

Unexplained Air Disasters: Compensation for Indirect Victims

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The air disaster of Malaysia Airlines Flight MH370, which disappeared on March 8, 2014, remains an enigma. The reasons for the deaths of the passengers and crew remain unexplained even after ten years of fruitless searches. Although the Malaysian government may relaunch the search for the missing plane this year, nothing can erase the moral trauma suffered by the indirect victims. The moral and financial repercussions on the indirect victims of passengers who died in an unexplained air disaster manifest as a feeling of not being able to grieve due to the lack of obvious causes of the accident. While international legal texts provide frameworks for compensating the damage suffered, national courts apply compensation scales that are inequitable among indirect victims. To address current inequities, recognizing the prejudice of waiting and worry could alleviate the suffering endured by indirect victims.

Keywords: unexplained air disaster, carrier liability, indirect victims, loss, loss of expectation and worry, compensation.

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Introduction

The air disaster differs from an accident. Indeed, in an air disaster, there is an element of accident, but what occurs goes far beyond, establishing “a dimension of collective drama that escapes the ordinary accident.” (Cahier, 2009) The definition of an air disaster implies “an idea of suddenness, surprise, and incredulity. By its magnitude, the disaster strikes minds” (Cahier, 2009). It is horrific for those who perish in an air disaster. Thus, the term “disaster” implies the severity of an air crash (Delpech, 2021). It specifically refers to the crash of a large aircraft that either violently hit the ground or crashed into the sea.

Annex 13 of the Chicago Convention of December 7, 1944, on civil aviation includes a scenario of an air disaster presupposing the deaths of passengers and crew in its definition of air accidents. Indeed, an air accident occurs particularly when “*the aircraft has disappeared or is completely inaccessible*” (OACI, 2010). The disappearance of an aircraft is thus a type of air disaster. Unlike an *accidental air disaster* where the wreckage of the aircraft is found, an air disaster following the disappearance of an aircraft is not materialized by the discovery

of the wreckage. What strikes minds here is the lack of material evidence of the disaster. In this situation, the outcome envisaged by Annex 13 of the aforementioned Convention is the presumed death of the passengers and crew following the disappearance. The definition of disappearance thus implies an additional idea of anxiety weighing on the relatives of the presumed dead passengers.

Two scenarios arise following an air disappearance:

The discovery of the wreckage in the days following the disappearance, definitively confirming the death of passengers. The disappearance will thus be explained by a technical investigation following the disaster. This is the most common situation and remains an explained air disaster.

The absence of discovery of the wreckage in the days, months, and years following the disaster. In this situation, the disappearance remains “unexplained”: the day of the disappearance continues to resonate and raises many questions about the exact reasons for the disaster. This is where unexplained air disasters are categorized. It is a situation that has already occurred in the history of aviation and deserves legal responses.

Many high-profile cases have documented unexplained disappearances of aircraft from radar since the early 1960s. Wrecks found after the disappearance of radars: Egyptair Airbus Cairo-Paris in 2016, Airbus A330-220 Rio-Paris Air France 2011, Boeing 737 Adam Air Surabaya-Manado 2007, Mayamarr Airways 1998, Sacta 1972. Moreover, these unexplained accidents have left severe moral traumas on the relatives of the passengers. Currently, the only case with no wreckage found is *Malaysia Airlines Flight MH370*, which disappeared in 2014. The disappearance of Flight MH370 has been the subject of media attention and recent reports that still maintain the mystery over the true causes of the accident. The most recent case is that of Malaysia Airlines (MH370, 2023; MH370, 2024). Departing Kuala Lumpur on March 8, 2014 with 239 people on board bound for Beijing, this Boeing 777 abruptly changed course an hour after take off and ceased all contact with air traffic controllers. On July 29, 2015, aircraft debris measuring around two square meters was found on the east coast of the island of La Réunion. According to the Paris public prosecutor’s office, analysis showed with certainty that it was a wing fragment from the Malaysia Airlines Boeing.

