Injuries during the course of international air travel

The liability of airlines for injuries suffered by passengers in the course of international air travel is covered by an international convention implemented by Australian law. Specifically, the *Civil Aviation (Carrier's Liability) Act* 1959 (Cth) implements the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air as amended at the Hague. This article will only deal with the general principles arising under this scheme and for simplicity I will refer to the provisions as "the Convention". The full text of the Convention can be found at Schedule 2 of the *Civil Aviation (Carrier's Liability) Act* 1959. As discussed in the article by Russell McIlwaine SC in this edition of *Plaintiff*, amendments to the Convention have been proposed but are yet to be implemented. These amendments will not affect the basic principles relating to liability discussed in this article.

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The time limits for pursuing claims and rules governing liability arise under the Convention. They differ from the legislative provisions and common law principles normally considered in a claim for damages for personal injury. It is essential that practitioners are familiar with the unique provisions that govern liability of international carriers or at least their existence, if for no better reason than that the time limit applicable to such claims is two years, with no extension of the time limit available, and failing to advise a potential claimant of this time limit may result in a professional negligence claim.

The law in this area is a quagmire of Conventions, Protocols, domestic legislation and international case law. To make matters even more difficult, many of the reported decisions cited in support of general propositions have been decided on the basis of peculiar stated facts or in circumstances where seemingly interesting questions about the Convention have been conceded. In one of the leading United States Supreme Court decisions, *Air France v Saks*, the case proceeded on the perhaps surprising basis that a sudden cabin depressurisation sufficient to cause the Plaintiff's ear drum to burst was part of the "normal" operation of the aircraft. In *Chaudhari v British Airways PLC*, a case which followed the US Supreme Court's line of reasoning in *Saks*, the Plaintiff, denied legal aid and unable to afford legal representation, did not even show up to the hearing of the appeal! The French have apparently gone their own way, disagreeing with the US and UK positions that the Convention excludes remedies under domestic legislation. In Australia, the passenger Plaintiffs in *Kenneth Magnus v Southern Pacific Air Motive* commenced proceedings outside the Convention's time limits and originally framed their actions in negligence and under the *Trade Practices Act*, but seem to have conceded the application of the Convention when the claims came before the court, at least with respect to physical injuries suffered in the accident. An attempt to attack the constitutionality of the limits on liability under the Convention in the High Court *[Nelson v Trevlyn Pty Limited Trading as Goldfields Air services P1/1998 (20 November 1998)]* failed because the issue was not raised at the hearing. In *Cameron v Qantas*, passive smoking claims by a number of passengers were framed in negligence and under the *Trade Practices Act* and the exclusive application of the Convention appears not to have been pressed by the airline.

Strict but not absolute liability

The liability of a carrier under the convention does not depend upon proof of fault. However, the scheme is not one of absolute liability and not every "occurrence" on board an aircraft will result in liability on the part of the carrier.

Article 17 is as follows:

> *The carrier is liable for damage sustained in the event of the death or wounding of a passenger 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.*

Article 17 was considered by the US Supreme Court in *Air France v Saks 470 U.S. 392* and defined as follows:

> *liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger.*

The approach in *Air France v Saks* was followed by the UK Court of Appeal in *Chaudhari v British Airways plc*. Mr Chaudhari suffered from hemiplegia. He suffered injuries when he had a fall on board an aircraft. His statement of claim was struck out at first instance and this decision was upheld on appeal:

> *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. Upon this footing, 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. As the Judge [at first instance] said, 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 of the Warsaw Convention.*

The facts in *Saks* involved a passenger who suffered a loss of hearing as a result of a sudden drop in cabin pressure. The appeal proceeded on the assumption that the sudden drop in cabin pressure was part of the "normal operation of the aircraft" and the interpretation of Article 17 adopted by the Supreme Court needs to be considered with this assumption in mind.

Taken out of context, the US Supreme Courts' interpretation of Article 17 may seem to substantially restrict the circumstances in which a carrier will be liable for injuries sustained on board an aircraft. However even in *Saks*, the Supreme Court was careful to point out that the definition adopted was to be "flexibly applied" and the Court quoted with approval cases involving terrorist attacks and assaults by fellow passengers. According the US Supreme Court in *Saks*:

