Passenger Liability Litigation in the UK and the US: Harmonisation (?) and Trends

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Overview

- Introduction
- The Warsaw Convention System
  - socio-historical evolution
  - substantive rules
  - case law
- Montreal Convention 1999
  - changes in substantive rules
  - case law
  - future trends
Introduction

- Regulates liability of international air carrier for passengers’ death or injury, as well as for loss, delay and damage to baggage and cargo

- NOT dealing with the liability of carriers to:
  - handling agents, caterers, maintenance companies
  - lenders and lessors - financing arrangements
  - airport authorities e.g. clean-up expenses
  - governmental bodies – immigration, customs
  - labour or employment law
What Law governs?

- Private International Air Law
  - Warsaw Convention System / Montreal Convention 1999

- National Law
  - National Air Law Codes / Commercial Codes / Consumer Protection Acts

- Judge Made Law
  - Contract / Tort / Bailment
Which Liability Scheme?

- Interests of carriers > interests of passengers
  - Presumed liability with reversed burden of proof: no requirement to prove fault – negligence
  - Breakable financial limits to carriers’ liability
  - No exclusions of liability or lower financial limits were permitted
What the main aims?

- **Exclusive law** for international air carriage: no resort to national laws

- Set out **uniform** limits of liability and conditions under which claims of liability against the carrier are to be made

- Unified documents of carriage
Romantic period of aviation

- Law subsidized the operation of air carriers
  - English law: liability depended upon the proof of negligence
  - US laws: highest degree of care BUT Courts in practice protected the infant industry:
    - doctrine of assumption of risks
    - reluctance to use the doctrine of *res ipsa loquitur*
  - Warsaw Convention 1929
    - enabled air carriers to attract capital and purchase insurance
Romantic period of aviation

- Aircraft accidents:
  - unpredictable events that often occur without anyone’s fault
  - e.g. weather-related accidents: “Courts were calling attention to the carrier’s inexperience with the atmosphere's capricious behaviour” [ W. Russ ]
Corporate period of aviation

- **WWII**
  - developed technical knowledge
  - increased passengers’ expectations/living standards

- **Aircraft accidents**
  - predictable and preventable events through technological rationality and organisational risk management

- Areas of liability widened and criticism of WC low limits
Corporate period of aviation

- US civil litigation:
  - create safety incentives to prevent risks from materialising
  - transfer the risks that cannot be prevented to the party in the best position to spread them

- UK civil litigation:
  - rejected reasonable foreseeability as a single general principle in determining the duty of care issue
  - three-stage test: foreseeability of the damage; proximate relationship between the parties; fair, just and reasonable to impose a duty of care
Corporate period of aviation

- **Hague Protocol 1955**
  - Liability limits were raised but not enough for the US
  - Term accident retained in Article 17
  - Simplified travel documents
  - Still interests of carriers > interests of passengers

- **Montreal Interim Agreement**
  - Applied only to flights to/from or with an agreed stop in the United States
  - Liability limit increased to USD 75,000/ no “all necessary measures” defence
  - US attempt to socialise aviation risks
Corporate period of aviation

- **Guatemala City Protocol 1971**
  - The aviation version of US theories of enterprise liability
    - Unbreakable liability limit/Supplementary compensation fund
    - Event instead of accident and personal injury instead of bodily injury
    - No wilful misconduct or all necessary measures defence
    - Recovery process was substantially simplified: no requirement to prove or rebut fault

- **Montreal Additional Protocols 1975**
  - Introduce SDRs as the Convention currency
  - Modernise cargo documentation
Mass transportation period of aviation

- Numerous high-profile accidents
  - Pan Am 103
  - KAL 007
  - TWA 800

- Criticism of the corrective justice approach of the Conventions
  - “We need a system that provides support and stability at the outset for victims’ families…[T]he Montreal Protocol system with the compensation plan at least gives the victims’ families some money at the outset. It gives them money to bury their dead, to probate wills and for trauma support…” [relative of victim in the Lockerbie accident]

- Impersonal service by air carriers often fuels passengers’ reactions
Mass transportation period of aviation

