

**ALAANZ DEBATE:  
EXPANSION OF THE 'BODILY  
INJURY CONCEPT' TO  
INCLUDE PSYCHIATRIC  
INJURIES?**

# *Pel-Air Aviation Pty Ltd v Casey* [2017] 93 NSWLR 438 per Macfarlan JA (Ward and Gleeson JJA agreeing)

[46] 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. This conclusion is consistent with this Court’s decisions in *Kotsambasis* and *American Airlines* .... It is also compatible even with the narrower view adopted by Lord Hope (with whom Lords Mackay and Steyn agreed) in [*King v Bristow*] .... Likewise it does not conflict with the American cases to which I have referred, although the suggestion in some of those cases that a “bodily injury” must be “palpable, conspicuous physical injury” ...

## *Pel-Air Aviation Pty Ltd v Casey (cont'd)*

[47] As will be apparent from my references above ...to the medical evidence in the present case, there was no proof here that Ms Casey's PTSD resulted from actual physical damage to her brain. However **the more difficult question that arises is whether the biochemical changes in her brain, of which there is evidence in the present case ... constitute "bodily injuries". My conclusion is that they do not.**

...

## *Pel-Air Aviation Pty Ltd v Casey (cont'd)*

[51] Consistent with these case authorities, I consider 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 compelling medical evidence to the contrary, such malfunctioning or chemical changes cannot fairly be described as “injuries” to the body. Moreover, **importance must be attached to the adjective “bodily” as a limiting word. It clearly draws a distinction between bodily and mental injuries: mental injuries are covered only if they are a manifestation of physical injuries, or if they result from physical injuries (including physical injuries to the brain).**

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# Aviation Legislation Amendment (Liability and Insurance) Bill 2012 – Commonwealth Parliament Bill Digest Commentary:

In Australia, the Federal Court has interpreted the term ‘personal injury’ to include claims for purely mental injuries: *South Pacific Air Motive and Anor v Magnus & Ors* (1998) 157 ALR 443. The issue that arises is whether the proposed amendment to refer to ‘bodily injury’, rather than ‘personal injury’, will operate so that passengers who are injured as a result of domestic aircraft accidents will be limited to claiming in respect of only physical injuries: Section 28 of the *Carriers’ Liability Act*. Much will depend on the Australian courts’ interpretation of the term ‘bodily injury’.

The Discussion Paper states that:

This change would still allow for the compensation of mental injuries in many instances, and there have been many cases where mental injuries have been compensated by Courts applying the ‘bodily injury test’ under the Warsaw/Montreal system.

It is recognised that deleting the reference to ‘personal injury’ and substituting ‘bodily injury’ will not remove all uncertainty in relation to this issue. This is because there remains ongoing legal conjecture as to how ‘bodily injury’ should be interpreted. However, limiting carriers’ liability under the domestic system to ‘bodily injury’ will ensure that the issue is treated consistently across the domestic and international frameworks and remove unnecessary complexity from the overall liability structure:

Department of Infrastructure, *Review of Carriers’ Liability and Insurance*, Discussion paper, op.cit., p.26.

The Explanatory Memorandum to the Bill reinforces this approach:

The Bill will limit carriers' liability under the domestic system to 'bodily injury' with the intention of ensuring that this issue is treated consistently across domestic and international frameworks: Explanatory Memorandum, Aviation Legislation Amendment (Liability and Insurance) Bill 2012, op. cit., p.2.

It would appear that the courts in the United States and the United Kingdom have interpreted the term 'bodily injury' to include claims for mental injuries in some circumstances where physical injuries have also been incurred.