

Aviation Liability 2021

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Aviation Liability

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Aviation Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew J Harakas of Clyde & Co US LLP, for his continued assistance with this volume.



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APPLICABLE TREATIES

Major air law treaties

1 | To which major air law treaties related to carrier liability for passenger injury or death is your state a party?

The United Kingdom is party to the following major air law treaties related to carrier liability for passenger injury or death:

- the Warsaw Convention 1929;
- the Hague Protocol 1955;
- the Guadalajara Convention 1961;
- Montreal Protocols Nos. 1, 2 and 4 1975; and
- the Montreal Convention 1999.

These treaties have legal effect through domestic statutes or statutory instruments currently in force, all of which have their basis in the Carriage by Air Act 1961. The United Kingdom is also a signatory to the Guatemala City Protocol 1971 and Montreal Protocol No. 3 1975, although it is unlikely that these instruments will come into force.

The Montreal Convention has force of law in the United Kingdom through EC Regulation 2027/97 (as amended by EC Regulation 889/2002) and the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, which amended the Carriage by Air Act 1961. Following the UK's exit from the European Union (EU), Regulation 2027/97 has been put into UK law by virtue of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, which will enter into full effect on 1 January 2021.

INTERNATIONAL CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

Montreal Convention and Warsaw Convention

2 | Do the courts in your state interpret the similar provisions of the Montreal Convention and the Warsaw Convention in the same way?

Yes, as a general principle (*Barclay v British Airways plc* (2010) QB 187).

3 | Do the courts in your state consider the Montreal Convention and Warsaw Convention to provide the sole or exclusive basis for air carrier liability for passenger injury or death?

Yes, the UK courts have upheld the exclusivity of the Montreal and Warsaw Conventions as providing the sole basis for air carrier liability for passenger injury or death (*Sidhu and others v British Airways plc; Abnett (known as Sykes) v British Airways plc* (1997) AC 430).

The exclusivity of these Conventions has been eroded to a certain degree by recent Court of Justice of the European Union (CJEU) and English case law relating to Regulation (EC) No. 261/2004 on denied

boarding and cancellation or long delay of flights. See, for example, *R (on the application of International Air Transport Association and another) v Department for Transport*, Case C-344/04; *Sturgeon and others v Condor Flugdienst GmbH; Böck and another v Air France SA*, Joined cases C-402/07 and C-432/07; *Nelson v Deutsche Lufthansa AG*; *R (on the application of TUI Travel plc and others) v Civil Aviation Authority*, Joined cases C-581/10 and C-629/10; and *Dawson v Thomson Airways Limited* (2014) 4 All ER 832.

Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

The term 'carrier' usually means the corporate legal entity contracting the carriage; it does not extend to ground handling agents and other service providers.

Where actual carriage is undertaken by successive carriers, the UK courts consider the following characteristics to be representative of successive carriage:

- the carriage must have been regarded by the parties as a single operation;
- it must have been divided into separate and successive (in terms of both time and place) stages; and
- the parties must have agreed that the carriage was to be performed by several successive carriers.

The English Court of Appeal held that a contract for carriage for the route Manchester-London-Los Angeles-New York-Manchester, where all flights were to be performed by British Airways apart from the Los Angeles-New York flight, which was to be performed by American Airlines, was an example of successive carriage (*Collins v British Airways Board* [1982] QB 734). Similarly, the English High Court determined there to be successive carriage in an example where a carrier's time-tables formed part of the contract for carriage and indicated that part of the journey was to be performed by another carrier (*Rotterdamsche Bank NV v BOAC* [1953] 1 All ER 675).

Carrier liability condition

5 | How do the courts in your state interpret the conditions for air carrier liability – 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' – for passenger injury or death in article 17(1) of the Montreal Convention and article 17 of the Warsaw Convention?

The English courts follow the approach of the United States Supreme Court decision in *Air France v Saks* as to the meaning of 'accident' under the Montreal and Warsaw Conventions, namely that an accident is an unexpected or unusual event or happening that is external to that passenger (see, for example, *Deep Vein Thrombosis and Air Travel*

Group Litigation, Re [2003] 1 All ER 935). An omission does not constitute an 'accident'.

The then House of Lords determined that 'bodily injury' means a change in some part or parts of the body of a passenger which is sufficiently serious to be described as an injury (*Morris v KLM Royal Dutch Airlines*; *King v Bristow Helicopters Limited* (2002) 2 AC 628). A psychiatric illness – emotional upset such as fear, distress, grief or mental anguish – may be evidence of bodily injury or the description of a condition that includes bodily injury but does not in itself constitute bodily injury.

