

Anonymised version

Translation

C-111/21 – 1

Case C-111/21

Request for a preliminary ruling

Date lodged:

25 February 2021

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

28 January 2021

Applicant and appellant on a point of law:

BT

Defendant and respondent in the appeal on a point of law:

Laudamotion GmbH

REPUBLIC OF AUSTRIA

[...]

OBERSTER GERICHTSHOF (SUPREME COURT, AUSTRIA)

The Supreme Court, sitting as the court ruling on appeals on points of law [...], in the case between the applicant BT, Vienna [...], [...] against the defendant Laudamotion GmbH, Schwechat, [...] concerning EUR 6 953.60 plus interest and costs and a declaratory judgment (value in dispute: EUR 5 000), in proceedings concerning the appeal on a point of law lodged by the applicant against the judgment of the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), sitting as the court ruling on appeals on the merits, of 7 April 2020, [...], by which the judgment by default of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 12 November 2019 [...] was varied, [...] made the following

Order:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

1. Does the psychological impairment of a passenger, which is caused by an accident and has clinical significance, constitute a ‘bodily injury’ within the meaning of Article 17(1) of the *Convention for the Unification of Certain Rules for International Carriage by Air concluded on 28 May 1999 in Montreal, signed on 9 December 1999 by the European Community and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001*?

2. If Question 1 is answered in the negative:

Does Article 29 of that convention preclude a claim for compensation which would exist under the applicable national law?

[...]

Grounds:

[1] 1. Facts underlying the decision to be given:

[2] On 1 March 2019, the applicant embarked on a journey from London to Vienna on an aircraft operated by the defendant. The left engine exploded during take-off, causing the aircraft to be evacuated. The applicant disembarked via the emergency exit on the right wing. The right engine was still moving and the jet blast hurled the applicant several metres through the air. Since then, she has suffered from sleep and concentration disorders, mood swings, sudden episodes of crying, severe fatigue and stuttering. The **[Or. 3]** applicant was diagnosed with post-traumatic stress disorder and is therefore receiving medical treatment.

[3] 2. Arguments of the parties and forms of order sought:

[4] The applicant seeks compensation for the treatment costs that she has incurred in the amount of EUR 4 353.60 and compensation for pain and suffering in the amount of EUR 2 500. She also seeks a declaration that the defendant will be liable for any future damage. She initially took the view that the defendant’s liability arose directly from Article 17(1) of the Montreal Convention (‘the MC’). In any case, the defendant was liable under the additionally applicable Austrian law.

[5] The defendant takes the view that Article 17(1) of the MC covers only bodily injuries in the strict sense, but not purely psychological impairments. It submits that recourse to national law is precluded under Article 29 of the MC; national law is superseded by the MC.

- [6] 3. Procedural background:
- [7] [...] [proceedings before the court of first instance]
- [8] The court of first instance granted the form of order sought [...]. It held that although Article 17(1) of the MC was not applicable, because that provision only provides for liability for bodily injury, the defendant is liable under Austrian law, which also provides for compensation in the case of purely psychological damage if – as is the case here – it has clinical significance. **[Or. 4]**
- [9] The defendant lodged an appeal against that decision. [...]
- [10] The appellate court dismissed the forms of order sought. It shared the view taken by the court of first instance that Article 17(1) of the MC does not cover purely psychological impairments. It stated that the question therefore arises as to whether the applicant can base her claim on Austrian law, which is applicable according to the conflict-of-laws rules. Austrian law also provides for a claim for compensation in cases of purely psychological impairment if it has clinical significance, that is to say, if it requires medical treatment or can at least be diagnosed. Pursuant to Article 29 of the MC, however, Austrian law is superseded by the provisions of that convention. In the case of personal injuries, Article 17(1) of the MC provides for entitlement to compensation only in the case of bodily injuries in the strict sense. That provision is conclusive; recourse to national law is not permissible.
- [11] The Supreme Court is required to rule on the applicant's appeal on a point of law against that judgment. She takes the view that the 'superseding solution' (*Verdrängungslösung*) underlying that judgment is not correct. Rather, the 'umbrella solution' (*Rahmenlösung*) should be followed. According to that solution, claims under national law can exist alongside those under the convention; they are merely subject to its conditions and limits of liability. By virtue of the appeal on a point of law, the Supreme Court is required to review the correctness of the contested decision in all aspects. It must therefore also clarify whether Article 17(1) of the MC does in fact **[Or. 5]** provide that no compensation is payable in the case of purely psychological impairments.
- [12] 4. Legal basis:
- [13] 4.1. The defendant's liability must be assessed in accordance with the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention; 'the MC'). The application of that convention results from the fact that the flight's place of departure and place of destination were located in different States Parties (United Kingdom, Austria), thus establishing international carriage within the meaning of Article 1 of the MC.

