ACTIONS FOR AVIATION INJURIES & DEATH

Rob Davis[1]

"Since ancient times, human beings have known of the dangers of flight. The mythologies of Greece, Crete, Persia and other lands include stories of injurious attempts by men and women to soar into the firmament. In his Metamorphoses, Ovid describes the winged flight of Daedalus and Icarus, brought to an end by the youth's reckless attempt to soar too high. The appellant in this case likewise complains of an injury caused by his air travel. However, whereas Icarus had only his father Daedalus to assist him in his peril, the appellant has the Warsaw Convention. To that Convention he has appealed. But as I shall explain, it is of no greater avail."

Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 79 ALJR 1215, per *Kirby J.

[1] B. Soc. Sc., LLM, LLM (Corp & Com), Barrister. Address: PO Box 213, West Burleigh, Qld, 4219. Phone: +61414339494. Email: rdavis@davislegal.com.au. Note: Throughout this paper italics are utilised for emphasis and, for the sake of brevity footnotes have been omitted from many case extracts. Readers should refer to the source documents for that material.

Table of Contents

1 INTRODUCTION 4

2 CHOOSING THE RIGHT COURT 4

2.1 GENERAL DISCUSSION. 5

2.2 JURISDICTION RULES. 6

2.2.1 Service within the Jurisdiction the Originating Process is filed. 6

2.2.2 Other Service within Australia 6

(a) High Court & Federal Court: 6

(b) State & Territorial Courts: 6

(c) Forum non-conveniens: 7

2.2.3 Service of Australian Process Outside Australia ("Long-Arm Jurisdiction") 8

(a) Issuing Process for International Service: 8

(b) Trans-Tasman Service: 9

(c) Service under Hague Convention: 9

(d) Service under Other Conventions and Treaties: 9

(e) Other proceedings authorised under a Multilateral Convention 9

(f) Submitting to Jurisdiction & Service 10

3 CHOICE OF LAW RULES. 11

3.1 GENERAL DISCUSSION. 11

3.2 AUSTRALIAN COMMON LAW 12

3.2.1 Tort 12

3.2.2 Contract Law 13

3.3 STATUTE LAW 15

3.4 CHOICE OF LAW IN THE CROSS-VESTING JURISDICTION 16

3.5 THE COMMONWEALTH JUDICIARY ACT 1903 17

4 AIRLINE CARRIERS' LIABILITY TO PASSENGERS 17

4.1 HISTORICAL ORIGINS 17

4.2 AUSTRALIAN COMMONWEALTH IMPLEMENTATION 19

4.2.1 Sources of Law. 19

4.2.2 Application of Law. 20

(a) Montreal 1999 20

(b) Part IV Civil Aviation (Carriers' Liability) Act (Cth) 20

(c) State Air Carriers' Liability Acts 21

4.2.3 Elements of the Cause of Action. **....... 21**

(a) The Causes of Action 21

(b) Meaning of "Passenger" 22

(c) Meaning of "Carrier" 27

(d) Meaning of "Sustained by reason of the death of a passenger" 30

(e) Meaning of "Accident" 31

(i) Not an Accident 31

(ii) Is an Accident 35

(f) Meaning of "Bodily Injury" 39

(g) Meaning of "…board the aircraft or in the course of any of the operations of embarking or disembarking" 44

(i) Embarkation 45

(ii) Disembarkation 49

4.2.4 Exclusive remedy. *50*

4.2.5 Damages assessment & limits. ***53***

(a) International Air Carriage Conventions 53

(b) Other Air Carriage under Part IV Civil Aviation (Carriers' Liability) Act (Cwth) 55

(c) Procedure for enforcing Liability for Death 55

(d) Applicability of Local Civil Liability Acts to Assessing Damages 55

(e) Applicability of Personal Injuries Proceedings Act 2002 (Qld) to Claims under the Air Carrier Regimes ...57

4.2.6 Contributory Negligence. ***59***

4.3 AUSTRALIAN STATE & TERRITORIAL IMPLEMENTATION 59

4.4 COMMONWEALTH AIR CARRIAGE AND COMMONWEALTH EMPLOYEE AIR CARRIAGE 60

4.5 APPLYING THE CORRECT AIR CARRIERS' REGIME 61

4.6 TWO-YEAR LIMITATION PERIOD CANNOT BE EXTENDED 62

5 LIABILITY FROM THINGS THAT FALL OUT OF THE AIR 63

5.1 AUSTRALIAN COMMONWEALTH LAW 63

5.2 AUSTRALIAN STATE LAW 64

6 INJURY CAUSED BY OTHERS 64

6.1 INTRODUCTION 64

6.2 EXAMPLES 65

6.1.1 Other passengers. *65*

6.1.2 Employers. *66*

6.1.3 Equipment suppliers (product liability). *66*

(a) USA Product Liability Law 67

(i) Source of Product Liability Law in the USA 67

(ii) US Damages Awards 69

(iii) Jurisdiction in USA Courts 70

(iv) Federal District Court 70

(v) State Supreme Courts 70

(vi) The General USA Approach to Holding Forum 71

(b) EU Product Liability Directive 71

(c) Australian Product Liability Law 73

7 CONCLUSION 77

1 Introduction.

This area of practice often requires some knowledge of different legal systems, liability theories, the basic principles of private international law, court's jurisdiction limits, and the court rules for foreign service of process.

The goal of this paper is to equip the busy practitioner with some, hopefully enough, information to assist them to assess and investigate the viability of an aviation claim and then take steps to ensure that it gets off on the right foot.

While civil aviation is a safe mode of transport the volume of air travel means that aviation injuries and deaths are quite common.

Aviation accidents may result in damage to passengers, air-crew, and people on the ground.

That damage can involve bodily injury, psychiatric harm, loss of expectation of financial support (dependency), or property damage.

The accidents occur everywhere in the world.

They involve accidents in airports, within aircraft, and less frequently, accidents as a result of impacts between aircraft and other things, including the ground.

The causes of aviation accidents are nearly infinite.