Technical and technological advances have resulted in increasingly severe and numerous mass bodily injuries due to mechanization and new risks that have emerged (Larribau-Terneyre & Buffelan-Lanore, 2020). It is the theory of risk (Grynbaum, 2011) that penalizes those who create a risk due to their activity by bearing the financial burden, which includes compensating for the damages caused. This theory devised by Raymond Saleilles and Louis Josserand at the end of the 19th century in response to the mechanization of society and an increase in workplace accidents.

Jurisprudence has developed, in this sense, the general principle of civil liability for things (Grynbaum, 2011). The Jaland’har decision uses the expression “presumption of liability” (Ch. réun., 1930) to define the system put in place by the adoption of a general principle of vicarious liability. Even though subsequent rulings and legislation such as the Badinter Act of July 5, 1985 on accidents involving motorized land vehicles have used the concepts of “de jure liability” or “strict liability” (Civil, 1957; Viney & Jourdain, 2006).

However, the process of developing the legal framework for the liability of air carriers is based not on common law but on air law. Although in certain specific cases the carrier is the guardian of the structure of the flying machine and is presumed to be responsible for its apparatus, there is a specific liability system for international air transport (Commercial, 2012)

The first liability system was established within the Warsaw Convention of 1929. However, to better respect economic realities and consumer interests, the Montreal Convention, the product of a diplomatic conference organized by ICAO, was adopted in 1999, unifying certain rules relating to international air transport. (Schubert, 2017)

In essence, air accidents necessarily result in mass bodily injuries with no escape for those on board. Facing an air disaster, the Montreal Convention establishes a two-tier liability system in case of death under Article 17: an objective liability of the carrier requiring proof of damage and a strict liability. The Montreal Convention thus establishes a regime of proven fault in the first case and presumed fault in the second case. The Montreal Convention always obliges the carrier to compensate for bodily injuries caused to transported victims. This implies that this obligation to compensate applies even in the case of unexplained air disasters. This obligation to compensate imposes a repair burden on the carrier. This principle of compensation is regularly monitored by the European Court of Human Rights. The principle of full compensation is fully recognized by Community law (ECJ, 1996; ECHR, 2004; ECHR, 2006). However, in the event of death, the Court refuses to establish an absolute and general obligation to award pecuniary compensation for non-pecuniary damage (ECHR, 2009). This obligation of the air carrier to compensate victims meets a compensatory need that also extends to indirect victims. According to article 16-1 of the French Civil Code, “Everyone has the right to respect for his body.” For this reason, tort law pays particular attention to damage to bodily integrity. All bodily and mental injuries, whatever their origin (such as unexplained air accidents), must be compensated on a lump-sum basis. New Zealand has adopted an even more comprehensive system tending towards a “right to compensation” (Accident Compensation Act), which came into force in 1972 and was recently amended by a law passed on July 19, 2018: its central idea is that compensation for bodily injury, especially those caused by dangerous objects, should be based on solidarity (Le Tourneau, 2022).

The moral and financial repercussions on the close relatives of passengers who died as a result of an unexplained air disaster manifest as a feeling of not being able to grieve due to the lack of obvious causes in the course of the accident. The close relatives of deceased passengers are considered indirect victims who can claim full compensation for their damage (Casson, 2017). However, in the face of these moral and material damages, nothing is truly fair to compensate for the loss of a loved one due to an unexplained death. Thus, in the *face of an unexplained air disaster, is the applicable compensation system truly fair for indirect victims?* Although international texts provide legal responses to frame the compensation of damage suffered by indirect victims, such damage, which has been consolidated over time by the lack of explanation, cannot adequately compensate for the unexplained death of a passenger relative. The rights of indirect victims, who suffer greatly, lie in their ability to choose the most generous jurisdiction in terms of compensation. Their grief will be comforted in the absence of being able to mourn (Grynbaum, 2011). The risks associated with technological development have multiplied. The legislator is taking particular care to ensure that specific and fair provisions are in place to compensate victims of personal transport accidents. In this sense, international air transport law provides two conditions of applicability in terms of compensating indirect victims following an unexplained air disaster (I). But this international compensation system compensates limitedly for the damage suffered by indirect victims because, in practice, compensation is inequitable (II).