[14] 4.2. The Montreal Convention was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001. It (therefore) forms an integral part of the EU legal order, with the result that the Court of Justice of the European Union has jurisdiction to give a preliminary ruling concerning its interpretation [...].

[15] 4.3. The interpretation of the following provisions of the Montreal Convention is in dispute:

Article 17(1) of the MC:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 29 of the MC:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this [Or. 6] Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages are not to be recoverable.

[16] 4.4. Under Austrian law, the injuring party is also liable for the consequences of purely psychological impairments if they have clinical significance, that is to say, require treatment, provided that the other conditions are met [...]. This applies in particular to post-traumatic stress disorder that requires treatment [...]. In such cases, the injuring party must compensate, in accordance with general principles, both the material damage (in particular, the treatment costs) and the non-material damage, by paying appropriate compensation for pain and suffering.

[17] 5. The first question referred:

[18] 5.1. Article 17(1) of the MC provides for liability for damage sustained in case of death or bodily injury (*‘körperlich verletzt’* in the German version) of a passenger. This ‘bodily injury’ is referred to as *‘lésion corporelle’* and *‘lesión corporal’* in the other authentic language versions of the convention (that are accessible to the referring court). Question 1 seeks to ascertain whether that term also covers psychological impairments that have clinical significance but are not the consequence of an injury to the body in the strict sense.

[19] 5.2. To the extent relevant in the present case, Article 17(1) of the MC is, in essence, the same as Article 17 of the *Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air* ('the WA'). [Or. 7]

[20] (a) This does not follow from the (non-authentic) German version of Article 17 of the WA, which reads as follows:

'Der Luftfrachtführer hat den Schaden zu ersetzen, der dadurch entsteht, dass ein Reisender getötet, körperlich verletzt oder sonst gesundheitlich geschädigt wird, wenn der Unfall, durch den der Schaden verursacht wurde, sich an Bord des Luftfahrzeugs oder beim Ein- oder Aussteigen ereignet hat.' [The carrier is liable for damage sustained in case of death, bodily injury or other damage to health of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.]

[21] The reference to 'damage to health' in the German language version suggests that Article 17 of the WA covered not only 'bodily injuries' in the strict sense but also other 'damage to health', which could also be understood to include purely psychological damage having clinical significance. On that basis, it is argued in the German-language legal literature that Article 17(1) of the MC, which refers only to bodily injuries, is worded significantly more narrowly, from which it must be concluded that purely psychological damage is not compensable [...].

[22] (b) However, that argument overlooks the fact that the authentic versions of Article 17 of the WA offer no indication that damage going beyond a 'bodily injury' (*'lésion corporelle'*, *'lesión corporal'*) could be compensable. Rather, that provision had referred to 'wounding' (*'blessure'*, *'herida'*) of the passenger as a further basis of liability. That concept was clearly narrower than the concept of 'bodily injury' (*'lésion corporelle'*, *'lesión corporal'*) and was therefore encompassed by it. It is not understandable why the non-authentic German version of Article 17 of the WA had dispensed with a translation of [Or. 8] 'wounding' and introduced the further concept of 'damage to health' in addition to that of 'bodily injury'.