They include (to mention only some):

(i) errors in product design and manufacture, instructions and warnings, training, procedures, maintenance and operation;
(ii) defects in buildings and other airport and aircraft facilities;
(iii) intentional malicious conduct by aircrew or other passengers;
(iv) acts of war (accidental, collateral, or intended);
(v) bad luck.

A variety of legal theories and potential defendants often exist in these cases. The legal theories applicable in each case will depend (and may vary according to) factors such as:

- the nature of the harm suffered;
- the relationship of the parties;
- the location of the accident;
- the circumstances of the accident;
- the residence or domicile of the parties;
- jurisdiction of the courts;
- choice of law applicable to each cause of action.

2 Choosing the Right Court.

© R J Davis (Feb 2024)

What follows under this section applies generally (i.e. it is not unique to aviation claims). It is discussed here because it is an issue that is often relevant in aviation claims – given their interstate and international nature.

The discussion in this section is, because of its broad scope, necessarily general.

Practitioners should use it as guide to their research and not as an end in itself.

2.1 General Discussion.

Jurisdiction is an issue that arises in every claim with an *international* element.

In *Gosper v Sawyer* (1985) 160 CLR 548 Mason and Deane JJ summarised the common law position thus (italics added):

> "8. The general doctrine of the common law is that, in the absence of a submission to the jurisdiction by a defendant, *civil jurisdiction is territorial, that is to say, related to the territory of whose system of government the particular court forms part*. Putting to one side actions involving questions of status or succession and actions in rem (where the basis of jurisdiction may be domicile or presence of property respectively), *the ordinary basis of territorial jurisdiction is the personal presence of the defendant within the court's territory* (see per Lord Selborne L.C., *Berkley v. Thompson* (1884) 10 App Cas 45, at p 49). The usual method by which a court asserts such jurisdiction is the issue (or, arguably, the issue and service) of its writ or other process directed to the defendant. Since the effective assertion of jurisdiction is confined by the limits of actual jurisdiction, *a court's power to issue process in an action in personam, where the defendant does not submit to the jurisdiction and where questions of status or succession are not involved, is prima facie exercisable only against those present within the limits of its territory at whatever be the relevant time or times* (see the discussion in *Laurie v. Carroll* (1958) 98 CLR 310, at pp 324ff.): *"A court cannot extend its process and so exercise sovereign power beyond its own territorial limits"* (Cheshire, op. cit., pp.107-108). Conversely, a court's power to authorize service of its writ is ordinarily a measure of its jurisdiction in an action *in personam* (cf. *John Russell and Company Limited v. Cayzer, Irvine and Company Limited* (1916) 2 AC 298, at p 302).
>
> 9. In the context of the matters mentioned in the preceding paragraph, *a statutory conferral of power upon a court to order service of its process outside its territory will ordinarily be construed as carrying with it an implied grant of jurisdiction to entertain an action, of which it is otherwise cognizant, against the person served: "whenever a defendant can be legally served with a writ, then the court, on service being effected, has jurisdiction to entertain an action against him"* (Dicey and Morris on The Conflict of Laws, 10th ed. (1980), vol.1, p.182). That general proposition is, of course, subject to any express or implied contrary intention or qualification to be discerned in the legislative provisions authorizing service outside the limits of territorial jurisdiction. Subject to any such contrary intention or qualification, the conferral upon a court of a power to order service outside its territory will provide the basis of "an extension of jurisdiction" (cf. *Laurie v. Carroll*, at p 332).
>
> 10. *It is possible to point to some statements in reported cases which lend at least superficial support for the view that a question of service outside territorial limits is a matter of the "practice" or "procedure" of the particular court* (see, e.g., *Black v. Dawson* (1895) 1 QB 848, at p 849). There is much to be said for that view in a case where a court plainly has power to order service of the particular process outside its territory and what is involved is the manner of exercise of the power in the circumstances of the particular case. *On the other hand, the question whether a court possesses the actual power to make an order for service outside its territory is not a mere matter of the practice or procedure observed by the particular court in the exercise of its jurisdiction. The existence of an actual power to order service outside territorial jurisdiction is a component and a measure of jurisdiction itself* (see, e.g., *Laurie v. Carroll*, at pp 322-324; In *re Anglo-African Steamship Co*. (1886) 32 Ch D 348, at pp 350,351)."

The jurisdiction of courts is obviously limited.

These limits reflect reality.

It is futile for a court to decide things that have no connection to the country or state of the court in question (absent the agreement of the parties in question) or where enforcement ultimately depends on foreign courts that themselves may be more appropriate venues for the dispute.

The rules applicable to jurisdiction always depend on the law and practice of the court where jurisdiction is invoked.

Sometimes there may be a choice where proceedings can be brought.

If that occurs then choose wisely according to the advantages and disadvantages of each jurisdiction.

The devil you know is not always preferable, from your client's perspective, to the one you don't.

2.2 Jurisdiction Rules.

2.2.1 Service within the Jurisdiction the Originating Process is filed.

As a general principle, an Australian court will entertain:

(a) any action in *personam* (which includes tort or contract) where the originating process can *validly be served* upon the defendant; and
(b) any action where the defendant submits to the jurisdiction of the court.

Valid service primarily depends upon the defendant's presence within the issuing court's jurisdiction at the time of service.[2]

This is generally applicable throughout all common law jurisdictions.

There are some exceptions to this and these are discussed below.

2.2.2 Other Service within Australia.

(a) High Court & Federal Court:

An originating action commenced in the *High Court of Australia* or the *Federal Court of Australia* may be served *anywhere in Australia*.

(b) State & Territorial Courts:

[2] See Davis, Bell & Brereton, *Nygh's Conflict of Laws in Australia*, 9th Edition, LexisNexis Butterworths, 2014, p. 28 at [3.5].

A proceeding of any *State* or *Territorial court* may be served outside the originating jurisdiction if served within Australia or its external territories under the Commonwealth *Service & Execution of Process Act 1992* ('SEOP').[3]

No other connection with the originating state or territory is necessary (from a *jurisdictional* perspective at least).

