 565 (Brennan J).

664 See *Jaensch* (1984) 155 CLR 549, 555 (Gibbs CJ).