

By Russell McIlwaine SC

Liability of international airlines for the DEATH of or INJURY to PASSENGERS

In May 1999, representatives of 121 nations attended a conference held at the Montreal headquarters of the International Civil Aviation Organisation (ICAO) to debate and draft a new international treaty. The aim was to modernise the rules relating to the liability of international air carriers for the death of or injury to passengers in the course of international commercial air travel.



The new treaty was intended to replace the *Warsaw Convention 1929*, as amended in 1955 by the Hague protocol and, in 1975, by the Montreal protocol no. 4 (*Warsaw*).

At the conclusion of the conference, over 100 nations and the European Union adopted the new treaty, known as the *Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montreal on 28 May, 1999 (*Montreal 99*).

MONTREAL 99 RATIFIED BY AUSTRALIA

Australia ratified *Montreal 99* on 25 November 2008 and amended the *Civil Aviation (Carriers Liability) Act 1959* (Cth) (Carriers' Act) to give *Montreal 99* the force of law in Australia. The amendment introduced a new part to the Carriers' Act, Part 1A. The English text of *Montreal 99* became Schedule 1A to the Carriers' Act.

The amendment came into effect on 24 January 2009.

In the explanatory memorandum to the amending Bill,¹ the responsible minister said that *Montreal 99* '... provides a modern and consolidated framework for the liability of air carriers which ... will eventually replace the existing international arrangements for carriers' liability contained within the Warsaw system....'

PARTIES TO MONTREAL 99

As at August 2013, 103 nations and the European Union are states parties to *Montreal 99*. These states parties include a large number of countries often visited by Australian travellers, including each of the member nations of the European Union, United States of America, Canada, Mexico, Brazil, Chile, Argentina, China, Japan, Singapore, Malaysia, India, Pakistan, Bangladesh, Turkey, Lebanon, Israel, Egypt, South Africa, Morocco and New Zealand; for a full list of states parties see ICAO website.² In this context, it is important to note that Taiwan, Indonesia, Fiji, Thailand, Korea, Philippines and Vietnam have not ratified *Montreal 99*.

SOLE AND EXCLUSIVE REMEDY

The Carriers' Act provides that in relation to carriage to which *Montreal 99* applies the liability of the carrier in respect of the death of or injury to a passenger is in substitution for any civil liability of the carrier under any other law in respect of such death or injury.³

The House of Lords in *Sidhu v British Airways Plc*,⁴ and the United States Supreme Court in *El Al Israel Airlines Ltd v Tsui Yuan Tsing*⁵ have ruled that *Warsaw* provides the sole and exclusive remedy for the death of or injury to passengers. This remains applicable to *Montreal 99*.⁶

INTERNATIONAL FLIGHTS TO WHICH MONTREAL 99 APPLIES

The international flights to which *Montreal 99* applies are flights, irrespective of the nationality of the aircraft,⁷ in which:⁸

- the place of departure and the place of destination as stated on the passenger ticket are both situated within the territories of states parties. For example, a flight from

Sydney to London, Australia and United Kingdom both being states parties; or

- where both the place of departure and the place of destination are within a single state party, provided there is an agreed stopping place within the territory of another state even where that state is not a states party. For example, a ticketed itinerary from Sydney to Bali and return to Sydney.

TIME LIMIT FOR CLAIMS

It is essential to be aware that Article 35 of *Montreal 99* provides that the right to damages is extinguished if an action is not brought within two years from the date of arrival at the destination, from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. Once extinguished, the right cannot be revived. There is no provision for an extension of time. There is no suspension of time for minors or claimants under a disability.⁹

JURISDICTIONS IN WHICH CLAIMS MAY BE BROUGHT

Warsaw confined the jurisdiction where an action could be brought to a court in a contracting state where the carrier is either ordinarily resident or has its principal place of business, where the contract of carriage was made, or before a court at the place of destination.

