

Invisible Injuries, Visible Advocacy: Proving Your Case When the Injury Can't Be Seen

By Erin Applebaum

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When an aircraft goes down, the images that most readily come to mind are of twisted metal and broken bodies. But not every injury leaves a visible scar.

On a snowy morning last February, Delta Connection/Endeavor Air Flight 4819, traveling from Minneapolis to Toronto, crashed on landing due to the poor judgment of an inexperienced pilot. The landing gear collapsed, the right wing tore away, and the aircraft flipped as it skidded down the icy runway.

Jet fuel spilled from ruptured tanks, drenching passengers as they scrambled from the mangled fuselage. Moments after the last person fled, the plane was engulfed in flames, as stunned passengers shivered in wet clothes on the frozen tarmac.

Miraculously, all 74 people on board survived. Yet their ordeal left a different kind of wound. In addition to physical injuries, nearly every passenger now struggles with post-traumatic stress disorder (PTSD), a psychological injury that can derail a person's life as thoroughly as any broken bone or amputated limb.

Defining PTSD

Most people who endure trauma carry some residual distress. PTSD, however, goes beyond ordinary pain and suffering.

It is a diagnosable illness triggered by moments of extreme terror, when the victim believes that death or serious harm is imminent. The experience leaves permanent marks on the brain.

The *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition* (DSM-5) describes the hallmarks



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of PTSD: intrusive symptoms like flashbacks and nightmares; avoidance of reminders; hyperarousal, jumpiness and irritability; and mood and cognitive shifts including guilt, numbness and loss of joy. Untreated, PTSD can persist for years and intrude on nearly every aspect of daily life.

Unlike a physical injury, PTSD resists neat documentation. Diagnosis relies heavily on self-reporting, which makes PTSD-focused cases uniquely challenging for plaintiffs' attorneys.

Defense counsel and insurers routinely cast doubt on the legitimacy of symptoms, while courts wrestle with the admissibility of expert testimony. The result is an uphill battle for survivors, who must prove that

an invisible injury is every bit as devastating as a visible one.

Making the Invisible Visible

Attorneys representing clients with PTSD must translate profound psychological harm into terms that defense attorneys, insurers, and juries can understand. The task is to make the invisible injury visible—to bridge the gap between subjective complaints and objective legal proof.

First, counsel must understand the governing law, since some jurisdictions recognize claims for purely psychological injury while others require an element of physical harm. Savvy lawyers frame PTSD as involving both: while most symptoms are psychological, medical science supports the view that trauma produces measurable physical changes in the brain.

Consider this analogy: picture a calm, bucolic river flowing steadily on a sunny day. This scene represents the brain at rest. Now imagine a severe thunderstorm flooding the river, breaching its banks and eroding its shores.

When the storm passes, the river flows again, but its banks are permanently altered. Trauma reshapes neural pathways in the same way: even after the danger subsides, the brain is left forever charged. Yet despite overwhelming lived experience confirming PTSD's reality, objective clinical tests remain limited. This discrepancy explains why it is so challenging to prove PTSD in court.

Defendants aggressively exploit the uncertainties of a plaintiff's PTSD diagnosis. Symptoms may emerge months after the incident, opening the door for causation arguments. Pre-existing mental health conditions or prior trauma become fertile cross-examination.

And because individuals may respond differently to the same event, jurors may wonder why one passenger from Flight 4819 developed disabling PTSD while another walked away seemingly unscathed. In these cases, credibility becomes the central battleground.

Practice Pointers for Plaintiffs' Attorneys

Transforming subjective complaints into objective, admissible proof requires methodical preparation. Five things are essential:

First, build the record. Encourage clients to obtain consistent treatment from qualified psychiatric providers and keep a daily journal of symptoms.

Longitudinal medical records and contemporaneous note-taking are extremely effective in proving genuine injury. It is especially valuable if the client's spouse is willing to take notes; often, loved ones perceive changes that the survivor does not.

Second, ensure that the client is seeing a professional trained in DSM-5 criteria and PTSD diagnosis. Clinicians should conduct interviews like the Clinician-Administered PTSD Scale for DSM-5 (CAPS-5) and administer self-report checklists like the PTSD Checklist for DSM-5 (PCL-5). Well-meaning advisors without proper credentials cannot provide admissible diagnoses.

Third, retain credible experts. Even with solid treatment records, an independent expert strengthens the case. Experts can verify the treater's conclusions with structured testing, rule out malingering, and address differential diagnoses. Together, the treating provider and the expert witness create a complete picture that is hard for the defense to dismiss.