Provided the requirements of the SEOP are technically met, the court's prior leave to serve, or later leave to proceed after service, is not required.[4]

Even a foreign resident visiting any place in Australia can be validly served with originating process issued out of *another* Australian State or Territory under SEOP.

A defendant validly served in another state or territory under the Act cannot object to *jurisdiction*.

(c) Forum non-conveniens:

Even if a Defendant may not be able to object to *jurisdiction*, a Defendant can object to the matter *proceeding* in that court's jurisdiction if the court of another State or Territory is a *more appropriate forum* (*forum non-conveniens*).

The rules of court may state that, if an objection is made, then the court has a discretion whether to exercise jurisdiction or stay the proceeding.[5]

Where another State or Territory court is a more appropriate forum, and the originating process is from:[6]

- a *Federal Court* - the matter may be transferred to the either a *Federal Court* or another *Supreme Court* as the more appropriate forum under the *Cross-Vesting Legislation*;[7]
- a *Supreme Court* - the matter may only be transferred to another *Supreme Court* as the more appropriate forum, under the relevant *Cross-Vesting Legislations;*[8] but

---

3 See, for example, Qld UCPR r 123.

4 See, for example, Qld UCPR r 123.

5 See, for example, FCR 2011 r 10.43A; NSW UCPR r 11.6; Qld UCPR r 127.

6 *See Generally Davis, Bell & Brereton, Nygh's Conflict of Laws in Australia, 9th Edition, LexisNexis Butterworths, 2014, p. 33-35 at [3.21-3.25].*

7 See FCR 2011 Note 2 under r 10.42.

8 *Re Wakim; Ex Parte McNally* (1999) 189 CLR 511; 163 ALR 270.

- in court an *inferior to the Supreme Court* - the matter in that court will be stayed under s 20 of the Commonwealth *Service & Execution of Process Act 1992*.

A foreign defendant that opposes a matter proceeding in Australia usually has to show that the Australian court is a *"clearly inappropriate forum"*.[9]

A range of factors relevant to determining when a forum is *"clearly inappropriate"*. These *include*:[10]

(i) any significant connection between the forum selected and either he subject matter of the dispute or the domicile of the parties;

(ii) any legitimate and substantial advantage to the plaintiff in the jurisdiction (such as greater damages, more favourable limitation period, better procedures, or the existence of assets within the jurisdiction against which any judgement can be enforced);

(iii) whether the substantive law of the forum will apply to the case or whether it will be governed by foreign law.

2.2.3 Service of Australian Process Outside Australia ("Long-Arm Jurisdiction").

(a) Issuing Process for International Service:

Each Australian court has rules which specify their long-arm jurisdiction.

Some courts permit service without prior leave whereas others may require leave (either before service, or before proceeding after service).[11]

In every case you should refer to the rules of court. See, for example those of the Federal Court of Australia,[12] Queensland Supreme Court,[13] NSW Supreme Court,[14] etc.

In each case you should *read the rules of court* as to when foreign service is permitted to be served, upon what terms it is permitted, and how it is to occur if it is permitted.

The rules provide the authority to issue proceedings for foreign service in each court, but relevant conventions will generally provide the means by which the service is to occur.

---

9 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, at 565. Also see *Piatek v Piatek* (2010) 245 FLR 137.

10 *Piatek v Piatek* (2010) 245 FLR 137.

11 See, for example, *Service of Australian Civil Legal Documents Overseas ("Outgoing Requests")* November 2018, Australian Government AG Department.

12 FCR 10.42 and 10.43. Also see FCR *Overseas Service and Evidence Practice Note (GPN-OSE)* 25 October 2016.

13 Qld UCPR r 125, introduced via *Uniform Civil Procedure (Service Outside Australia) Amendment Rule 2019*.

14 NSW UCPR 2005 r 11.4 and Schedule 6.

© R J Davis (Feb 2024)

The most common conventions and treaties are discussed below.

(b) Trans-Tasman Service:

Refer here to the *Trans-Tasman Proceedings Act 2012* (Cth).

Leave is not required, and the document may be served in the same manner as would apply to service by the rules of the place of issue.[15]

Nor is it necessary for the court to be satisfied that there is a connection between the proceeding and Australia.[16]

(c) Service under Hague Convention:

Australia joined *The Hague Service Convention* on the 1 November 2010.

Here proceed on the assumption that international service must, *a priori*, be first authorised under the rules of the court in which proceedings are commenced.

Court Procedure Rules of each State and Territory specify *when* proceedings initiated in their courts may be served abroad (discussed above).

In short, *assume* that the *Hague Service Convention* specifies the *means* by which service is to be affected *within convention countries,* but not the originating court's permit enabling service.

(d) Service under Other Conventions and Treaties:

Refer generally to *Service of Australian Civil Legal Documents Overseas ("Outgoing Requests")* November 2018, Australian Government AG Department.

This publication contains general information about other relevant treaties and conventions affecting service overseas.

(e) Other proceedings authorised under a Multilateral Convention*:*

Where an action competently arises under an international convention then that convention itself may contain special provisions conferring and regulating jurisdiction.

[15] Section 9 *Trans-Tasman Proceedings Act 2012* (Cth).
[16] *Ibid.*

Accidents during international air travel are an example of this.

Article 33 of *Montreal 1999*, which applies to actions between passengers and carriers arising from accidents during international air carriage, states:

> **"Article 33—Jurisdiction**
>
> 1. An action for damages *must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination*.
> 2. In respect of damage resulting from the death or injury of a passenger, an action *may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement*.
> 3. For the purposes of paragraph 2,
>   (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
>   (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.
> 4. Questions of procedure shall be governed by the law of the court seised of the case."

The meaning of *"place of destination"* was considered by the NSW Court of Appeal in *Gulf Air Company GSC v Fattouh* [2008] NSWCA 225; 251 ALR 183. There the claimant was a passenger on an international journey from Beirut to Sydney via Bahrain and return.