Montreal 99 provides an additional jurisdiction in which an action for damages may be brought. It allows a plaintiff to bring an action for damages in a court which is in the territory of a state party where:

- at the time of the accident, the plaintiff had his principal and permanent residence; and
- the carrier operates 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 conducts its airline business in the jurisdiction from premises it or the other carrier with which it has a commercial agreement owns or leases.¹⁰

DAMAGES ASSESSED IN ACCORDANCE WITH LOCAL LAW

Like *Warsaw*, *Montreal 99* is not concerned with intra-national division and treats a state party as a single entity. Thus, a person entitled to bring an action in Australia may bring proceedings in any Australian state or territory jurisdiction. The assessment of damages in a claim provided by *Montreal 99* is determined by local law. As the Carriers Act is a federal law and the state or territory court is exercising federal jurisdiction, ss79 and 80 of the *Judiciary Act 1903* (Cth) are engaged, and the local law to be applied is the local law of the state or territory in which the proceeding is brought, as explained by the High Court of Australia in *Agtrack (NT) Pty Limited v Hatfield*.¹¹

LIABILITY

Chapter 111 of *Montreal 99* deals with the liability of the carrier and the extent of compensation (Articles 17 to 37). >>

Given the current judicial interpretation of 'bodily injury', damages are not recoverable for purely psychological injury but may be recoverable if accompanied by physical injury.

When drafting *Montreal 99*, the delegates to the conference deliberately retained many of the provisions of *Warsaw* so that the judicial interpretation of those provisions would remain applicable.

Article 17 (1) provides that a carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition only that the accident that caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

There are some important words in Article 17 which need to be considered:

Accident

The death or injury must be caused by an accident. The term 'accident' in the context of *Warsaw* was considered by the Supreme Court of the United States in *Air France v Saks*. The Supreme Court decided that 'liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger ... when the injury indisputably resulted from the passenger's own internal reaction to the usual normal and expected operation of the aircraft, it has not been caused by an accident ...'¹²

Saks was a case in which a passenger experienced severe pain in her left ear when the aircraft was descending to land. She sustained permanent deafness in the left ear. The evidence established that the aircraft's pressurisation system had operated in a normal manner. The question for determination at trial and on appeal was whether hearing loss caused by the normal operation of the aircraft's pressurisation system was an 'accident' within the meaning of Article 17. The Supreme Court ruled that it was not.

By contrast, hearing loss caused by pressure changes as a consequence of a sudden dive of an aircraft was ruled to be caused by an 'accident' within the meaning of Article 17 by the New York Supreme Court in *Weintraub v Capital International Airways*.¹³

In *Chaudhari v British Airways Plc*,¹⁴ the UK Court of Appeal, ruled that '...in principle "accident" is not to be construed as including any injuries caused by the passenger's particular, personal or peculiar reaction to the normal operation of the aircraft ...' In *Chaudhari*, the passenger was a hemiplegic. While attempting to leave his seat to go to the toilet, Mr Chaudhari was unable to stand properly and fell and injured his hip. Leggatt LJ held that '... what befell Mr Chaudhari

was not caused by any unexpected or unusual event external to him, but by his own personal, particular or peculiar reaction to the normal operation of the aircraft ... he fell as a result of his pre-existing medical condition. His injury was not caused by an accident within the meaning of Article 17...'¹⁵ On the other hand, a drunken passenger falling on to and injuring another passenger was ruled to be an 'accident' within the meaning of Article 17 in *Oliver v Scandinavian Airlines*.¹⁶

The decision in *Saks* has been accepted as correct and relied upon by courts of high authority in many states parties, including the High Court of Australia in *Povey v Qantas Airways Limited*¹⁷ and the House of Lords in the United Kingdom in *Morris v KLM Royal Dutch Airlines*.¹⁸

Embarking or disembarking

The terms 'embarking' and 'disembarking' were considered by the United States Court of Appeals first circuit in *McCarthy v North West Airlines*,¹⁹ wherein it was ruled '... most courts have interpreted the terms "embarking" and "disembarking" to connote a close temporal and spatial relationship with the flight itself ...'