[23] (c) Article 17(1) of the MC therefore differs from the authentic versions of Article 17 of the WA solely by virtue of the fact that the concept of 'wounding' has been omitted. However, this did not limit the scope of application of that provision. This is because the term 'wounding' was to be understood in Article 17 of the WA as a subset of 'bodily injury' and was therefore superfluous in reality; its omission therefore does not lead to any change in meaning. Therefore, contrary to the view expressed in the legal literature (section [a] above), a limitation of the scope of application of Article 17(1) of the MC can in no way be derived from a comparison of the

German language versions of Article 17 of the WA and Article 17(1) of the MC (for further information on the legislative history of Article 17(1) of the MC, see section 5.4. below).

[24] 5.3. Case-law from common-law jurisdictions and the prevailing view taken in the German-language academic literature militate in favour of a narrow interpretation.

[25] (a) Given that the wording is – as explained above – in essence unchanged, the interpretation of Article 17(1) of the MC can in principle be based on the case-law on Article 17 of the WA. That case-law, proceeding on the basis of the decision of the US Supreme Court in the *Eastern Airlines, Inc. v. Floyd* case of 17 January 1991 [...], assumes for the most part that the concept of ‘bodily injury’ does not encompass purely psychological damage – that is to say, that which is not the result of bodily injury in the strict sense [...] [Or. 9] [...]. This applies in particular to post-traumatic stress disorders that do not manifest themselves physically [...].

[26] (b) Although those decisions originate almost exclusively from common-law jurisdictions, the prevailing view taken in the German-language legal literature is also in line with them. That literature also proceeds on the assumption that purely psychological damage is not compensable under Article 17(1) of the MC [...]. The authors justify this primarily by pointing to the wording of the provision and its presumed restriction compared to Article 17 of the WA as a result of the omission of the term ‘damage to health’ (see, in this regard, section 5.2. above, however). By contrast, other authors take the view that liability for purely psychological impairments does exist if the national law provides for such liability [...].

[27] 5.4. The view that Article 17(1) of the MC does not cover purely psychological impairments is not convincing in any case.

[28] (a) This follows, first, from a closer consideration of the legislative history of Article 17(1) of the MC [...]: In the preliminary draft of the convention, it had been planned to include the term ‘mental injury’ in the [Or. 10] provision on liability. It is true that no agreement was reached on this in the diplomatic conference. However, it was stated in the conference that the expression ‘bodily injury’ was included in the convention

‘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 [...] [...]

[29] In actual fact, therefore, the conference left the question open; it was ultimately left to case-law to interpret the term ‘bodily injury’ [...]. The legislative history of the provision therefore does not preclude a broader

understanding of the concept of ‘bodily injury’. On the other hand, it cannot be deduced from the considerations of the diplomatic conference that that question would have to be assessed according to the (otherwise) applicable law [...]. As a matter of principle, uniform law is to be interpreted uniformly; there are no grounds for referring back to national law in cases of doubt.

[30] (b) It is also recognised with regard to Article 17(1) of the MC that psychological damage which also manifests itself physically can be compensable. It is not disputed that this is the case for physical consequential damage ([...] strokes, premature births or stomach ulcers due to post-traumatic stress disorder). In addition, however, it could also be argued that symptoms of the psychological damage which prove its clinical significance are sufficient as a physical manifestation, that [Or. 11] is to say, in this specific case, the application’s sleep and concentration disorders, sudden episodes of crying, severe fatigue and stuttering. According to that view, it is not the extent of the physical symptoms that is determinative, but the proof provided (also) by way of those symptoms that the alleged psychological impairment is not merely feigned, but actually exists and has clinical significance [...].

[31] (c) Another argument in favour of the broad interpretation is that, even in the case of (superficially) purely ‘psychological’ disorders, the metabolism of certain neurotransmitter systems is altered [...], that is to say, there are thus also – quite apart from the abovementioned symptoms – physical effects in the strict sense that were caused by the accident. This was demonstrated in respect of post-traumatic stress disorders in a recent study [...]. The distinction between physical damage in the strict sense and psychological impairments having clinical significance therefore loses any objective justification. This also militates in favour of Article 17(1) of the MC applying also in the case of psychological impairments having clinical significance (which do undoubtedly exist in this specific case).