- **Unilateral air carriers’** and governments initiatives:
  - JAL, ANA, JAS waived limits for passenger death or injury for carriage performed by them
  - Australia: increase to 260,000 SDR
  - European Union: increase to 250,000 SDR
  - IATA invites airlines to amend their conditions of carriage and voluntarily increase limits (IATA Intercarrier Agreement on Passenger Liability 1995):
    - Two-tier system
      - up to SDR 100,000: strict liability/ no all necessary measures defence
      - above SDR 100,000: presumed liability
Mass transportation period of aviation

- (Finally) Montreal Convention 1999
  - Two-tier system with 5th jurisdiction for passengers
    - Strict liability >113,000 SDRs: contributory negligence only available defence
    - Presumed liability with reverse burden of proof < 113,000 SDRs: contributory negligence of the claimant, absence of negligence of the carrier, damage was solely caused by the negligence of a third party; the available defences
  - Not as hostile to carriers as some commentators argue:
    - Insurers are comfortable with unlimited liability for safety-related accidents
    - The terms accident and bodily injury are retained: litigation incentive
    - *Baah v Virgin Atlantic* (US) and *Barclay v British Airways plc* (UK) retain the case law history of the Warsaw Convention System
Mass transportation period of aviation

- From an industrial society to a risk society
  - Air carriers are held liable for “almost anything, including the consequences of human behaviour which is (not necessarily linked to but merely) facilitated or even occasioned by carriage by air” [M. Clarke]
  - Courts respect less and less the integrity of the Conventions and “inject” tort law principles into the interpretation of their terms
Which Convention Applies?

- ICAO [http://www2.icao.int/en/leb/Lists/Current%20lists%20of%20parties/AllItems.aspx](http://www2.icao.int/en/leb/Lists/Current%20lists%20of%20parties/AllItems.aspx)

- Highest Common Denominator
  - Note EC Regulation 2027/97 as amended by EC Regulation 889/2020: APPLIES MC99 TO ANY EUROPEAN AIR CARRIER IRRESPECTIVE OF THE ACTUAL ROUTE

- If No Common Denominator…
  - No Convention applies
    - E.g. Thailand / Taiwan
  - Note *Chubb & Sons Ltd v Asiana Airlines*
    - *Warsaw Convention 1929 and Hague Protocol 1955*
Which Convention Applies?

SIN-BKK-SIN = Montreal
TYO-BKK-TYO = Montreal
BKK-JKT-BKK = Thai Civil Code
BKK-TYO-BKK = Thai Civil Code
MNL-BKK-MNL = Warsaw/Hague
JKT-BKK-JKT = Warsaw
Which Convention Applies?

PEK-BKK-PEK = Montreal
BKK-PEK-BKK = Thai Civil
TPE-BKK-TPE = Taiwan Civil
LHR-BKK-LHR = Montreal
JFK-BKK-SFO = Montreal
Why is it important?

- Determining which Convention or legislative scheme applies is crucial when assessing a claim.

- It will determine the amounts of compensation that may apply to the claim.

- Heads of damages – with the exception of punitive damages – and quantum of damages subject to national law.
## DEATH CLAIM OF MARRIED MAN WITH TWO DEPENDANTS

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<th>Amount (£)</th>
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<td>The Netherlands</td>
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## Death Claim of Married Man with Two Dependents

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The Warsaw/Montreal System
Main provisions and case law

Main provisions:
- Exclusivity
- Liability
- Jurisdiction
- Time limits
- Recourse
Exclusivity

- **Warsaw-Hague-MAP4**
  - Art 24 – any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this Convention

- **MC99**
  - Art 29 – 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 the Convention
  - punitive, exemplary or any other non-compensatory damages shall not be recoverable
Exclusivity

- **Sidhu v British Airways** – UK House of Lords
  - LHR – KUL via KWI
  - 2 Aug 1990 – 1st Gulf War
- “The idea that an action for damages may be brought by a pax against the carrier outside the Convention in the cases covered by art 17…seems to be entirely contrary to the system which [the Convention was] designed to create”

- **El Al v Tseng** - US Supreme Court
  - JFK – TLV
  - Security search
- Claimant sort normal tort damages
- Convention exclusively governs personal injury and death claims in international air transportation
Exclusivity

- UK courts clearly favour the exclusive application
  - Recent examples:
    - *Barclay v British Airways plc* (2008)