I. A compensation system subject to a double restrictive condition

According to air law provisions, a double condition is necessary to recognize the inexplicable nature of air disasters. First, the unexplained disappearance is assimilated to the presumed death of passengers on board during a flight (A). Then, despite search and rescue operations and official investigations over several months, it is impossible to explain an obvious cause of the accident following a technical investigation (B).

A) The Presumption of Death of Passengers and Crew

The factual situation that concerns us refers to the terms of Annex 13 of the Chicago Convention. An air disaster must occur when the aircraft is operated by a pilot and in flight, that is, between the moment passengers board until they disembark. The accident therefore occurs during the aircraft's operational phase when passengers are on board. The situation in question concerns an "aircraft" that "has disappeared" or is "completely inaccessible" (*situation c*). Note 2 in the margin of the accident definition specifies the term "disappeared." The aircraft is considered disappeared "*when official searches have ended without the wreckage being found.*" There is a lack of precision on the term disappearance and also on the definition in note 2. General international aviation law does not have a clear definition regarding the disappearance of a commercial aircraft during a flight. However, it is possible to deduce a practical definition. The disappearance of an aircraft in flight would actually correspond to the lack of news regarding the aircraft's position from the captain or a loss of communication between the captain and air traffic control services, materialized by the disappearance of the aircraft from control radars.

The causative event must be an "accident" and not an "incident" as provided in Article 17.1 of the Montreal Convention of May 28, 1999. In air transport, French jurisprudence defines an "accident" as an event external to the victim and sudden (Mercadal, 2000; Cour, 1988). This notion naturally excludes any fact attributable to the transported passenger (Judicial, 1997). Similarly, American courts consider an accident as an unexpected or unusual event or occurrence external to the passenger (Supreme, 1985). This unexpected or unusual nature perfectly aligns with unexplained and external reasons that caused an accident.

The disappearance of an aircraft in flight is perceived when there is a loss of contact with the aircraft's electronic signal in air traffic. This is therefore a *serious anomaly* that raises concerns for both States and accident investigation services. The disappearance is actually always "temporary" because for each case of aircraft disappearance, either the entire wreckage or only a few pieces of it have always been found, whether after a few days or fifty years of searching. In international general aviation law, an aircraft is considered missing when, following search and rescue operations and a series of measures taken by the *neighboring* States of the location of the aircraft's disappearance, it has been impossible to locate the wreckage of the disintegrated aircraft. Subsequently, the rescue teams go to the site to try to find survivors once the wreckage has been located. Most often, they were alerted by air traffic control, which witnessed the event, but not always. Rescue teams generally implement a specific emergency plan taking into account the particular difficulties and the large number of victims, all deceased.

The disappearance of an aircraft from radar control also presupposes the death of the passengers on board as well as the crew. Indeed, in all cases of disappearance, the first stage

of disappearance from the radars has been followed by the discovery of an air crash with no survivors. This is why the disappearance of an aircraft results in the immediate death of the passengers on board. Thus, there is the presence of fatal injuries proving the existence of bodily harm. This is not about adopting the interpretation of Articles 88 to 90 of the French Civil Code. The Warsaw and Montreal Conventions adopt a presumption of death for passengers in the event of disappearance since there is a system of financial advances before any compensation for the damage suffered by the relatives of the direct victims of the accident only a few days after the crash (Mercadal, 2000). The unexplained disappearance of an aircraft in flight can only be recorded following an absence of an obvious cause after a technical investigation into the accident.

B) The absence of an obvious cause of the air disaster following a technical investigation.