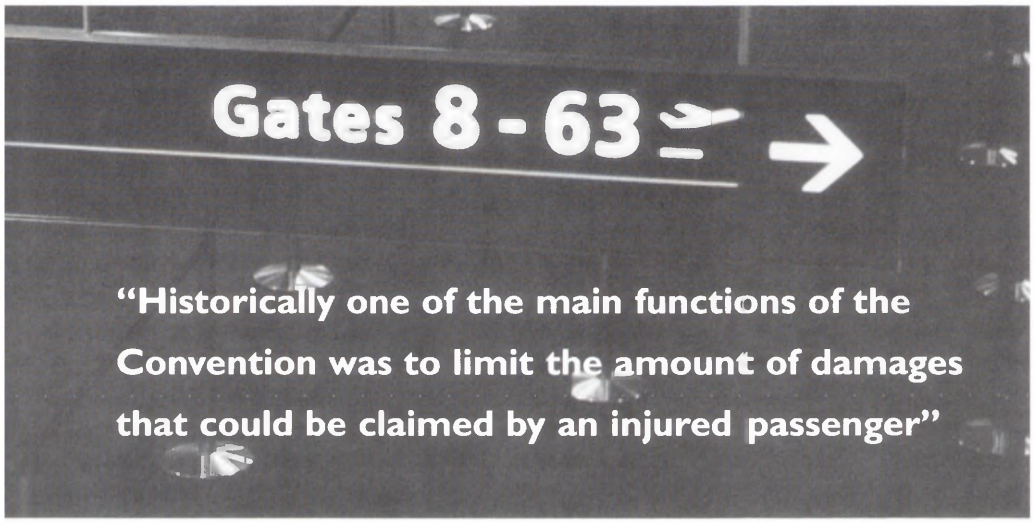
> *Any injury is the product of a chain of causes, and we require only that the passenger be able to prove some link in the chain was an unusual or unexpected event external to the passenger.*

The Convention covers injuries occurring during the course of the flight and in the course of the "operations of embarking and disembarking". The scope of the operations of embarking and disembarking is not defined in the convention but has been considered in some overseas cases and by the NSW Court of Appeal in *Kotsambis v Singapore Airlines Ltd* (1997) NSWLR 110. These cases have emphasised the need for a close connection between the "operations" and the flight.

The Convention provides the exclusive remedy

Historically, there has been some uncertainty as to whether the Convention excluded domestic remedies. Up until relatively recently, many jurisdictions in the United ▶

States accepted that the Convention did not exclude domestic remedies, at least in circumstances where the domestic remedies were held to be not inconsistent with the provisions of the Convention. However, both the United States Supreme Court and the House of Lords have now held that the Convention provides the sole remedy in respect of personal injury on board aircraft. The Convention excludes remedies under domestic law, so claimants who are not able to bring themselves within the scope of the Convention, are probably without a remedy.



Article 24 of the convention provides as follows:

> *1. 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.*
>
> *2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.*

See also section 13 of the Civil Aviation (Carriers Liability) Act 1959 which reads as follows:

> *. . . the liability of a carrier under the Convention in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury.*

Article 24 has been held to exclude any other remedy under domestic law. For example , the US Supreme Court in *El Al Israel Airlines v Tseng 525 U.S. 155 (1999)*, it was held that the use of the phrase "cases covered by Article 17" in Article 24 did not mean that cases that are not covered are not subject to the restriction – the intention of the framers of the convention was to provide a uniform and comprehensive codification of the liability for international air carriers. This approach has also been adopted by the House of Lords – see *Sidhu v British Airways plc [1997] AC 430.*

In Australia, the effectiveness of Article 24 in excluding common law and Trade Practices Act 1974 remedies has not been the direct subject of any reported appellate level decision so far as I am aware. In *Kotsambasis v Singapore Airlines* and *American Airlines v Georgopolous*, both NSW Court of Appeal Cases, the claims were pursued as claims under the Convention and the issue was whether Article 17 extended to psychiatric injuries.

In *Magnus v South Pacific Air Motive* relief was claimed under the *Trade Practices Act* and in negligence, but it was conceded at first instance and on appeal that the Convention excluded these causes of action, at least in respect of physical injuries. The Full Court held that any claim for damages for "nervous shock" was also excluded by the Convention.

"Nervous shock"

The Convention covers "bodily injury" (*"lésion corporelle"* in the French text). This has been interpreted as excluding any claim for "nervous shock" or pure psychiatric injuries.

For example, the NSW Court of Appeal has held that the convention does not extend to purely psychiatric injury – *Kotsambasis v Singapore Airlines Limited.* This decision follows the US Supreme Court approach *in Eastern Airlines v Floyd 499 U.S. 530 (1991).* Contrast this approach with the decision of the Full Court of the Federal Court in *Air Motive v Magnus*, where it was decided that the term "personal injury" in the provisions of the *Civil Aviation (Carrier's Liability) Act* 1955 covering domestic flights (discussed below) was wide enough to include "nervous shock".