There are a number of English authorities on the meaning of 'in the course of any of the operations of embarking or disembarking'. In *Adatia v Air Canada* (1992) PIQR P 238, the English Court of Appeal considered a passenger's movement through the various airport procedures (including his or her physical location) to indicate whether he or she was, at the relevant time, engaged in the embarkation of the flight in question. See also *Phillips v Air New Zealand Ltd* (2002) 1 All ER (Comm) 801.

No negligence defence

- 6 How do the courts in your state interpret and apply the 'no negligence' defence in article 21 of the Montreal Convention, and the 'all reasonable measures' defence in article 20 and the 'wilful misconduct' standard of article 25 of the Warsaw Convention?

Whether a carrier can rely on the contributory negligence of a passenger depends on the precise facts of a case. The English courts have held that contributory negligence did not feature in a case of injury as a result of turbulence where the passenger did not fasten his seat belt during a flight (*Goldman v Thai Airways International Ltd* (1981) 170 ER 266).

It is well established by the English courts that 'all reasonable measures' should be interpreted as 'all reasonably necessary measures'; see *Chisholm v British European Airways* (1963) 1 Lloyd's Rep 626 and *Goldman v Thai Airways International Ltd* (1981) 170 ER 266.

The English courts have applied the concept of 'wilful misconduct' in an aviation context as requiring either intention or subjective recklessness; see *Thomas Cook v Air Malta* (1997) 2 Lloyd's Rep 399 and *Rolls-Royce plc v Heavylift-Volga DNEPR Ltd* (2000) 1 All ER (Comm) 796.

Advance payment for injury or death

- 7 Does your state require that advance payment be made to injured passengers or the family members of deceased passengers following an aircraft accident?

EC Regulation 2027/97 (as amended) requires EU registered carriers to make advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered. The payments should not be less than 16,000 special drawing rights (approximately £17,500) per passenger, must be made without delay and in any event within 15 days, and are made to the injured passenger or the family members of the deceased passenger as appropriate. Following the UK's exit from the EU, Regulation 2027/97 has been put into UK law by virtue of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, which will enter into full effect on 1 January 2021.

Advance payments may be offset against any subsequent sums paid on the basis of air carrier liability and are not returnable unless there is a finding of contributory negligence by a passenger or the individual in receipt of the advance payment was not the person entitled to compensation.

Deciding jurisdiction

- 8 How do the courts of your state interpret each of the jurisdictions set forth in article 33 of the Montreal Convention and article 28 of the Warsaw Convention?

English case law is suggestive that the seat of the board of directors is the most appropriate test for the ordinary residence of a corporation (*Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corpn* (1981) QB 368). There is no case law on the concept of branch offices or agencies of carriers under the Montreal Convention.

The place of departure will also be the place of destination in the case of return tickets or a round trip regarded from the outset as a single operation (*Grein v Imperial Airways Ltd* (1936) 2 All ER 1258).

There is no English case law on the 'fifth jurisdiction' created by article 33(2) of the Montreal Convention.

English law has the common law doctrine of forum non conveniens and the English courts will apply it to Montreal and Warsaw Convention claims.

Period of limitation

- 9 How do the courts of your state interpret and apply the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention?

The English courts uphold the two-year period of limitation, which is absolute and not subject to tolling; see *Sidhu v British Airways plc* (1995) PIQR P 427 and *Phillips v Air New Zealand* (2002) 1 All ER (Comm) 801.

Liability of carriage

- 10 How do the courts of your state address the liability of carriage performed by a person other than the contracting carrier under the Montreal and Warsaw Conventions?

There is no English case law regarding the liability of carriers in a code sharing or similar arrangement.

DOMESTIC CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH

Governing laws

- 11 What laws in your state govern the liability of an air carrier for passenger injury or death occurring during domestic carriage?

The liability of UK carriers in passenger cases is governed by EC Regulation 2027/97 (as amended), which applies to both international and non-international carriage. Domestic carriage is therefore subject to the liability rules of the Montreal Convention. Following the UK's exit from the EU, Regulation 2027/97 has been put into UK law by virtue of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, which will enter into full effect on 1 January 2021.

Nature of carrier liability

- 12 What is the nature of, and what are the conditions for, an air carrier's liability?

An air carrier's liability is strict and subject to the conditions set out in article 17.1 of the Montreal Convention, namely that a carrier is liable for damage where a passenger suffers a bodily injury while in the process of embarking or disembarking or on board the aircraft.

Liability limits

13 | Is there any limit of a carrier's liability for personal injury or death?

Damages for personal injury or death are unlimited unless the carrier can prove that:

- such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- such damage was solely due to the negligence or other wrongful act or omission of a third party.

If a carrier is able to prove that it was not negligent or that it did not commit a wrongful act, damages will be subject to a limit of 128,821 special drawing rights (approximately £140,000).