About two hours prior to landing in Sydney he was assaulted by another passenger. On arrival in Australia, where he was to holiday for three-months, he issued proceedings under the relevant convention (Montreal No 4). The carrier objected to jurisdiction on the basis that the place of destination, as described on the ticket, was Beirut.

The court (Allsop P, Hodgson JA and Campbell JA agreeing) held that the mutual contractual intentions of the parties, evidenced by their agreement and the ticket, was determinative. Accordingly, the place of destination was, on the evidence found to be, Beirut.

(f) Submitting to Jurisdiction & Service*:*

Generally speaking, a defendant can waive any objection to jurisdiction, (either expressly by agreement, or implicitly by his or her conduct in the proceeding), and thereby submit to the court's jurisdiction.

In *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266 the court observed:

> *"Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises or has voluntarily recognised that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings.* In particular he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. *The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim.*"

It is sometimes worth asking a foreign defendant whether it will agree to accept service and consent to jurisdiction.

But before doing so it is *usually* wise to first issue proceedings in the court of the Plaintiff's first preference. This is to deny the prospective defendant, once alerted, from issuing earlier proceedings in its home (or some other) jurisdiction.

If Australia is clearly the most convenient forum (see *forum non conveniens*, discussed in the previous section) then you will probably receive an affirmative answer.

3 Choice of law Rules.

Just because a court has jurisdiction, and forum is maintained, that is no guarantee the court will not apply the law of another place in resolving the dispute.

That said, the choice of law rules of the court (in Australian law at least) is part of the law of the forum.

Much of what follows under this section also applies generally (i.e. it is not unique to aviation claims). Again, it is discussed here because choice of law is an issue that commonly arises in international aviation claims.

3.1 General Discussion.

Choice of law, in the *international* context, depends on a number of academic theories of jurisprudence that have evolved, mainly, in the last two centuries.

These theoretical concepts have arisen in different legal systems of the globe.

While many legal systems have now accepted similar theoretical basis for choice of law rules, differences do sometimes still exist.

Further, the expression 'choice of law' implies that the injured party has some *choice* in the matter.

In reality, that is rarely the case.

The *choice* is the courts, and even that *choice* is dictated by established legal principle.

What follows is a general discussion of the rules adopted and applied within Australia's federal system.

As just mentioned, these are largely based on the private international context from which the rules have evolved.

I will summarise the main principles.

Australian rules approximate those *likely* to be applied internationally (in other common law jurisdictions at least).

Exceptions can exist and you should remain prepared to seek expert foreign assistance.

Where an Australian court applies the law of another country then it will be necessary to prove, (often by expert evidence) what that law is.

As the law informs and determines the pleadings, it is critical these issues are identified and clarified early during the investigation of a claim.

3.2 Australian Common Law.

3.2.1 Tort.

Since *Pfeiffer,*[17] Australian choice of law in *tort* has been the place where the accident occurred (the *lex loci delecti*).

But sometimes that *place* is ambiguous.

For example, the elements of some *torts* occur over time and locality - with different aspects of the same cause of action taking place in different jurisdictions.

In *Voth v Manildra Flour Mills Pty Ltd*[18] the Australian High Court ('HCA' approved of the *Privy Council's* locality test in *Distillers Co., (Biochemicals) Ltd –v- Thompson*:[19]

> "The right approach is, when the tort is complete, to look back over the events constituting it and ask the question: *where in substance did the cause of action occur*?"

The HCA provided some additional guidance in *Dow Jones & Co. Inc v Gutnick*[20] (a *tort* defamation case) - there the majority held (italics added):[21]

> "Reference to decisions such as *Jackson v Spittall*, *Distillers Co (Biochemicals) Ltd v Thompson* and *Voth v Manildra Flour Mills Pty Ltd* show that locating the place of commission of a tort is not always easy. Attempts to apply a single rule of location

---

17 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503.

18 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567, per Mason CJ, Deane, Dawson and Gaudron JJ.

19 *Distillers Co., (Biochemicals) Ltd –v- Thompson* [1971] AC 458, per Lord Pearson at 468.

20 [2002] HCA 56, 10 December 2002; (2002) 77 ALJR 255, at [43]. Note: The *italics added* by the writer.

21 *Ibid*, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

> (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. *Especially is that so in cases of omission. In the end the question is "where in substance did this cause of action arise"? In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt."*

3.2.2 Contract Law.

The parties may, by contract, expressly or impliedly nominate the law that is to apply to their agreement.

In the absence of an agreement about choice of law, and absent any basis on which to imply a term dealing with the issue, the matter becomes more complex. Then the court must then identify the jurisdiction with the *closest connection* to the transaction.[22]

That also can be ambiguous.

I now set out some examples to illustrate this point.

In *Garstang –v- Cedenco*,[23] Master Harrison of the NSWSC said (italics added):[24]

> "The principal factors to be considered when determining which system of law the contract has its closest and most real connection are *the place of contracting, the place of performance, the place of residence or business of the parties and the nature and subject matter of the contract* – see *Re United Railways of Havana and Regala Warehouses Limited* (1960) 1 Ch. 52 at 91; *Mendelson-Zeller Co Inc v T & C Providores Pty Limited* (1981) 1 NSWLR 366 at 368-9."

The Plaintiff in *Garstang* was employed in NSW but injured in Victoria, Master Harrison summarized the process he followed in determining that NSW, and not Victoria, was the applicable choice of law under the contract of employment (italics added):[25]

> "There is no dispute that:
>
> (1) The contract was entered into either in Wagga Wagga or in Whitton, both of which are in New South Wales.
>
> (2) At the time the contract was entered into the plaintiff was a resident of New South Wales and the defendant had a place of business in New South Wales namely at Whitton.

---

22 See, for example, observations by Higgins CJ in *Pulido –v- RS Distributions Pty ltd & Ors* [2003] ACTSC 61 (1st August 2003), at [46-47].

23 *Garstang –v- Cedenco* [2002] NSWSC 144 (12th March 2002).

24 *Ibid*, per Master Harrison at [17].

25 *Ibid*, per Master Harrison at [18-19].