An action must be commenced within 2 years

Article 29 provides for a two-year limitation period, after which rights are extinguished:

> *The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date that the aircraft ought to have arrived, or from the date on which the carriage stopped.*

There is no provision for an extension of this two-year time limit, or, more accurately, the right to claim provided by the convention cannot be revived once the two-year period has expired. The Convention's time limits override domestic limitations legislation and there is no opportunity to extend the time for commencing proceedings. Similarly, the running of the time limit is not deferred in the case of minors or in circumstances where the claimant is under a disability. See for example *Timeny v British Airways plc* (1992) 56 SASR 287.

Where can the claim be pursued?

The options available for a claimant in terms of the forum for pursuing a claim are contained in Article 28:

> *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 having jurisdiction where the carrier is ordinarily resident, or has his [or her] principal place of business, or has an establishment by which the con-*

tract has been made or before the Court having jurisdiction at the place of destination.

Note that "territory" presumably refers to the nation-state, rather than a State or Territory of the Commonwealth of Australia. Also note that the Convention is silent as to the laws to be applied once liability is established and careful consideration of the law applicable to the heads of damages that can be claimed and the assessment of those damages may be required.

Caps on damages

Historically, one of the main functions of the Convention was to limit the amount of damages that could be claimed by an injured passenger or the dependants of a passenger who had died. Up until recently these limits were very low.

However the significance of these limits has over the years been lessened by amendments to the Convention and voluntary agreements amongst the contracting parties. Amendments to the *Civil Aviation (Carrier's Liability) Act 1959* by the *Transport Legislation Amendment Act* 1995 effectively makes a voluntary assumption of increased liability a condition of a licence for an international carrier to fly into and out of Australia. Under these provisions, contained in section 11A of *the Civil Aviation (Carrier's Liability) Act 1959*, an international air carrier's liability is increased to 260,000 SDRs. ("SDR" refers to Special Drawing Rights, an International Monetary Fund unit of exchange. At 9 March 2001, an SDR was equivalent to $A2.529580). More recently, there has been a trend toward international carriers voluntarily agreeing to waive reliance on the liability limits contained in the Convention. See the article in this edition by Russell McIlwaine SC for details of the IATA inter-carrier agreement on passenger liability and other developments.

Article 25 of the Convention prevents a carrier from taking advantage of the caps on liability if it can be shown that the "act or omission of the carrier, his servants or agents" was "done with intent to cause damage or recklessly and with knowledge that damage would probably result". The need to utilise the provisions of Article 25 has been lessened by the increase in or the waiver of reliance upon the caps that limit the damages that can be claimed.

Other remedies

While the convention extends to servants or agents of air carriers, it does not apply to other parties who may be liable for injuries suffered by passengers. Depending on the circumstances, claims might arise against manufacturers of aircraft or aircraft components, caterers, airport authorities or fellow passengers. Similarly, the convention does not modify or exclude workers compensation claims by employees travelling for work purposes.

Note section 75AI of the *Trade Practices Act* 1974 which is intended to exclude the application of the product liability provisions contained in Part VA of the *Trade Practices Act* where a claim is available under the Convention.

Similar provisions cover domestic travel

The Convention does not apply to travel within Australia. However Part IV of the *Civil Aviation (Carrier's Liability) Act* 1959 implements an equivalent scheme with respect to inter-state travel. Legislation in similar terms at State level applies the same provisions to intra-state travel.

Conclusion – reforms?

The Warsaw Convention had its origins in the early part of last century at a time when the international carriage of passengers was a fledgling business. It was seen as necessary to not only provide a uniform system of liability, but also a limit to that liability to avoid the potentially prohibitive cost of obtaining insurance coverage for air carriers. The trade-off for this limited liability from the airlines' point of view was a strict liability scheme with damages available to an injured passenger without proof of fault.

The Convention is showing its age, even with the amendments and the increases in the caps on damages. A scheme of international uniformity is probably desirable as it recognises the extraterritorial nature of the service provided by international airlines. Similarly, liability without proof of fault would also seem to be appropriate given the difficulty and expense a claimant may be confronted with in investigating and proving the causes of an accident. However the exclusion of nervous shock claims, and restriction of an injured passenger's right to claim full compensation without being subject to caps on damages, while possibly appropriate at the time the convention was drafted, seem ill-suited to today's well-established international air travel industry. PL

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