Main defences

14 | What are the main defences available to the air carrier?

The English courts will apply the defences of contributory negligence of a passenger, all reasonable measures and wilful misconduct.

Whether a carrier can rely on the contributory negligence of a passenger depends on the precise facts of a case. The English courts have held that contributory negligence did not feature in a case of injury as a result of turbulence where the passenger did not fasten his seat belt during a flight (*Goldman v Thai Airways International Ltd* (1981) 170 ER 266).

It is well established by the English courts that 'all reasonable measures' should be interpreted as 'all reasonably necessary measures'; see *Chisholm v British European Airways* (1963) 1 Lloyd's Rep 626 and *Goldman v Thai Airways International Ltd* (1981) 170 ER 266.

The English courts have applied the concept of 'wilful misconduct' in an aviation context as requiring either intention or subjective recklessness; see *Thomas Cook v Air Malta* (1997) 2 Lloyd's Rep 399 and *Rolls-Royce plc v Heavylift-Volga DNEPR Ltd* (2000) 1 All ER (Comm) 796.

Damages

15 | Is the air carrier's liability for damages joint and several?

No.

Rule for apportioning fault

16 | What rule do the courts in your state apply to apportioning fault when the injury or death was caused in whole or in part by the person claiming compensation or the person from whom the right is derived?

The English courts will apply the defence of contributory negligence of a passenger. Whether a carrier can rely on the contributory negligence of a passenger depends on the precise facts of a case. The English courts have held that contributory negligence did not feature in a case of injury as a result of turbulence where the passenger did not fasten his seat belt during a flight (*Goldman v Thai Airways International Ltd* (1981) 170 ER 266).

Behaviour that will be deemed contributory negligence on the part of a compos mentis adult may not be so regarded for a child or person with reduced mental capacity.

Statute of limitations

17 | What is the time within which an action against an air carrier for injury or death must be filed?

The English courts uphold the Montreal/Warsaw two-year period of limitation, which is absolute and not subject to tolling; see *Sidhu v*

British Airways plc (1995) PIQR P 427 and *Phillips v Air New Zealand* (2002) 1 All ER (Comm) 801. A claim must be filed and issued at court within that two-year period and thereafter served within four calendar months of issue.

THIRD-PARTY ACTIONS

Seeking recovery

18 | What are the applicable procedures to seek recovery from another party for contribution or indemnity?

A party may seek a contribution or indemnity from another party by adding them as a party to existing proceedings brought against that party by a claimant. If the proceedings have settled or a judgment issued, the party seeking a contribution may rely on the Civil Liability (Contribution) Act 1978.

Time limits

19 | What time limits apply?

A party seeking a contribution under the Civil Liability (Contribution) Act 1978 must issue proceedings within two years of the date on which it is held liable by a judgment.

LIABILITY FOR GROUND DAMAGE

Applicable laws

20 | What laws apply to the liability of the air carrier for injury or damage caused to persons on the ground by an aircraft accident?

The United Kingdom is a signatory to, but has not ratified, the Rome Convention 1952 on surface damage, and it is not a party to the Montreal Protocol 1978. Instead, liability for surface damage caused by aircraft in the United Kingdom is governed by section 76 of the Civil Aviation Act 1982.

Damages may be recovered for loss or damage caused to a person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft in flight, taking off or landing. Recovery of such damages is subject to the relevant rules applicable to torts in the relevant UK legal jurisdiction (England and Wales, Scotland or Northern Ireland).

Nature and conditions of liability

21 | What is the nature of, and what are the conditions for, an air carrier's liability for ground damage?

Section 76(2) of the Civil Aviation Act 1982 provides for strict liability in surface damage cases unless the loss or damage was caused or contributed to by the negligence of the person who suffered it.

Liability rests on the owner of the aircraft unless that aircraft has been leased out for more than 14 days. In that instance, the owner has no liability for surface damage unless it employed flight crew on the aircraft (wet lease).

Liability limits

22 | Is there any limit of carriers' liability for ground damage?

There is no limit of a carrier's liability for surface damage where the claimant is able to prove that the material loss or damage was caused by, or by a person in, or an article, animal or person falling from, an aircraft in flight, taking off or landing.

Main defences

23 | What are the main defences available to the air carrier in a claim for damage caused on the ground?

There is a defence of contributory negligence available where a carrier can prove that the loss and damage was caused or contributed to by the negligence of the claimant.

LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

Applicable laws

24 | What laws apply to the liability of the air carrier for injury or death caused by an unruly passenger or a terrorist event?

Where a passenger suffers injury or death caused by an unruly passenger or a terrorist event on board an aircraft or in the course of the operations of embarking or disembarking, liability would be governed by the Montreal Convention. The English courts would consider whether the circumstances involving the unruly passenger or terrorist attack constituted an 'accident'.