Fourth, anticipate credibility attacks. Address pre-existing trauma or mental health issues head on. Prepare clients thoroughly for deposition to distinguish between past issues and new ones.

Collect corroborative evidence: screenshots of text messages describing panic, depression and anxiety; requests for time off from work; smartwatch data showing consistently disrupted sleep; credit card statements evidencing social withdrawal; calendar entries reflecting cancellations and declined invitations.

Speak to the plaintiff's friends and colleagues to see if they've noticed any changed behavior; testimony from non-party witnesses often proves highly persuasive.

Fifth, be strategic. PTSD tends to evolve as time passes, and credibility builds with consistent treatment and corroboration. Resist the urge to push early settlement demands that undervalue long-term harm.

Conversely, if no credible diagnosis is available, avoid overreaching. Advancing a weak PTSD claim risks undermining the entire case.

Notable Outcomes in PTSD Litigation

In 1995, the Kreindler firm achieved one of the first jury awards for purely emotional injuries in an airline turbulence case. When American Airlines Flight 58 hit severe turbulence en route from Los Angeles to New

York, passengers were thrown from their seats, and many believed they were about to die.

At trial, American argued that the 13 plaintiffs exaggerated their emotional injuries. The jury disagreed, awarding a collective \$2,000,000 for the passengers' lasting psychological harm.

A later milestone came in *Doe v. Etihad Airways*, P.J.S.C., 870 F.3d 406 (6th Cir. 2017), which expanded the boundaries of psychological injury claims arising on international flights. Injuries that occur on cross-border commercial flights are governed by the Montreal Convention, a treaty that bars recovery for purely emotional damages absent a physical injury.

The *Doe* plaintiff alleged that she developed PTSD after being pricked by a needle in a seatback pocket, an incident that forced her to undergo repeated testing for communicable diseases and stopped her from breastfeeding her child or being intimate with her husband. PTSD comprised nearly her entire claim for damages, while the physical harm from the puncture wound was minimal.

Etihad argued that Doe's PTSD wasn't compensable because psychological damages must flow directly from the physical injury itself, and a finger prick could not reasonably support a PTSD claim. After the district court ruled for Etihad, the Sixth Circuit held on appeal that psychological conditions are compensable as long as they occur *simultaneously* with a physical injury—even a minor one—and don't have to flow *directly* from it.

The decision was significant because it validated PTSD as a compensable condition within Montreal Convention jurisprudence and opened the door for international passengers traumatized by events like turbulence to pursue claims for emotional damages despite suffering only minor physical injuries.

Beyond Aviation

Although the Toronto plane crash provides a vivid illustration, post-traumatic stress disorder is hardly unique to aviation claims. Survivors of car accidents, train derailments, building collapses, and mass shootings often walk away physically intact but psychologically scarred.

In New York, the definition of "serious injury" under Insurance Law § 5102(d) has long been a

flashpoint in auto accident litigation. Defendants traditionally argue that PTSD and other purely psychological conditions cannot satisfy the statute. The Appellate Division, however, has taken a more nuanced approach.

While the First and Second Departments have not recognized PTSD as a "serious injury" under §5102(d), the Third and Fourth Departments have held that it may qualify where plaintiffs can submit objective medical evidence of the diagnosis along with admissible proof of functional limitations.

Under those circumstances, PTSD can satisfy the statutory categories of "significant limitation of use of a body function or system" or a "medically determined injury or impairment of a non-permanent nature" that prevents the performance of customary activities for at least 90 of the first 180 days following the accident. See *Chapman v. Capoccia*, 283 A.D.2d 798, 799–800, 725 N.Y.S.2d 430 (3d Dep't 2001); *Krivot v. Pitula*, 79 A.D.3d 1432, 1433, 913 N.Y.S.2d 828 (3d Dep't 2010); *Hill v. Cash*, 117 A.D.3d 1425, 1427, 984 N.Y.S.2d 741 (4th Dep't 2014); *Vergine v. Phillips*, 167 A.D.3d 1319, 1320–21, 91 N.Y.S.3d 272 (3d Dep't 2018).

While this line of authority is not brand new, the discussion is still important because upstate courts have embraced PTSD as a qualifying "serious injury" while downstate courts have not. Absent guidance from the Court of Appeals, the law will remain fractured, and threshold motions will continue to be a battleground.

Closing the Gap

Invisible injuries demand visible advocacy. As plaintiffs' lawyers, we must approach these cases with the same rigor we devote to catastrophic physical harm.

That means building credibility for our clients, educating judges and juries, and telling the human story of trauma's lasting impact. The Toronto crash is a sobering reminder that trauma takes many forms. Our responsibility is to ensure the law not only sees these injuries, but values them equally.

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