In *McCarthy*, the relevant factor in determining whether a passenger was embarking or disembarking was the degree of control being exercised by the carrier. In *McDonald v Air Canada*,²⁰ a passenger who had collected his luggage and passed through customs was held to be no longer to be in the terminal building when he was injured.

On the other hand, in two other United States cases, *Day v Trans World Airlines* and *Evangelines v Trans World Airlines*,²¹ passengers who had checked in their luggage, passed through customs and immigration and were waiting in a segregated departure lounge for a call to board, were held to be in the course of embarking when they were injured by a bomb explosion. In *Kotsambasis v Singapore Airlines*,²² Meagher JA explained that '... for Article 17 to attach, the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is to enter the aircraft ...'

Bodily injury

The term 'bodily injury' has been retained from *Warsaw* in Article 17 of *Montreal 99* instead of a broader term, such as 'personal injury'. This is highly controversial. How the term will be interpreted by courts of high authority in the *Montreal 99* context is presently unclear.

This is a complex issue beyond the scope of this article, and will require a decision from a superior court of high authority of a states party, such as the United States Supreme Court, UK Supreme Court, the High Court of Australia or similar, to settle the meaning of the term 'bodily injury' in the *Montreal 99* context.

As the judicial interpretation of 'bodily injury' presently stands in relation to *Warsaw*, damages are not recoverable for purely psychological injury but may be recoverable if accompanied by physical injury.

The relevant authorities dealing with *Warsaw* in this context include the decision of the Supreme Court of the United States

in *Eastern Airlines Inc v Floyd*,²³ the decision of the House of Lords in *Morris v KLM Royal Dutch Airlines*²⁴ and, in Australia, the decision of the NSW Court of Appeal in *Kotsambasis v Singapore Airlines*.²⁵

DAMAGES RECOVERABLE

Montreal 99 provides that damages for the death of or injury to a passenger can be recovered up to 113,100 special drawing rights without the need to prove fault on the part of the airline,²⁶ subject to a reduction for contributory negligence.²⁷ If the airline proves contributory negligence, the court determining the damages claim must assess the damages recoverable as if there was no negligence on the part of the passenger and no limit on the damages fixed by the convention, then reduce the damages so assessed to the extent the court thinks just and equitable, having regard to the passenger's contribution to the damage. If the reduced amount exceeds the limit fixed by the convention, the damages must be reduced to the limit.²⁸

Unlimited damages above 113,100 special drawing rights may be awarded unless the airline can prove that the death or injury and consequent damage was not caused by its negligence or other wrongful act or omission, or can prove the damage was solely due to the negligence or other wrongful act or omission of a third party,²⁹ subject to a reduction for contributory negligence.³⁰

'Special drawing rights' is not a currency but a unit of account established by the International Monetary Fund for exchange purposes. The International Monetary Fund lists the value of special drawing rights in relation to most of the world's national currencies on its website (www.IMF.org). At present 113,100 SDRs is valued at \$A172,000.³¹ These values are known and can be obtained from most banks.

Where the domestic law of the state of a carrier provides for advance payments, then the carrier must make such payments. These payments do not constitute an admission of liability and may be offset against any amounts, subsequently paid as damages by the carrier.³²

Damages cannot be recovered for punitive, exemplary or any other non-compensatory damages.³³

SUCCESSIVE CARRIERS

In the case of several successive carriers, which these days is common, the carriage is regarded as one single operation.³⁴ However, an action can be taken only against the carrier operating the flight during which the accident happened.³⁵

CONTRACT OF CARRIAGE

Provided there is no conflict with the provision of *Montreal 99*, airlines are free to contract as they wish and may stipulate that the contract of carriage is subject to higher limits of liability than those provided by the convention, or no limits at all.³⁶

However, any provision relieving the carrier of liability or fixing a low limit is null and void.³⁷

In recent years, the printed passenger ticket has been superseded by an E-ticket which shows the place of departure and place of destination and stopping points. Otherwise, the terms and conditions are to be found on the airline's website.