Investigators belong to three main categories: the local investigation bureau (In France the *Bureau d'enquêtes et d'analyses* (BEA) of the Ministry of Transport; In Canada, the Transportation Safety Board (TSB); In the United States, the National Transportation Safety Board (NTSB)), the investigation bureau of one or more concerned countries, and the "accident management" division of either the airline or the aircraft manufacturer or one or more insurance companies. These organizations systematically seek to have the maximum information taken at the source and bring technical skills to serve the local investigation bureau. It is always the local bureau that remains in control of the investigation. The airline and the civil authorities of the location of the disaster organize the reception and information for the relatives of the victims or the presumed victims. Today, this is generally done with the help of psychologists trained for extreme shock situations that represent the announcement of the sudden disappearance of a relative or friend.

An airplane accident rarely has a single cause. The specialists from the investigation bureau most often seek the determining cause of the accident. They look for the breakage of an element or the malfunction of an element or any other causes identified by post-accident technical investigations. Therefore, the investigation bureau's report must contain the determining cause of the disappearance of the aircraft in flight. In principle, the investigation bureau's report does not determine liabilities, but it is an essential element for potential legal actions. The investigation begins once a rescue plan has been implemented. One or more investigation organizations go to the site to search for the black boxes, analyze the available information, and investigate the causes of the disaster. The investigation results (which can take several months or several years) are then used in several ways: victim compensation by insurance companies, search for liabilities; possible correction of inherent defects in the aircraft involved; possible correction of defects in the procedures used. However, the problem here lies in the fact that it is still not possible to explain the results of a technical investigation with certainty in the absence of an obvious cause proving the origin and course of the accident. This happened with Flight MH370.

Malaysia Airlines Flight 370 ended with the unexplained disappearance of a Boeing 777 on March 8, 2014, between Kuala Lumpur, Malaysia, and Beijing, China, its planned destination. The crew operating for *Malaysia Airlines* last communicated with air traffic control about 38 minutes after take-off while the plane was over the South China Sea. The aircraft disappeared from radar screens a few minutes later, but continued to be tracked by military radar for an additional hour. The aircraft's trace was lost about 370 kilometers northwest of Penang Island.

With the 227 passengers and 12 crew members presumed dead, the disappearance of Flight 370 is the deadliest air accident involving a Boeing 777. The search for the missing plane, which became the costliest in aviation history, initially focused on the South China Sea and the Andaman Sea, before analysis of the aircraft's automated communications with a satellite of the British company *Inmarsat* indicated that the aircraft had continued its route for several hours and over thousands of kilometers, ending up somewhere in the southern Indian Ocean, off the coast of Australia. The lack of official information in the days following the disappearance sparked strong criticism in China, especially from the relatives of the passengers, the majority of those on board being of Chinese origin. Between 2015 and 2016, several marine debris washed up in the western Indian Ocean were identified as coming from the aircraft. However, the three-year search over a maritime area of 120,000 km² failed to locate the aircraft. After the end of the first phase of the search in January 2017, a second campaign launched in January 2018 by the private company *Ocean Infinity* also ended in failure after six months. Relying mainly on the analysis of Inmarsat satellite data, the *Australian Transport Safety Bureau* (ATSB) initially suggested that a hypoxia event was the most likely cause given the available evidence, although no consensus was reached among investigators. At various stages of the investigation, possible hijacking scenarios were considered. However, the final report of the Malaysian Ministry of Transport in July 2018 did not provide any conclusion on the exact cause of the disappearance. In the absence of a definitive explanation, the aviation industry's safety recommendations and regulations mentioning Flight 370 mainly aim to prevent the recurrence of the circumstances associated with its disappearance, including increasing the battery life of underwater locator beacons, extending flight recorder durations, and implementing new aircraft position reporting standards over oceans. Published on July 30, 2018, the Malaysian investigation report details numerous technical elements already announced, without concluding to a specific cause. It conditions the eventual formulation of the cause of the disappearance on future discoveries, excluding the hypothesis of pilot suicide and a major malfunction, while admitting the possibility of a hijacking by a passenger. This entire investigation leaves the jurist perplexed and plunges the victims' relatives into an even deeper and more lasting trauma. On August 6, 2018, at the request of the judiciary, France reopened the investigation, becoming the last country to do so. The investigation was entrusted to the air transport gendarmerie research section (SR-GTA). Subsequently, the report indicates that it is likely the pilot maneuvered the aircraft until the end and that nothing supports the suicide theory. Certainly, this rules out the suicide cause, but it does not admit an obvious cause.