- US courts opinion is divided
  - Recent cases point towards the exclusivity of the Conventions
Exclusivity

- European Court of Justice (ECJ) bypassed the exclusivity of the Montreal Convention
  - *R (on the Application of International Air Transport Association and European Low fares Airline Association) v Department for Transport*

- Exclusivity and strict liability brings Article 17 to the centre of attention
Liability: Passenger

- **Warsaw-Hague-MAP 4**
  - Art 17 - Death or bodily injury from accident on board aircraft or during (dis)embarkation

- **MC99**
  - Art 17.1 - Death or bodily injury from accident on board aircraft or during (dis)embarkation

- Accident = fault? negligence? ability to exercise control?
What is an accident?

The United States Supreme Court and the United Kingdom House of Lords define an accident as:

- “An unexpected or unusual event or happening that is external to the passenger”.

- “When the injury indisputably results from the passenger own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by the accident and article 17 cannot apply”.

Justice Sandra Day O’Connor,
(Cited by Lord Scott of Foscote in: DVT and Air Travel Group Litigation [2005] UKHL 72)
Liability: Passenger – art 17 litigation

- Bodily injury
  - mental injury caused by physical injury
  - psychological condition as a result of physical changes to the brain
  - pure stand-alone mental injury not compensable

But...

- What if anxiety or depression can be documented as resulting specifically from a chemical (bodily) change?
- As medical science improves, expect a shift in jurisprudence on this issue.
Liability: Passenger – art 17 litigation

- Pre-existing medical condition
  - Courts have held that the conduct of an airline has amounted to an accident leading to the death of a passenger from a medical condition

  - e.g. death of a passenger from an asthma attack
    - second hand exposure to cigarette smoke - flight attendants refused requests to move him from the smoking section of the aircraft (Husain v Olympic Airways 2004)
Liability: Passenger – art 17 litigation
Liability: Passenger – art 17 litigation

- Assault by other pax
- Terrorist attacks
  - Risk characteristic of air travel
Liability: Passenger – art 17 litigation

- Slip & fall
Liability: Passenger – art 17 litigation

- Hot drink spillage
Liability: Passenger – art 17 litigation

- (Dis)embarkation
  - location of pax
  - nature of pax activity
  - whose control/direction

- PRM European Regulation
  - Conflicts with MC99 (?)
Liability: Passenger - Defences

- All necessary measures
  - Little practical importance
  - This is why air carriers dropped this defence

- Contributory negligence
  - Turbulence
Liability: Passenger – Unlimited liability

- Carrier may not rely on limitation of liability if:
  - Intent to cause damage or recklessly and with knowledge that damage would probably result
  - Wilful misconduct

- Subjective or objective test of knowledge?
  - Pan Am Lockerbie
  - KAL 007
Jurisdiction

- Warsaw (art 28) / Montreal (art 33.1)
  - country where carrier ordinarily resident/domiciled
  - country where carrier has its principal place of business
  - country where carrier has an establishment through which contract made
  - country of final destination

- MC99 – art 33.2 – 5th jurisdiction for pax death or injury
  - pax domicile
  - if Contracting State
  - to/from which carrier operates
  - in which carrier conducts business of carriage by air
Rights of recourse

- Warsaw-Hague-MAP 4
- art 30A – nothing in Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person
- Nothing in Warsaw on this issue

- MC99
- art 37 – nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person
Limitation period

- Warsaw
  - art 29 – 2 years from date of arrival or planned arrival or date on which carriage stopped

- MC99
  - art 35 - 2 years from date of arrival or planned arrival or date on which carriage stopped

Problem of claims by minors
Some Thoughts on Litigation Trends

• Continued efforts to develop and integrate appropriate health measures and technology on board aircraft and in and around airport facilities where evidence based medicine or industry standard supports it.

• But …availability = expectation
Some Thoughts on Litigation Trends

• It is difficult to predict when an internal policy may be argued, or deemed, to be an industry standard.

• This is often governed by perception or professional agreement.

• Courts have left the door wide open to determine that failure to follow an industry standard or internal policy can amount to an accident

• Courts are ready to find accident on the basis of the crew’s behaviour
Thank You