The English Court of Appeal has held that a passenger who was indecently assaulted by another passenger on board a flight had suffered an accident (*Morris v KLM Royal Dutch Airlines* (2002) QB 100). Whether a terrorist attack is considered to be an accident in the context of damage suffered by a passenger will depend on the facts of a particular case.

Where a passenger suffers injury or death at an airport by an unruly passenger or a terrorist event and where that passenger is not in the process of embarking or disembarking, an airport operator or the security services may be liable in tort.

Nature and conditions of liability

25 | What is the nature of, and what are the conditions for, an air carrier's liability for injury or death caused by an unruly passenger or a terrorist event?

Liability under the Montreal Convention is strict. A passenger or their representatives would have to show that the passenger had suffered an accident while on board the aircraft that resulted in bodily injury or death.

The English courts follow the approach of the United States Supreme Court decision in *Air France v Saks* as to the meaning of 'accident' under the Montreal and Warsaw Conventions, namely that an accident is an unexpected or unusual event or happening that is external to that passenger (see, for example, *Deep Vein Thrombosis and Air Travel Group Litigation, Re* [2003] 1 All ER 935). An omission does not constitute an 'accident'.

The then House of Lords determined that 'bodily injury' means a change in some part or parts of the body of a passenger which is sufficiently serious to be described as an injury (*Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Limited* (2002) 2 AC 628). A psychiatric illness – emotional upset such as fear, distress, grief or mental anguish – may be evidence of bodily injury or the description of a condition that includes bodily injury but does not in itself constitute bodily injury.

There are a number of English authorities on the meaning of 'in the course of any of the operations of embarking or disembarking'. In *Adatia v Air Canada* (1992) PIQR P 238, the English Court of Appeal considered a passenger's movement through the various airport procedures (including his or her physical location) to indicate whether he or she was, at the relevant time, engaged in the embarkation of the flight in question. See also *Phillips v Air New Zealand Ltd* (2002) 1 All ER (Comm) 801.

Liability limits

26 | Is there any limit of liability for injury or death caused by an unruly passenger or a terrorist event?

Where a claim is governed by the Montreal Convention, it is subject to the Montreal liability limit for injury or death (128,821 special drawing rights; approximately £140,000). Where a claim is made in tort, there is no limit of liability but it is necessary for a claimant to prove the amount of damages claimed.

Main defences

27 | What are the main defences available to the air carrier in a claim for injury or death caused by an unruly passenger or a terrorist event?

There are no defences available to a carrier in relation to the Montreal Convention, other than a reduction of damages where the damage caused by the unruly passenger or terrorist event was:

- not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- solely due to the negligence or other wrongful act or omission of a third party.

A carrier may also rely on the expiry of limitation, where appropriate. Similar concepts would apply to a tortious claim brought by a passenger against an airline operator or the security services in relation to an unruly passenger or terrorist event.

LIABILITY FOR HARM CAUSED BY DRONES

Applicable legislation

28 | Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

The Air Navigation Order 2016 (SI 2016/765), as amended by the Air Navigation (Amendment) Order 2018 and the Air Navigation (Amendment) Order 2019, classifies a 'small unmanned aircraft' (SUA) as any unmanned aircraft, other than a balloon or a kite, having a mass of not more than 20kg without its fuel but including any articles or equipment installed in or attached to the aircraft at the commencement of its flight.

Where a SUA causes damage to persons or property on the ground, section 76(2) of the Civil Aviation Act 1982 applies meaning that SUA operators and owners are strictly liable for surface damage caused by SUAs operated or owned by them (such as injury to an individual or damage to property). That liability is theoretically unlimited but can be reduced by the contributory negligence of the victim.

Individuals who suffer injuries or damage from defective SUAs, including SUA owners, may be able to recover damages from the manufacturer or importer under Part I of the Consumer Protection Act 1987, which enacted the EU Product Liability Directive (85/374/EEC) into English law and imposes strict liability on manufacturers and importers of SUAs, in negligence or under general principles of product liability.

Liability for mid-air damage caused by a SUA is determined in the normal way for torts committed in the relevant UK legal jurisdiction.

CONSUMER PROTECTION AND PASSENGER RIGHTS**Applicable legislation**

- 29 Summarise aviation-related consumer-protection laws or regulations related to passengers with reduced mobility, flight delays and overbooking, tarmac delay and other relevant areas.