In such situations, there is an inequitable application of the *quantum* of compensation for the emotional distress suffered by indirect victims.

II. An inequitable compensation regime.

Even if international and European texts provide for automatic compensation for indirect victims in such disasters (A), this does not prevent the real compensation for the damage suffered by indirect victims from being inequitable depending on the jurisdiction seized (B).

A) An international system of automatic compensation for indirect victims in the event of an unexplained air disaster

The applicable text for a flight whose disappearance remains unexplained depends on the departure location of the disappeared aircraft. Subject to community law are, firstly, all flights (regular or otherwise) departing from an airport located in a member state of the European Union, Iceland, Norway, or Switzerland, regardless of the destination airport (same state, another EU state, third country) and irrespective of the carrier's nationality. Secondly, all flights to an airport located in an EU member state, Iceland, Norway, or Switzerland, regardless of the departure airport, provided that the carrier is considered "community-based," meaning it holds a license issued by an EU state. The flight that caused the accident is therefore subject to the provisions of the Montreal Convention, provided that the state of the departure location is a signatory. This Convention significantly modernized the regime of the 1929 Warsaw Convention, which already governed the liabilities of air carriers in case of passenger deaths, allowing for a shift to a single legal instrument. The Montreal Convention thus establishes a uniform legal framework to govern the liability of airlines, especially in the event of passenger deaths. At the community level, it is the regulation of October 9, 1997 (Council, 1997), modified by the regulation of May 13, 2002 (Regulation, 2002), that imposes unlimited liability on community air carriers in case of passenger deaths. This regulation also applies the rules of the Montreal Convention to all flights operated by community air carriers, both domestic and international. According to the provisions of the regulation of September 24, 2008, there are common rules for operating air services within the European Union.

The Montreal Convention establishes a unique regime of compensation ceilings in case of passenger deaths, applicable to indirect victims. These new compensation principles had already been applicable in Europe since the Council Regulation of October 17, 1997. The rules are imposed on community air carriers for both internal and international flights. The carrier's liability will be engaged under the conditions provided by the Montreal Convention. Article 17 of the Montreal Convention stipulates that the carrier is responsible for the damage caused in particular in case of a passenger's death onboard the aircraft. The right holders in case of death do not need to prove fault since it is a liability "by operation of law" (Bloch & Le Tourneau, 2023b) for both death and injuries when the accident occurred onboard the aircraft and during boarding or disembarking operations. This concept is similar to that of "gardien" (guardian) within the meaning of article 1384, al. 1er in fine, of the Civil Code (Bloch & Le Tourneau, 2023a). The carrier can only exonerate itself by establishing the victim's fault. As in the Warsaw Convention, the presumption only applies when the accident was the cause of the victim's damage, which means proving that the damage is attributable to an accident external to the victim. The victim passenger is entitled to full compensation, which is the most remarkable contribution of the Montreal Convention. Compensation for indirect victims is thus provided. The victims are entitled to full compensation for the damage suffered:

- (1) If the amount of compensation is less than the equivalent of 128,821 Special Drawing Rights (SDR), approximately 130,000 euros, the carrier will be automatically liable, meaning liable by operation of law. It can only exclude its liability if it proves that the victim contributed by their fault or negligence to the damage suffered; in which case, shared responsibility would be possible. Thus, the carrier cannot exclude or limit its liability except in cases of the victim's negligence or detrimental omission.
- (2) If the amount of compensation exceeds 128,821 SDR or approximately 130,000 euros, the carrier is only presumed liable, it can not only exclude or limit its liability by proving the passenger's fault but also by proving that it, its agents, and representatives were blameless. When the damages exceed 128,821 SDR per

passenger, there are two other exoneration causes provided by Article 21 of the Montreal Convention: the “due diligence” of the carrier (i.e., absence of fault) and third-party fault (Convention, 1999).