> (3) At the time the contract was entered into the place of performance within the contemplation of both parties was at Whitton. That is the place where performance commenced and it then continued at Jerrilderie, New South Wales. It was after the contract was made that the plaintiff was directed to travel outside of New South Wales. The defendant's performance of its part of the contract by payment of the plaintiff took place in New South Wales by payment into the plaintiff's bank account at Wagga Wagga.
>
> (4) At the time the contract was entered into the nature and subject matter of the contract was the harvesting of a crop of tomatoes within New South Wales.
>
> (5) The contract contained no express terms in respect of the law to be applied to the contract. There was no oral discussion in respect of the law that was to be applied to the contract.
>
> (6) The accident occurred in Echuca, Victoria.
>
> The place of contracting was the State of New South Wales. At the time of entering into the contract the place of performance was New South Wales and the subject of the contract was employment for harvesting of tomatoes. It is my view that the contract has its closest and most real connection with the law of New South Wales. *At the time the contract was entered into the system of law with which it had a connection was the New South Wales system of law. Victoria was not even within the contemplation of the parties. The only link with Victoria is that the accident occurred there. Accordingly, the proper law to be applied to the contract is the New South Wales law*."

In *Busst –v- Lotsirb Nomines Pty Ltd*[26] the plaintiff, who was employed in Queensland by an employer who carried on business in both Queensland and New South Wales, was injured at work in Tweed Heads (NSW). She sought damages alternatively in contract and in tort.

The primary judge found that the law of NSW applied to the tort claim (which made that aspect of the claim subject to the *Workers Compensation Act 1987* NSW), but the law of Queensland applied to the contract claim.

The defendant appealed from the latter finding, relying on the fact that while the contract was originally formed in Queensland and subsequently varied in Queensland, the substance of the variation was that the plaintiff would be transferred to NSW and would perform her work there.

Davies JA (with whom Williams JA and Holmes J agreed) held that the proper law of the contract remained Queensland:[27]

> "It may be accepted that a change in contractual relations between parties, whatever terminology is used to describe it, may lead to a change in the proper law of the contract. But again the question is one of degree. In this case, on the above facts, the variation was made in Queensland by the plaintiff, a resident in Queensland, and the defendant, a company carrying on business in Queensland, to be performed by the plaintiff in New South Wales and by the defendant substantially, by payment of the plaintiff's salary, in Queensland. It is true that the defendant had an obligation, in New South Wales, under the contract as varied, to provide a safe place and system of

[26] *Busst –v- Lotsirb Nomines Pty Ltd* [2002] QCA 296 (16th August 2002).

[27] *Ibid,* per Davies JA at [8-9].

work but this was, in content, much the same obligation as it had under the contract before variation, the only difference being that it was to be performed in New South Wales instead of in Queensland. The only significant change affected by the variation is, therefore, to the place of performance of the contract by the plaintiff.

The question in this case is with which system of law has the contract, as varied, its closest and most real connection. There is no doubt that the contract of employment made between the parties in 1998 had its closest and most real connection with Queensland. The question is whether a variation to the place of performance by the plaintiff but not, in substance, by the defendant was sufficient to change the proper law to New South Wales."

Davies JA later concluded (italics added):[28]

"On the other hand it is true that the place of performance of a contract is an important factor in the determination of this question and that, in this case, the fact that the plaintiff was required to perform the contract in New South Wales necessarily engaged New South Wales law applying to employees employed in that State. The question is whether that is sufficient to alter the proper law of the contract.

Although the question might be thought to be a finely balanced one, *in my opinion the learned primary judge was correct in concluding that the contract, made as it was in Queensland between a resident in Queensland and a company relevantly carrying on business in Queensland, for performance of work in Queensland and payment therefore in Queensland, varied only by, relevantly, a change in the place of performance of work to New South Wales, still retained its closest and most real connection with Queensland*. I would accordingly refuse leave to appeal against his Honor's judgment."

3.3 Statute Law.

Where a matter is regulated by statute then the choice of law depends on the power and intent of the legislature.

It is *presumed* that Parliaments do not intend to pass laws that are beyond their constitutional powers to enforce.[29]

Comity between nations requires that each respect the legitimate sovereignty and jurisdiction of the other.

This paper will not discuss the theoretical or other constitutional limits of the legislature.

It is sufficient to note that a necessary consequence of the prior presumption is the subsequent *presumption* that, absent express statements to the contrary, *legislation is not intended to have extraterritorial effect*.[30]

[28] *Ibid,* per Davies JA at [11-12].

[29] Pearce & Geddes, *Statutory Interpretation in Australia*, 8th Edition, LexisNexis Butterworths 2014, p. 219 at [5.8]. Refer to the HCA authorities cited therein.

[30] *Ibid*, pp. 219-220 at [5.9]. Refer to the further authorities cited therein.

It is relatively rare (but becoming more common) for Acts to express any intent to apply to conduct and omissions outside the State or Territory in question, or indeed to express any extra-territorial intent at all.

The defective product liability provisions in the *Competition and Consumer Act 2010* ('CCA') have some extraterritorial application (discussed later).

Similarly, the international carriage provisions of the *Civil Aviation (Carriers Liability) Act 1959* ('CACLA') have extraterritorial application to the extent that they implement multilateral air carriage conventions and often apply to events that occur outside Australia (also discussed later).

Where Acts are silent on such things the ultimate reach of the Act will depend on extraneous sources, such as the relevant *Acts Interpretation Act* (however named), and the presumptions referred to above.

As a rule, the various *Acts Interpretation Acts* provide that references to *"…places, jurisdiction and other matters and things"* are references to things "*…in or of the"* Commonwealth, State or Territory in question.[31]

This is consistent with the common law presumptions.