The provision of assistance by airports and airlines to disabled persons and persons with reduced mobility is governed by EC Regulation 1107/2006. This applies to flights operated by any airline departing an EU airport, and flights operated by an EU-registered airline to an EU airport. While the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 set out offences and penalties for non-compliance with Regulation 1107/2006, Regulation 1107/2006 does not create a private law action sounding in damages (*Stott v Thomas Cook Tour Operators Ltd* (2014) UKSC 15). Following the UK's exit from the EU, Regulation 1107/2006 has been put into UK law by virtue of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, which will enter into full effect on 1 January 2021.

EC Regulation 261/2004 (as amended by the UK) provides for fixed compensation in the range of £220 to £520 (depending on flight length) per passenger and/or care and assistance to passengers in the event of flight delays of three hours or more, flight cancellations or denied boarding, and provides remedies for overbooking. It applies to flights operated by any airline departing a UK airport, and flights operated by a UK-registered airline to a UK airport. Regulation 261/2004 has been subject to a large amount of case law made by the CJEU, which is summarised in Interpretative Guidelines issued by the European Commission in June 2016 (Commission Notice C/2016/3502). CJEU case law has been made post-2016, including with reference to bird strikes, employee strikes, damage to an aircraft tyre caused by a screw on a runway, and a runway fuel spillage. The English Court of Appeal has also ruled on various aspects of Regulation 261/2004 in *Jet2.com v Huzar* (2014) 4 All ER 581, *Dawson v Thomson Airways Limited* (2014) 4 All ER 832, *Gahan v Emirates and Buckley and ors v Emirates* (2018) 1 WLR 2287 and *Blanche v EasyJet Airline Company Ltd* [2019] Bus LR 1258. Following the UK's exit from the EU, Regulation 261/2004 has been put into UK law and amended by virtue of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, which will enter into full effect on 1 January 2021.

The Montreal Convention also applies to damage occasioned by delay to passengers and their baggage, subject to proof of loss and a limit of liability (5,346 special drawing rights per passenger, approximately £6,000).

The Consumer Rights Act 2015 applies to the aviation sector and provides consumers with a statutory right to require a contract for carriage to be provided with reasonable care and skill. In the event that that right is breached, a passenger may bring a claim against the carrier for compensation resulting from the breach. Such compensation cannot be limited to less than the ticket price, and the English courts will take the Montreal Convention into account when assessing the level of damages due.

LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS**Relevant laws**

- 30 What laws apply to the liability of the government entities that provide services to the air carrier?

En route air traffic services in the United Kingdom are provided by NATS, a private company licensed by the UK Secretary of State for Transport to provide such services pursuant to the Transport Act 2000. Any liability of NATS would be in tort, subject to the concept of sovereign immunity as applicable to air navigation service providers. The UK government is under no legal obligation to compensate damages beyond the financial capacity of NATS although there may be a moral duty to do so.

A number of private companies provide air traffic control at airports. UK airport authorities are private companies following the privatisation of the British Airports Authority by the Airports Act 1986.

Nature and conditions of liability

- 31 What is the nature of, and what are the conditions for, the government's liability?

Not relevant.

Liability limits

- 32 Are there any limitations to seeking recovery from the government entity?

Not relevant.

CRIMINAL PROCEEDINGS**Responsibility for accidents**

- 33 Can an air carrier be criminally responsible for an aviation accident?

There is no precedent in the United Kingdom for an air carrier being held criminally responsible for an aviation accident. However, it is possible that a carrier could be found guilty of corporate manslaughter or homicide pursuant to the Corporate Manslaughter and Corporate Homicide Act 2007 where:

- the way in which the carrier's activities had been managed or organised caused a person's death;
- the person's death was the result of a gross breach of a relevant duty of care owed to that person by the carrier; and
- the way in which the senior management of the carrier managed or organised the carrier's activities was a substantial element of the breach.

Effect of proceedings

- 34 What is the effect of criminal proceedings against the air carrier on a civil action by the passenger or their representatives?

A court may stay civil actions brought against the carrier by a passenger or their representatives, or a coroner's inquest or fatal accident inquiry concerning the death of a passenger, pending the outcome of connected criminal proceedings.

Compensation

35 | Can claims for compensation by passengers or their representatives be made against the air carrier through the criminal proceedings?

No, such claims would be made via civil proceedings.

EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

Liability

36 | What is the legal effect of a carrier's conditions of carriage or tariffs on the carrier's liability?

The UK courts will not uphold any provision in a carrier's contract for carriage that seeks to relieve the carrier of liability or sets a lower limit than that set out in the Montreal and Warsaw Conventions (*Abnett v British Airways plc* (1997) AC 430). Any such provision would be null and void; the remainder of the contract for carriage is not affected.