To exonerate itself from liability, the carrier can demonstrate that it was impossible to take necessary appropriate measures in the face of an unexplained cause (Mercadal, 2000, Actualisation 2023). In this sense, the carrier can demonstrate, as invited by the terms of Article 20§1 of the Montreal Convention, that it was impossible to take necessary measures due to the criteria of force majeure. Indeed, the impossibility of taking necessary measures would stem from the unforeseeable and irresistible nature of the event that caused an unexplained disappearance. For example, courts consider weather conditions as exonerating only if they exhibit the characteristics of force majeure. In this regard, their intensity must have been exceptional considering the time of year and location. Thus, a company that could not land on the airport runway is not exonerated by the presence of “moderate” (Commercial, 1993) fog. Therefore, an accident of unknown origin should not result in compensation from the carrier as long as it demonstrated due diligence. Often, the carrier will only manage to exonerate itself by proving what precisely caused the damage. However, in the case of an unexplained origin, it will be impossible for it to prove the precise cause of the damage. The ceilings set by the Montreal Convention cannot be excluded in the event of an accident of unknown origin. There can be no exclusion of compensation limits when the accident is of unknown origin (Cour, 1980) or when the causal link between the fault and the damage is not established with certainty (Cour, 1979).

Regarding the Montreal Convention, regardless of the amount of compensation and regardless of whether the liability is by operation of law or presumed, the carrier will be obliged to compensate indirect victims. It must provide an immediate advance to allow indirect victims to meet their immediate needs without waiting for the outcome of a lengthy procedure. The amount of this advance is not determined by the Montreal Convention but is generally set by national laws. In case of death attributable to a European carrier, the 1997 European regulation provides that the advance cannot be less than the equivalent of 16,000 SDR, approximately 20,900 euros per deceased passenger, knowing that it must be paid within fifteen days of the accident. Payment of this advance does not constitute an acknowledgment of the company’s liability. This payment will be deducted from the final full compensation payment.

The company *Malaysia AirLines* was obliged to compensate the victims’ relatives. Reference must be made to the Montreal Convention. This text was ratified by Malaysia and China in 2008. This text incorporates certain rules related to international air transport. Article 17 of the Montreal Convention specifies that “*the carrier is liable for the damage*” when the passenger dies during the flight. It is a principle of automatic liability, but the compensation can be capped under certain conditions. However, the 280 companies that signed the Kuala Lumpur agreement adopted on October 31, 1995, had committed not to cap compensation. This is notably the case for *Malaysia Airlines*. The compensation procedure is always carried out based on the provisions of the Montreal Convention. First, airlines offer advance compensation as provided by the Convention. The airlines then attempt through their insurers to negotiate amicably with the victims. But if the parties cannot reach an agreement, the relatives can directly sue the airline, even if the compensation scales will sometimes be inequitable depending on the jurisdiction seized.

B) Inequitable compensation scales according to states.

The rules of jurisdiction for hearing a liability action against an air carrier are determined by international air transport conventions. One might be inclined to invoke the Montreal Convention of May 28, 1999, for the unification of certain rules relating to international air transport. Article 28 sets out the rules of territorial jurisdiction for a liability action against the air carrier in the context of international transport. According to the first paragraph of this article, “*An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier, the principal place of its business or the place where it has an establishment by which the contract has been made, or before the court at the place of destination.*” The Court of Cassation adds that Article 28, paragraph 1, of the Warsaw Convention “*enacts a rule of direct jurisdiction that has an imperative and exclusive character, so that it precludes any derogation by applying internal rules of jurisdiction, particularly that of Article 42, paragraph 2, of the Code of Civil Procedure.*” This solution is not new (Cour, 2006). This rule of direct jurisdiction means that the French judge seized, when called upon to rule on their own jurisdiction, must apply this Article 28 to assess this jurisdiction, to the exclusion of any other conflict of jurisdiction rule, particularly the French rule of territorial jurisdiction.