3.4 Choice of Law in the Cross-Vesting Jurisdiction.

The Commonwealth *Jurisdiction of Courts (Cross-Vesting) Act 1987* and the equivalent state and territorial legislation seek to vest subject-matter jurisdiction between superior courts of each Australian Jurisdiction.[32]

Section 11(1) of the Acts provide:

> "(1) Where it appears to a court that the court will, or will be likely to, in determining a matter for determination in a proceeding, be exercising jurisdiction conferred by this Act *or by a law of a State relating to cross-vesting of jurisdiction*:
>
> (a) subject to paragraphs (b) and (c), the court shall, in determining that matter, apply the law in force in the State or Territory in which the court is sitting (including choice of law rules);
>
> (b) subject to paragraph (c), *if that matter is a right of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory*; and
>
> (c) the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory."

The choice of law issue generally arises, insofar as referral of jurisdiction between *state courts*, where the forum court is asked to *give effect to a right of action arising under the*

[31] See, for example, s 21(1)(b) of the Commonwealth *Acts Interpretation Act 1901* (as amended). Also see s 35 of the *Queensland Acts Interpretation Act 1954* (as amended) - which is in identical terms. These are representative of similar provisions in other States and Territories.

[32] In 1999 the High Court struck down part of the scheme, insofar as it purported to transfer state jurisdiction to federal courts, as unconstitutional. See *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

written law of another state (as occurs, for example, if a claim is brought in NSW seeking damages under the Victorian dependency laws, or under the Qld state *Civil Aviation (Carriers Liability) Act 1964*, etc.)

Choice of law may become significant in relation to intra-state or intra-territorial air incidents if commenced out of the state or territory where the accident occurred.

This is because since 2003 most Australian jurisdictions have introduced some version of *Civil Liability Act*, often inconsistent, and usually intended to be substantive in application.

In this regard see s 79 and s 80 of the Commonwealth *Judiciary Act 1903* (below).

The issue is discussed further later in this paper under the headings:

(a) *Applicability of The Local Civil Liability Acts to Assessing Damages*; and

(b) Applicability of the Qld Personal Injuries Proceedings Act to Claims under the Air Carrier Regimes.

3.5 The Commonwealth Judiciary Act 1903.

Section 79(1) of the Commonwealth *Judiciary Act 1903* provides:

> (1) The laws of each State or Territory, *including* the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
> …

Section 80 of that Act applies to proceedings (italics added):

> "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, *the common law* in Australia as modified by the Constitution *and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised* is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

4 Airline Carriers' Liability to Passengers.

The majority of aviation accidents, by number of claims at least, involve international and domestic carriage of passengers by airlines. These claims all fall to be determined under special laws relating to the commercial carriage of passengers by air.

4.1 Historical Origins.

The laws relating to airline carriers originated in 1929 with the multilateral *Convention for the Unification of Certain Rules relating to International Carriage by Air*, (the '*Warsaw Convention'* for short).

This convention was intended, in part, to provide a degree of legal and economic protection to the then nascent international airline industry.

The convention (and its successors) provided strict but limited liability to passengers injured or killed in an *"accident"* in return for the abolition of all other legal causes of action against the air carriers.[33]

Liability for damage to goods was (and is) also covered, but that is not the focus of this paper.

The *Warsaw Convention* has been amended and replaced (at least for those parties to the newer treaties) on several occasions,[34] most recently culminating in the *Montreal Convention 1999*.

Many countries (but not all) are now parties to the *1999 Montreal Convention*.[35]

Where an aviation injury occurs during *international air travel* you should check to ensure that *both* the State of *departure* and the State of *arrival* are participants in the *same convention*.

'State' in this context refers to a *Nation State* that is a *State Party* under the applicable convention.

If not, then further investigation is necessary to correctly identify what (if any) system of law applies against the carrier.

Australia has ratified each of the amendments and replacements of the original *Warsaw Convention*.

Montreal 1999 has had force of law in Australia since 12 July 2008.[36]

To the extent that *Montreal 1999* does not apply then prior conventions, where relevant, still have effect and bind Member States participating in them.

Accordingly, and as Australia is a member of each of the prior Air Carriers' Conventions, each of which have force of law in Australian by reason of the CACLA, then these conventions retain relevance.

If no convention applies then recourse must be had to whatever other law may be found that is both applicable and also amenable that provides compensation for the incident.

---

33 The policy underpinnings of the international conventions regulating liability for carriage by air have been analysed in some detail in many cases. See, for example, *Povey v Qantas Airways Limited* [2005] HCA 33; *Sidhu & Ors v British Airways plc* [1997] 1 All ER 193; [1997] AC 430; *El Al Israel Airlines Ltd v Tyui Yuan Tseng* 525 US 155 (1999); to mention only a few.

34 *Warsaw Convention* 12/10/1929; *Warsaw Convention as amended at The Hague* 1955; *The Hague Protocol* 28/9/1955; *Guadalajara Convention* 18/9/61; *Guatemala Protocol* 8/3/1971; *Montreal No. 4 Convention* 1975; *Montreal Protocol No. 4* 25/9/1975; *Montreal Convention 1999.*

35 According to Wikipedia there were 120 Member States participating in *Montreal 1999* as at June 2016. This includes 119 of the 191 ICAO Member States plus the European Union.

36 See the current compilation of the Commonwealth *Civil Aviation (Carriers Liability Act) 1959.*

4.2 Australian Commonwealth Implementation.

4.2.1 Sources of Law.

The Commonwealth *Civil Aviation (Carriers Liability) Act 1959* ('CACLA'):

(a) implements (*inter alia*) *Montreal 1999* (insofar as it applies to the international carriage) as part of the law of Australia;[37] and

(b) *to the extent that an international treaty does not apply*, Part IV of CACLA governs:[38]

  (i) *other* international carriage originating in Australia (to the extent that it may not be governed by a treaty); and

  (ii) domestic carriage between States and Territories within Australia; and

  (iii) domestic intra-territorial carriage.

Part IV only applies to carriage in an aircraft operated by the holder of an "airline licence" or "charter licence" in the course of either:

- "commercial transport operations"; or
- trade and commerce between Australia and another country.

Each of the expressions (in inverted commas above) are defined in s 26 CLCLA.

Australia's participation in an international convention does not, *per se*, create any domestic legal rights.[39] That convention must be given effect to as part of the domestic law by legislation before it applies as force of law.[40]

Accordingly, all proceedings in Australia pursuant to the air carriage *conventions* must be brought under the relevant provisions of CACLA, which Act implements that convention as force of law in Australia.