When considering an action against an airline, it is important to read the terms and conditions published on the airline's website carefully, particularly airlines from non-states parties. As noted earlier, *Montreal 99* has not been ratified by all nations and *Warsaw* remains applicable for most of those outside *Montreal 99*. For example, a ticketed itinerary from Sydney to Bali and return to Sydney is governed by *Montreal 99* but a single flight from Sydney to Bali is governed by *Warsaw*.

Thailand has not ratified *Montreal 99* and is not a signatory to *Warsaw*. However, the Thai National Airline, Thai Airways International, has agreed, by its terms and conditions of carriage, to be governed by *Montreal 99* where otherwise applicable.

CONCLUSION

In its preamble, *Montreal 99* recognised the need to modernise *Warsaw*, ensure the protection of the interests of the international air consumers and provide equitable compensation based on the principle of restitution.

The additional jurisdiction, the unlimited damages recoverable based on the presumption of fault which the airline carries the onus of displacing, are all positives provided by *Montreal 99*.

The negative is the failure to resolve the controversy about the meaning of 'bodily injury' and whether *Montreal 99* permits recovery of damages for purely psychological injury. ■

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Notes: 1 *Civil Aviation Amendment (Montreal Convention and other measures) Bill 2008*. 2 www.icao.int/secretariat/legal. 3 Carriers' Act, s9E. 4 *Sidhu v British Airways Plc*, (1997) AC 430. 5 *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155. 6 Article 29, *Montreal 99*. 7 Carriers' Act, s9B. 8 Article 1, *Montreal 99*. 9 See *Timeny v British Airway Plc* (1992) 56 SASR 287. 10 Article 33(2), *Montreal 99*. 11 *Agtrack (NT) Pty Limited v Hatfield* (2005) 223 CLR 251 at 258 (8-11). 12 *Air France v Saks* 470 US 392 (1985) 404-5. 13 *Weintraub v Capital International Airways* 16CCH Av Cases 18,058. 14 *Chaudhari v British Airways Plc*, UK Court of Appeal (civil division) unreported 16 April 1997. 15 *Ibid*. 16 *Oliver v Scandinavian Airlines* 17 CCH Av Cases 18283. 17 *Povey v Qantas Airways Limited* (2005) 223 CLR 189 at 205 (36) and 236-8 (152-60). 18 *Morris v KLM Royal Dutch Airlines* (2002) 2 AC 628 at 656(c). 19 *McCarthy v North West Airlines* 56 F3d (1995). 20 *McDonald v Air Canada* (1971) 439 F2d 1402. 21 *Day v Trans World Airlines* (1975) 528 F2d 31 and *Evangelinos v Trans World Airlines* (1976) 550 F2d 152. 22 *Kotsambasis v Singapore Airlines* (1997) 42 NSWLR 110. 23 *Eastern Airlines Inc v Floyd* 499 US 530 (1991). 24 *Morris v KLM Royal Dutch Airlines* (2002) 2 AC 628. 25 See note 22 above. 26 Article 21 (1), *Montreal 99*. 27 Article 20 *Montreal 99*, s9H Carriers' Act. 28 Section 9H, Carriers' Act. 29 Article 21(2), *Montreal 99*. 30 Article 20, *Montreal 99*, s9H Carriers' Act. 31 Article 23, *Montreal 99*. 32 Article 28, *Montreal 99*. 33 Article 29, *Montreal 99*. 34 Article 1(3), *Montreal 99*. 35 Article 36(2), *Montreal 99*. 36 Article 25, *Montreal 99*. 37 Article 26, *Montreal 99*.

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