For the indirect victims of an air disaster, there are legal difficulties in terms of recourse possibilities. Article 33.2 of the Montreal Convention provides for a liability action against the carrier. This article reiterates the terms of Article 24 of the Warsaw Convention, which posed numerous difficulties. Jurisprudential responses are divided between supporters of the exclusivity of the Warsaw regime, prohibiting any other form of recourse, and defenders of the victims’ interests, who consider it unjust to leave them without recourse. There is thus a conflict of norms in certain national laws between the application of Article 24 of the Warsaw Convention and the application of a national law text. For example, British case law on December 12, 1996, relied on Article 24 of the Convention, which states that “*in the cases covered by Articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.*” The U.S. Supreme Court ruled similarly to the *House of Lords* on January 12, 1999, overturning a decision by the Second Circuit *Court of Appeals* that had decided that the recourse instituted by the Warsaw Convention was not exclusive and had thus allowed the plaintiff to base their action on internal law. In France, the situation is different: Article 24 of the Warsaw Convention does not give the contracting party of the carrier a direct right of action against the agent. It leaves it to the applicable national law to settle this issue. In France, the doctrine opts for the quasi-delictual liability, more specifically of former Article 1382 of the Civil Code, now Article 1240.

Whether states rely on Article 33.2 of the Montreal Convention to delineate the action of indirect victims, this article does not address the nature of the compensable damage. This leaves it to the applicable national law to settle this issue. The qualification of compensable damage is thus subject to the law of the forum. There is therefore a disparity in terms of compensation according to the scales set by the states, which creates a certain injustice for indirect victims. In practice, the amount of compensation is highly variable from one family to another. Article 33.2 of the Montreal Convention offers indirect victims the choice of the country in which they can bring a liability action against the carrier: the place of residence of the passenger victim, the place of purchase of the ticket, that is, the conclusion of the contract, the place of departure, the place of arrival, and the seat of the company. In this sense, the indirect victim has great

procedural choice. Is it a concealed *forum shopping*? This can allow them to choose the law of a state that will be more likely to justly compensate the damage suffered, especially since the action can be brought both against the aircraft manufacturer and the airline. Each state has its own jurisprudence that is more or less generous (Cour, 2015; Cour, 2019). In the event of an aviation accident resulting in the death or injury of passengers, the carrier, if it is required to do so by the law of its country, will without delay make advance payments to natural persons who are entitled to compensation to enable them to meet their immediate economic needs. This solution is obviously transposable under the Montreal Convention, which succeeded the Warsaw Convention. It is preferable to choose the United States, where justice grants much larger compensations than in China or Malaysia.

Indirect victims can justify having suffered emotional damage due to the death of a close passenger (children, parents, cohabitants, spouses...). This moral damage can be accompanied by material damage when these victims justify that they lived off the work of the deceased victim (Mercadal, 2000, Actualisation 2023). It is up to the indirect victim to demonstrate that the damage they complain about comes from an accident external to their person, which can result, for example, from unexplained circumstances. In French law, all damage is compensable for indirect victims provided it is certain and direct (Cour, 1986). It can be bodily damage, material damage, resulting in financial loss, or moral damage, that is, other than financial. In Great Britain, courts also compensate for moral damage (Division, 1956). However, in some cases, plaintiffs can only obtain damages for loss of affection. For example, Nigerian law only compensates for pecuniary damage in the event of an air crash on its territory (Cour, 2023).