Each Australian State has separately enacted State *Civil Aviation (Carriers' Liability) Acts* which:

(c) apply to purely *intra-state* air travel; and

(d) incorporate, by reference, as applicable to that travel, Parts IV and IVA of the Commonwealth Act (save for some exceptions).

---

[37] Section 9B *Civil Aviation (Carriers Liability) Act 1959* ('CACLA'). The section was introduced by *Act No 79 of 2008*, effective from 24 January 2009.

[38] See s 27(1) of Part IV CACLA.

[39] See observations on this in *Povey v Qantas Airways Limited* [2005] HCA 33, per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[40] Contrast the position in the USA, where the courts have decided that the USA's membership of the convention was sufficient to give rise to the cause of action contemplated by the convention itself.

The end result is a combination of international treaty, federal and state legislation which, insofar as the liability provisions are concerned, adopt generally similar liability elements and wording.

As a result, local decisions generally refer to and apply international jurisprudence with respect to air carrier's liability.

4.2.2 Application of Law.

(a) Montreal 1999.

Montreal 1999 (when it applies) covers to all "international carriage" involving transport:[41]

(i) between a place of departure in one State Party and a place of destination in another State Party; or

(ii) between destinations within one State Party if there is an agreed stopover in another State (whether a member State or not).[42]

Carriage performed by successive carriers, if it is regarded by the parties as a single operation, is deemed to be one undivided carriage.[43]

It does not matter if the flag of a carrier is not itself a member of the convention.

An English language version of *Montreal 1999* is appended as Schedule 1A to the current compilation of CALA. The original version of the convention is in the French language.

(b) Part IV Civil Aviation (Carriers' Liability) Act (Cth).

I have already discussed the general types of geographical carriage covered by Part IV CACLA.

The Act is further confined to carriage *"…under a contract of carriage"* in an aircraft being operated:[44]

(i) *"… by the holder of an airline licence or charter licence in the course of commercial transport operations"*; or

---

41 Montreal 1999 Article 1.2.

42 As was the case in *Gulf Air Company GSC v Fattouh* [2008] NSWCA 225; 251 ALR 183, referred to previously in the text.

43 *Ibid*, Article 1.3. This is discussed further below under the heading *"Meaning of 'Carrier'"*.

44 CACLA s 27(1).

(ii) *"…in the course of trade and commerce between Australia and another country"*.

Unlike *Montreal 1999*, here carriage between points of departure and destination in the *same* State or Territory, where there is a stopover outside that State or Territory, will be deemed to be carriage between the *origin* and the point that is *most distant from that point*.[45]

But as with Montreal 1999, carriage performed by successive carriers, if it is regarded by the parties as a single operation, is also deemed to be one *undivided carriage*.[46]

(c) State Air Carriers' Liability Acts.

These various State Acts (which apply only to *intra-state* carriage) are also confined to carriage *"…under a contract of carriage of the passenger"* in an aircraft *"…being operated by the holder of an airline licence or a charter licence in the course of commercial transport operations*".[47]

These Acts also expressly state that they do *not* apply to carriage otherwise covered by an international convention or treaty or under Part IV CACLA.

4.2.3 Elements of the Cause of Action.

(a) The Causes of Action.

The actionable parts of *Montreal 1999* and Part IV CACLA are expressed in substantially similar terms.

For example (italics added):

Article 17(1) states:

> "The *carrier is liable* for *damage* sustained in case of *death* or *bodily injury* of a *passenger* upon condition only that the *accident* which *caused* the *death* or *injury took place on board the aircraft* or *in the course of any of the operations of embarking* or *disembarking*."

Section 28 states:

> "Subject to this Part, where this Part applies to the *carriage* of a *passenger*, the *carrier is liable* for *damage sustained by reason of* the *death* of the *passenger* or any *bodily injury* suffered by the passenger

[45] CACLA s 27(3).

[46] CACLA s 27(4).

[47] See s 4 of the various State *Civil Aviation (Carrier's Liability) Acts*.

> *resulting from* an *accident* which *took place on board the aircraft* or *in the course of* any of the operations of *embarking* or *disembarking*."

Further, Article 17 of *Montreal 1999* is in similar terms to the analogous article in each of the prior conventions.

Accordingly, the prior decisions interpreting terms applicable to the cause of action remain applicable, notwithstanding changes to the conventions over time.

Australian courts give weight to and attempt to maintain coherence with the international jurisprudence of other convention states.[48] If international conventions were interpreted and applied differently by the contracting states then conventions would soon become meaningless.

In *Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 79 ALJR 1215, McHugh J stated:

> *"Article 17 must be construed in the context of an international agreement that constitutes a Code governing the liability of air carriers from many countries.* So, although this Court is concerned with rights and liabilities created by an Australian statute, Australian courts should not take an insular approach to the construction of Art 17. Nor should it be interpreted by reference to presumptions and technical rules of interpretation applied in construing domestic statutes or contracts. Instead, an Australian court should apply the rules of interpretation of international treaties that the Vienna Convention on the Law of Treaties has codified. Article 31 of that Treaty declares that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of its terms and their context and in the light of the treaty's object and purpose. Article 32 declares that resort may be had to extrinsic sources to confirm the meaning in certain circumstances. Those sources may be consulted to confirm the meaning that results from applying Art 31. They may also be used to ascertain the meaning where the application of Art 31 results in a meaning that is manifestly absurd, unreasonable, ambiguous or obscure."

And per Kirby J:

> "…because the Warsaw Convention is intended to have a uniform operation, in substitution for a multitude of differing outcomes affecting an international industry of ever-growing size and importance, *it is imperative that domestic courts should give close attention to relevant rulings made by the courts of treaty partners. No other approach would secure a coherent body of treaty law."*

(b) Meaning of "Passenger".

The word *"passenger"* is not defined in either the convention, in the CACLA, or in any of the local state and territorial *Carrier's Liability Acts*.