[32] (d) Whether psychological damage is compensable should also not depend on whether it occurs on its own or as a consequence of bodily injury in the strict sense – even if only [Or. 12] minor – which has also led to physical pain [...]. The applicant did not allege the latter here, with the result that it must be assumed that she did not suffer any such injury. However, the referring court takes the view that the circumstance of whether she also suffered a (slight) bodily injury in the strict sense in the accident or whether she escaped unharmed in that respect due to a lucky coincidence cannot justify a viable distinction. What is decisive for her claim is the psychological consequences of the accident, which manifest themselves physically and the cause of which is attributable to the defendant.

5.5. On the basis of these considerations, the referring court leans towards a broad interpretation of Article 17(1) of the MC. (Objectified) psychological

disorders having clinical significance should also be considered as bodily injury within the meaning of Article 17(1) of the MC. The opposite view could undoubtedly also be justified, however. The Court of Justice of the European Union is therefore asked for clarification on this question.

[34] 6. The second question referred:

[35] 6.1. If Article 17(1) of the MC does not cover purely psychological impairments, the question arises as to whether a claim for compensation can be established under the applicable national law. The applicability of Austrian law is not in dispute between the parties; it results (in the absence of a choice of law as claimed by one of the parties) from Article 4(2) of the Rome II Regulation, read in conjunction with Article 23(1) thereof (habitual residence of both parties in Austria), or Article 5(2) of the Rome I Regulation (habitual residence of the applicant and place of destination in Austria), depending on the categorisation of the claim.

[36] 6.2. The claim would be justified under Austrian law. However, Article 29 of the MC provides that ‘in [Or. 13] the carriage of passengers, [...], any action for damages, however founded, [...] can only be brought subject to the conditions and such limits of liability as are set out in this Convention’. Two views on that provision are expressed in the German-language legal literature. According to the ‘superseding solution’ (*Verdrängungslösung*), Article 29 of the MC excludes, from the outset, claims for compensation based on other legal bases [...]; according to the ‘umbrella solution’ (*Rahmenlösung*), the bases of claims under the convention exist alongside those under national law; the latter are subject to the ‘conditions and [...] limits of liability’ of the convention, but are not excluded in principle [...].

[37] 6.3. If it is assumed that Article 17(1) of the MC comprehensively regulates liability for personal injury resulting from accidents during the operation of the aircraft, the ‘umbrella solution’ (*Rahmenlösung*) does not lead to the application of national law either (if Question 1 is answered in the negative). This is because, in that case, one of the ‘conditions’ for liability provided for in the convention, namely the existence of bodily injury in the strict sense, would not be met. National law could therefore be applied only if the convention were to be interpreted as not covering, from the outset, damage resulting from purely psychological impairments. This is clearly the view taken by the applicant. It is most likely also based on the argument that psychological disorders that have clinical significance are to be compensated if they are covered by the concept of ‘bodily injury’ under the applicable national law [Or. 14] [...].

[38] 6.4. That view, however, would have the disadvantage that the extent of liability for personal injuries caused by an accident within the meaning of Article 17(1) of the MC would depend on the content of the applicable national law. This would run counter to the purpose of the convention to

create a uniform liability framework. Moreover, the premiss that the convention does not cover purely psychological consequences of accidents from the outset is questionable. The reason for this is that – if Question 1 is answered in the negative – Article 17(1) of the MC could certainly be understood in such a way that personal injuries resulting from an accident are to be compensated only if they lead to death or bodily injury in the strict sense.

[39] 6.5. These considerations militate against allowing a claim under national law on compensation if Article 17(1) of the MC does not provide for such a claim. However, since a different interpretation of Article 29 of the MC is not entirely ruled out, the Court of Justice of the European Union is also asked to clarify this question.

[40] 7. Stay of proceedings:

[...]

WORKING DOCUMENT