- The English courts have upheld in a carrier's contract for carriage: a jurisdiction clause that requires passengers to bring compensation claims for flight delays and cancellations in the Irish courts (*Menditta v Ryanair*, HHJ Wood QC, County Court at Liverpool, 31 May 2017); and
- a clause limiting the circumstances in which the carrier will engage with third-party claims handlers instructed on behalf of a passenger (*Bott & Co Solicitors Ltd v Ryanair DAC* (2018) 3 Costs LO 275; as affirmed by the English Court of Appeal in [2019] 1 WLR 3375, but which is subject to an appeal to the UK Supreme Court which was to be heard on 27 October 2020 but has been adjourned with no relisting date set at time of writing).

Terms in a carrier's contract for carriage may be determined to be ineffective and unenforceable if they are found to be unfair by reference to the general fairness test in Part 2 of the Consumer Rights Act 2015 (CRA). The CRA prohibits carriers from limiting their liability to less than the full ticket price.

Under English common law, a carrier must take sufficient steps to draw a passenger's attention at the earliest possible opportunity to any relatively unusual terms in the contract for carriage to ensure that such terms are incorporated.

DAMAGES

Damage recovery

37 | What damages are recoverable for the personal injury of a passenger?

Under general principles of English tort law, damages are intended to put an innocent party back in the position it would have been in had the wrong not occurred.

Compensation in personal injury cases consists of general damages and special damages. General damages consist of compensation payable for pain, suffering and loss of amenity arising out of the injuries sustained in an accident, which may be physical or psychological. The Judicial College Guidelines provide guidance as to the level of general damages. Special damages represent actual financial losses incurred as a direct result of the accident.

A carrier cannot exclude or limit its liability for bodily injury. Damages for bodily injury under the Montreal Convention are unlimited subject to the carrier being able to prove that it was not negligent or that it did not commit a wrongful act, in which case damages are

subject to a limit of 128,821 special drawing rights (SDRs) (approximately £140,000). Punitive damages are not recoverable in Montreal Convention claims.

An injured passenger has standing to pursue and benefit from a claim for personal injury unless that passenger is a child (under 18) or a protected party (a person who by reason of mental disorder is incapable of managing and administering his or her own affairs). A litigation friend (usually a parent, guardian or other relative) may bring a claim for personal injury on behalf of a child or protected party. Money recovered by or on behalf of a child or protected party may be dealt with only as directed by the court.

It is an established principle in the international case law arising from claims for bodily injury under the Montreal Convention that contracting an infectious disease while on board an aircraft can constitute bodily harm. However, whether or not contracting a disease such as covid-19 could be deemed to be the result of an 'accident' is currently unclear and no cases on the issue have come before the English courts to date.

38 | What damages are recoverable for the death of a passenger?

Damages for the death of a passenger in an accident that took place on board an aircraft or in the course of embarking or disembarking are potentially unlimited subject to the carrier being able to prove that it was not negligent or that it did not commit a wrongful act, whereby the damages would be subject to the Montreal Convention limit of 128,821 SDRs (approximately £140,000).

Actions in the English courts relating to the death of a passenger are governed by the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. Claims may be brought by the executors on behalf of the deceased's estate or the deceased's dependants. A court-appointed representative is not required.

ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

Investigatory authority

39 | Who is responsible in your state for investigating aviation accidents?

The investigation of civil aviation accidents and serious incidents within the United Kingdom, its overseas territories and crown dependencies is performed by the Air Accidents Investigation Branch (AAIB), an independent unit within the Department for Transport. Investigations are performed in accordance with the provisions of ICAO Annex 13, EC Regulation 996/2010 and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018. Following the UK's exit from the EU, Regulation 996/2010 has been put into UK law by virtue of the Aviation Safety (Amendment etc) (EU Exit) Regulations 2019, which will enter into effect on 1 January 2021.

Disclosure restrictions

40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information or cockpit voice recordings in litigation.

Final accident reports are published and are admissible in English civil proceedings as a matter of law (*Rogers v Hoyle* (2013) EWHC 1409 (QB); affirmed on appeal in *Hoyle v Rogers* (2014) EWCA Civ 257). Cockpit voice and image recordings and their transcripts are sensitive safety information that may not be made available or used for purposes other than safety investigation (article 14, Regulation 996/2010; regulation 25, Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018). Flight data recorder recordings should not be made available

or used for purposes other than those of the safety investigation, airworthiness or maintenance purposes, except when such records are de-identified or disclosed under secure procedures.

A court may decide that the benefits of the disclosure of sensitive safety information for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. See the decision of the Scottish Court of Session in *Lord Advocate, Petitioner* (2015) CSOH 80 (combined voice and flight data recorder), and the English High Court cases of *Chief Constable of Sussex Police v Secretary of State for Transport & Anor* (2016) EWHC 2280 (QB) (pilot statements, GoPro cockpit footage and engineering reports) and *British Broadcasting Corporation & Anor v Secretary of State for Transport & Anor* [2019] 4 WLR 24 (GoPro cockpit footage).