To calculate the amount of compensation following an unexplained air disaster, the damage suffered is assessed by experts. In France, the damage suffered depends on numerous conditions that allow the accumulation of several applicable scales from the Dintilhac report:

Fixation of emotional damage according to the relationship with the victim. If the passenger is the father, mother, or spouse of the indirect victim, then the compensation is almost automatic (Casson, 2017). This should include the proven pathological repercussions that the death may have had on certain relatives. In practice, it is almost automatic to compensate the loss of affection of the direct victim's closest relatives (father and mother, etc.). For example, the amount of moral damage for the spouse in case of death is between 20,000 and 30,000 euros, according to a scale set by the Victims' Aid Association of France. For the death of a father, a child receives 30,000 euros. However, it is also necessary to consider individuals without a family relationship, provided they can prove a real emotional connection with the deceased.

Fixation of emotional damage due to the sudden and unexplained disappearance of a plane. In case of sudden disappearance or painful circumstances, the amount of compensation will be much higher because the moral damage is considered "emotional damage." This will be the case for the victims of the missing *Malaysia Airlines Boeing 777*.

Fixation of economic damage due to losses suffered. For this, it is necessary to assess the losses suffered and the loss of earnings for the families of the crash victims. A proven economic dependence link is required, as in the case of a child and a parent. Material damage, which is assessed based on the deceased parent's income and the economic damage suffered by the family, can be much higher than moral damage.

Regardless of the reasons for the disappearance of flight MH370 (conspiracy, fiction, official cover-up), (Van De Winkel, 2015) the courts that compensated indirect victims could not consider the *damage of waiting and anxiety*, deemed by the mixed chamber of the Court of Cassation as a particular category of moral damage since March 25, 2022 (Mixed, 2022).

According to the French Supreme Court (Cour de cassation), meeting in a mixed chamber, in a ruling dated March 25, 2022, this damage exists when: “a person’s next of kin, who learn that the person is or has been exposed, on the occasion of an individual or collective event, to a danger likely to affect his or her physical integrity, experience anxiety linked to the sudden discovery of this danger and the uncertainty weighing on his or her fate... .” The damage of waiting and anxiety constitutes a new category of damage for the relatives of the direct victim (damage suffered particularly by indirect victims). It is defined as the fear and anxiety experienced by the relatives of a direct victim when they learn that they have been involved in an attack, assault, or accident, and they wait for the outcome, namely information about the life or death of the direct victim (Steinle-Feuebach, 2000). This exceptional damage applies to exceptional situations. In this case, the indirect victims of passengers on flight MH370 have for many years experienced anxious waiting for the exact reasons for the flight’s disappearance and the lack of certain cause for the death of the close passenger. Now that this damage is referenced in the French legal order, if a similar situation arises again, this specific damage in the Dintilhac nomenclature will likely be compensated in addition to the damage of affection.

Conclusion

A compensation system is provided by the Montreal Convention. This system outlines the main lines in terms of compensation procedures applicable to indirect victims (an immediate financial advance following the unexplained disappearance, an automatic compensation threshold). The carrier’s liability will always be presumed since there is an absence of fault on the part of the passenger, knowing that the exonerating cause based on force majeure will be difficult to apply. The need for compensation is so important in the situation of an unexplained air disaster that the compensatory function of civil liability takes precedence over any possible evidence of the carrier’s exoneration. The amount of compensable damages depends on the competent jurisdiction. There is no harmonization in these terms provided by the Montreal Convention, which creates inequalities between the full compensation of damage suffered by victims. For example, indirect victims of flight MH370 with a nationality of a third-world country (Malaysia) will face less significant compensation from their jurisdiction compared to indirect victims with a nationality of a developed country (France). Unexplained air disasters being exceptional situations, the recognition of the damage of waiting and anxiety applicable to attacks and collective accidents is a particular exceptional damage that can be taken into account alongside traditional damages (moral and material). This could help alleviate the suffering endured by indirect victims who cannot grieve their loved ones who died following an unexplained disappearance in the airspace.

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