



New developments air carriers liability for injury to passengers

Since I last published on this topic (APLA National Conference paper, 1998) much has happened in the field of international air law. I foreshadowed reform in my 1998 paper when I referred to the IATA Inter-carrier agreement on passenger liability. The motive behind the IATA agreements was part of a wider process to modernise international air law concerning the liability of international air carriers for the death or injury of passengers.

R S McIlwaine SC is a Barrister at Sir James Martin Chambers, DX 548 Sydney, **PHONE** 02 9223 8088 **FAX** 02 9223 8493

In 1999 representatives of 121 Nations met in Montreal. Their deliberations resulted in a new convention called the Montreal Convention ("Montreal") which, when implemented, will replace the Warsaw Convention and its related amending and supplementary instruments ("Warsaw") and provide the new uniformed code for international air carriers liability for death and injury to pas-

sengers. This article outlines the changes involved.

Montreal

In drafting Montreal many of the provisions of Warsaw were deliberately retained so that decades of judicial interpretation of those provisions would remain applicable. So, for example, article 17 of Warsaw (the primary liability provision) remains the same and the



nts in international death and personal

interpretation of the term “accident” by the Supreme Court of the United States in *Air France v Saks* 470 US 392 (1985) will remain as applicable to Montreal as it currently is to Warsaw.

The important features of Montreal are:

1. Unlimited liability

The liability of the carrier is to be unlimited and is strict liability up to 100,000 SDRs. A carrier, however,

may be able to avoid liability beyond 100,000 SDRs (no fault defence) if it can prove (onus on carrier) that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party.

2. Advance payments

If the domestic law of the state of the carrier requires advance payments


then the carrier must make such payments. Otherwise, carriers are encouraged to do so in any event.

3. No punitive damages

Punitive, exemplary or non-compensatory damages are not recoverable.

4. No damages for purely mental injury

The issue of mental injury accompanied by physical injury is still unresolved although recovery in these circumstances is likely.



**“Montreal has retained
much of the form and
content of Warsaw”**

5. Additional (fifth) jurisdiction
Warsaw limits the jurisdiction where an action for damages can be brought to a court having jurisdiction in a contracting state where either the carrier is ordinarily resident, the carrier has its principal place of business, the carrier has an establishment where the contract for carriage was made or at the place of destination in the contract of carriage.

Montreal provides an additional jurisdiction. A plaintiff can also bring a claim in a court provided the following requirements are satisfied:

- a) The jurisdiction must be the principal and permanent residence of the passenger at the time of the accident. This is not determined by the nationality of the passenger but where the passenger actually resided.
- b) The carrier must operate passenger air services to the jurisdiction with its own aircraft or aircraft of another carrier, with which it has a commercial agreement such as a joint services agreement but not an agency agreement, and conduct its airline business in the jurisdiction from premises it or the other carrier with which it has a commercial agreement owns or leases.

Exclusivity of uniformed international code

The House of Lords held in *Sidhu v British Airways* (1997) AC 430 that Warsaw provided the exclusive cause of action and sole remedy for passenger claims against international carriers for death or personal injury.

The doubt about exclusivity which existed in the United States for many years has now been resolved by the Supreme Court of the United States decision in 1999 in *El Al Israel Airlines v Tsui Yuan Tseng* wherein the Supreme Court reached a similar conclusion to the House of Lords in *Sidhu*.

The *Civil Aviation (Carriers liability) Act 1959* (Cth) (as amended) provides (ss35 and 36, subject to s37) that the liability of an international air carrier under Warsaw is in substitution for any civil lia-

bility under any other law.

Whilst the issue of exclusivity has not been determined by the High Court of Australia, it is likely, in the interests of international uniformity, that the reasoning and holding of the House of Lords and the Supreme Court of the United States will be given considerable weight by the High Court if this Court has to decide that issue.

Commentary

The two most important features of Montreal are unlimited liability (subject to the no fault defence) and the additional, fifth, jurisdiction. It should be noted, however, that unlimited liability is available in many instances because of the IATA inter-carrier agreements and some other domestic arrangements.

As mentioned earlier, Montreal has retained much of the form and content of Warsaw such as key provisions like Article 17. This provision provides the basis upon which an international air carrier can be liable in damages for the death or injury of a passenger.

Article 17 provides “the carrier is liable for damage sustained in the event of the death or wounding or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking”.

The key words in Article 17, ‘accident’, ‘bodily injury’, ‘embarking’, and ‘disembarking’, have already been the subject of many judicial rulings which will continue to be as applicable to Montreal as they are and have been to Warsaw. See generally my 1998 paper which deals with these judicial rulings.

Please also remember that the two-year period in which to commence proceedings continues under Montreal. Like Warsaw, this period cannot be extended.

It is to be hoped that Montreal will be implemented shortly. Nearly two years have passed, yet Australia and many other nations still have not done so. My enquiries about when Montreal will come into force have thus far been unrewarding, however, as soon as I know when this has happened I will endeavour to ensure APLA members are informed. 