Relevant post-accident assistance laws

41 | Does your state have any laws or regulations addressing the provision of assistance to passengers and their family after an aviation accident?

Article 21 of Regulation 996/2010 makes provision for the assistance to the victims of air accidents and their relatives by requiring all EU member states to establish a civil aviation accident emergency plan at a national level. At an operator's level, there is a requirement for operators to have a 'Victim Assistance Plan' that can be implemented in the event of an accident. Plans should include a point of contact for relatives and survivors seeking information and for psychological support for victims and their relatives.

INSURANCE REQUIREMENTS

Mandatory requirements

42 | Are there mandatory insurance requirements for air carriers?

EC Regulation 785/2004 (as amended) requires all air carriers and aircraft operators flying within, into, out of, or over the territory of an EU member state to hold a minimum level of insurance cover as regards their aviation-specific liability for passengers, baggage, cargo and third parties. The insured risks must include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion. The Civil Aviation (Insurance) Regulations 2005 permit the UK Civil Aviation Authority (UK CAA) to impose sanctions for non-compliance with Regulation 785/2004. Following the UK's exit from the EU, Regulation 785/2004 has been put into UK law by virtue of the Civil Aviation (Insurance) (Amendment) (EU Exit) Regulations 2018, which will enter into effect on 1 January 2021.

Compliance with the minimum insurance requirements in Regulation 785/2004 is a condition for the granting of an operating licence by the UK CAA under EC Regulation 1008/2008. Following the UK's exit from the EU, Regulation 1008/2008 has been put into UK law by virtue of the Operation of Air Services (Amendment etc) (EU Exit) Regulations 2018, which will enter into full effect on 1 January 2021.

LITIGATION PROCEDURE

Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

The United Kingdom has three legal jurisdictions – England and Wales, Scotland, and Northern Ireland – each of which has a separate court system and is subject to different procedural rules. The three jurisdictions share a final court of appeal, the UK Supreme Court (UKSC).

The civil court structure in England and Wales consists of, in ascending order, the County Court, High Court, Court of Appeal and UKSC. The English civil courts apply the Civil Procedure Rules (CPR).

Whether a claim begins in the County Court or the High Court depends on its value, complexity of facts, legal issues, remedies or procedures involved, subject matter, and the importance of the outcome of the claim to the public in general. The High Court is divided into specialist divisions. The majority of non-personal injury aviation claims are brought in the Commercial Court, part of the Business and Property Courts in the High Court.

Appeals on points of law, rather than findings of fact, are usually made to the next level judge within the court hierarchy. For claims heard in the County Court, this may be either a Circuit Judge within the County Court or a High Court Judge, depending on the level of the judge who determined the claim at first instance. Appeals from the High Court are made to the Court of Appeal or, in exceptional circumstances, directly to the UKSC, a process known as leapfrogging. Appeals from the Court of Appeal are made to the UKSC.

Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

Disclosure usually takes place in English civil proceedings after statements of case (pleadings) have been exchanged. An 'all the cards on the table' approach applies meaning that the parties must make standard disclosure unless otherwise ordered. Standard disclosure requires a party to make a reasonable search for, and to disclose, documents on which it relies, which adversely affect its own case or another party's case or support another party's case (CPR 31.6). Alternative orders for disclosure include those for reliance or issue-based disclosure. The parties in a personal injury claim will usually be required to give standard disclosure.

The concept of disclosure has been temporarily overhauled in the Business and Property Courts. A mandatory two-year pilot scheme started on 1 January 2019 with the aim of moving away from standard disclosure and towards 'basic disclosure' based on statements of case and five models of 'extended disclosure' (see PD 51U). The regime is a 'living' pilot and it is anticipated that the initial two-year pilot scheme, which is due to expire in January 2021, will be extended within the Business and Property Courts to allow for further changes to be tested.

Evidence

45 | Does the law of your state provide for any rules regarding preservation and spoliation of evidence?

In English civil proceedings, parties are under a duty to preserve disclosable documents, and a party's solicitor is under a positive duty to the court to ensure to inform his or her client of that obligation (PD 31B.7 and PD 51U.4). The court may draw adverse inferences where a party fails to preserve or disclose relevant documents.

Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

The legal costs of a party in English civil proceedings are recoverable subject to a costs order made by a judge (CPR 44 to 47); because costs orders are in a judge's discretion, they are incredibly difficult to appeal. The usual order is that the losing party pays the winner's costs of the litigation on a standard basis. Such costs are subject to taxation by a judge and, as a rule of thumb, the winning party can expect to be awarded a sum representing 60 to 70 per cent of the costs incurred by it, to be paid by the losing party.

Alternative costs orders include that the losing party pay the winning party's costs on an indemnity basis, whereby an order is made for a higher percentage of a party's costs on assessment than would be the case if costs were assessed on the standard basis, or each party bears its own costs.

In claims for damages for death or personal injury, there is a regime of qualified one-way costs shifting. This has the effect that costs orders against a losing claimant cannot be enforced beyond the value of any damages and interest awarded to the claimant (CPR 44.13 to 44.17).

JUDGMENTS AND SETTLEMENT

Pre- and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

Pre-judgment interest may be imposed pursuant to a contract or statutory power. An express interest clause in a contract displaces any statutory rate of interest and will usually state a rate to be applied, which must comply with common law rules on penalty clauses. Statutes that provide for pre-judgment interest include the Late Payment of Commercial Debts (Interest) Act 1998 (8 per cent over the Bank of England base rate), the Senior Courts Act 1981 and the County Courts Act 1984 (simple interest at such rates as the court thinks fit).

The rules on post-judgment interest differ depending on the court. High Court judgment debts carry interest at a fixed rate of 8 per cent (the Judgments Act 1838, CPR 40.8 and CPR 44.2(6)). County Court judgments generally carry interest at a rate of 8 per cent (County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991). For both, interest on judgments begins to run from the date of the judgment until the date of payment.

Settlements

48 | Is court approval required for settlements?

Court approval is not required for settlements unless a child or protected party is involved, in which case an application for approval must be made to the court under CPR 21 before the settlement becomes binding.

49 | What is the effect of a settlement on the right to seek contribution or indemnity from another person or entity? Can it still be pursued?

Under the Civil Liability (Contribution) Act 1978, a contribution may be sought from another person or entity liable for the same damage notwithstanding any settlement between the parties. Section 10 of the Limitation Act 1980 provides that a party seeking such a contribution must issue proceedings within two years of the date of a judgment or arbitration award against a party, or the earliest date on which a settlement amount was agreed between the parties.

50 | Are there any financial sanctions, laws or regulations in your state that must be considered before an air carrier or its insurer may pay a judgment or settlement?

No.

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UPDATE AND TRENDS

Key developments of the past year

51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The UK left the EU ('Brexit') at 11 pm GMT on 31 January 2020. Further to the European Union (Withdrawal Agreement) Act 2020, the UK is subject to an 11-month implementation period ending on 30 December 2020 during which it is no longer a member of the EU but EU rules still apply. Following the end of the implementation period on 1 January 2021, UK secondary legislation relevant to aviation law enacted at an EU level will come fully into force, including the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019, the Aviation Safety (Amendment etc) (EU Exit) Regulations 2019, the Civil Aviation (Insurance) (Amendment) (EU Exit) Regulations 2018, and the Operation of Air Services (Amendment etc) (EU Exit) Regulations 2018.

During the implementation period, the UK courts remain bound by Court of Justice of the European Union (CJEU) case law, including that regarding aviation regulations such as EC Regulation 261/2004. While the UK courts are not bound by CJEU decisions made on or after 1 January 2021, they may 'have regard' to such judgments.

As a direct result of the covid-19 pandemic, the commencement date for Commission Implementing Regulation (EU) 2019/947 concerning the rules and procedures for the operation of unmanned aircraft was delayed until 31 December 2020. This regulation intends to create a harmonised system of regulation for drones across the EU and support the progressive development of the unmanned aircraft market by introducing registration requirements for drones and outlining design and manufacture standards. As the regulation will take effect before the end of the implementation period, it will be transposed into the UK's body of law on 1 January 2021.

The previous UK parliamentary session ended prematurely as a consequence of the December 2019 general election with the effect that certain items of draft legislation, including the Drone (Regulation) Bill 2017-19, were unable to complete the legislative process and become law.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic resulted in the cancellation of, and delay to, flights in both the UK and EU. On 18 March 2020, the European Commission published guidance to the effect that it considered certain scenarios relevant to the pandemic to be 'extraordinary circumstances', thereby exempting the airlines in question from paying fixed compensation to passengers under EC Regulation 261/2004. These scenarios included where a government advises against all travel – or all but essential travel – to a destination, and cancellations or long delays resulting from the impact of covid-19 in other circumstances that are not inherent in the operation of the airline and beyond its control (such as an airspace closure). The Commission's guidance, which has been endorsed by the UK Civil Aviation Authority, also reminded airlines of their obligations to provide care and assistance to passengers, and to process ticket refunds within 14 days and in cash rather than in vouchers.

On 13 May 2020, the Commission published a non-binding Recommendation on Vouchers to encourage member states to introduce measures that would make the use of vouchers more attractive to consumers, for example by providing them with insolvency protection.

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