Article 1.1 of *Montreal 1999* states that the convention applies to all *'international carriage'* by aircraft *"…for reward"* and also *"gratuitous carriage"*. Article 1.2 defines *"international carriage"* as carriage in *"according to the agreement between the parties…"* between places of

[48] *Povey v Qantas Airways Limited* [2005] HCA 33. See also Article 31 of the *Vienna Convention on the Law of Treaties*.

departure and destination located in territories of two different State Parties to the convention etc.

Section 27(1) of CACLA refers to carriage in the course of *'commercial transport operations'* and *'in the course of trade and commerce'*. Section 26 defines commercial transport operations as *"…operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo"*. Section 27(3) CACLA assumes the existence of a *"contract of carriage"*, yet s 26 provides that the word 'contract' includes *"…an arrangement without consideration"*.

Nonetheless, the question sometimes arises whether an injured party is a *passenger* or, something else, such as a member of the *aircrew*. Usually this issue assumes significance when passengers seek to exclude themselves from the liability caps within the Conventions or the Acts, or when an aircraft operator seeks to raise limitation point against a party it was carrying. The issue also arises in contribution claims between tortfeasors, where the existence of capped liability on one party affects the court's apportionment of damages.[49]

A number of cases have considered this issue, including the following:

- *Societe Mutuelle d'Assurance Aerien c. Veuve Gauvain* (1967) RFDA 436.

  Here a flying instructor and his student were killed when, at the end of the flying lesson, the instructor collided with an overhead wire while demonstrating low level flying. It was found the trainee pilot was not a passenger as that trainee was present pursuant to a contract of instruction, and not as a passenger.

- *In re Mexico City Aircrash of October 31, 1979* [1983] USCA9 859; (1983) 708 F.2d 400.

  Three flight attendants on board a Western Airlines flight between Los Angeles and Mexico City were killed when the aircraft crashed outside Mexico City. Two of the attendants were working on the flight at the time of the crash, the third was "deadheading" to another flight assignment.

  The representatives of all three sued the employer (Western Airlines) relying on, *inter alia*, the *Warsaw Convention*, but their claims were opposed by the employer which asserted they were not passengers, and therefore were only entitled to limited remedies under the Californian Workers Compensation Scheme.

  Fletcher J of the United States Court of Appeals (9th Circuit) in delivering the judgment of the court with respect to the two attendants

49 *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169.

who were actually undertaking work at the time of the crash, found (italics added):[50]

> "In the cases of appellants Haley and Tovar, we conclude that the argument sweeps too broadly. Decedents Theresa Haley and Regina Tovar were indisputably working as flight attendants on board Flight 2605. Even though Haley and Tovar were in some sense 'transported' by the plane, we do not think that they received 'transportation' as 'passengers' within the meaning of the Convention. *The term 'transportation' seems to us to require as a minimum that the voyage be undertaken for the principal purpose of moving the individual from point A to point B. In the cases of Haley and Tovar, the voyages were undertaken not for this reason, but for the exclusive purpose of performing employment duties.* We conclude that Haley and Tovar were not, therefore, 'passengers' aboard Flight 2605, and that the summary judgments in favour of Western on the claims of plaintiffs Haley and Tovar were proper."

As to the third employee, Fletcher J after referring to the decision in *Demanes v. United Air Lines*, 348 F. Supp. 13 (C.D. Cal. 1972) (where two deadheading pilots were found to have been "passengers"), he concluded that if the *primary purpose* of the employees' presence on the flight was not to perform employment obligations, but to travel between LA and Mexico City, then she was a "passenger".

- *Fellows (or Herd) v Clyde Helicopters Ltd* [1997] AC 534.[51]

Here Sergeant Herd, a police officer, was acting as an observer on a helicopter his employer had chartered for police surveillance operations. The helicopter collided with a building during a snow storm and he was killed.

His widow sued the helicopter operator, and it was therefore necessary for the House of Lords to determine whether the air carriers' convention provisions applied under UK legislation.

Contract documents had described sergeant Herd as being part of the "crew", and his functions on board the helicopters included giving instructions to pilots, informing pilots of manoeuvres required, and otherwise acting as an observer for the pilots etc.

Lord Mackay of Clashfern LC,[52] after referring to Article 17 of the Warsaw Convention, concluded that sergeant Herd was a *passenger* within the meaning of that word (italics added):

> "In my view it is clear that the respondents were the carrier in respect of the carriage of Sergeant Herd. It is true that Sergeant Herd was on the aircraft for the purpose of carrying out his duties as a member of the Police Helicopter Unit, but from the facts as alleged, which I have quoted above, it is clear that *he had no responsibility whatever in respect of the operation of the aircraft, which was solely under the control of the pilot, and therefore in my opinion the activities which Sergeant Herd was carrying on while on the aircraft are not*

[50] *In re Mexico City Aircrash of October 31, 1979* [1983] USCA9 859; (1983) 708 F.2d 400, per Fletcher J at 417.

[51] *Fellows (or Herd) v Clyde Helicopters Ltd* [1997] AC 534; cited and followed in *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169 per Pasten JA at [88-93].

[52] With whom Lords Nicholls, Hoffmann and Hope agreed.

to be regarded as contributing in any way to the carriage of himself or the other persons on board. He therefore is properly regarded as a passenger."

- Disley v Levine t/as Airtrak Levine Paragliding [2001] EWCA Civ 1087; [2002] 1 WLR 785.

  Here a trainee flying a paraglider with an instructor was found not to be a passenger.

  The trial judge, Buxton LJ referred to *Heard* and observed:[53]

  > "That observation was however directed at the particular facts of the Herd case, where it had been argued that Sergeant Herd was not a passenger because he was empowered to give directions to the pilot as to where the helicopter should fly. *In every other respect, however, Sergeant Herd was on the helicopter for the purpose of being conveyed from one place to another, albeit places that he determined while he was in the air rather than in advance when he was on the ground. He therefore fulfilled the normal understanding of the word 'passenger'. That is also the purposive meaning of the word when it is used in a Convention directed at commercial air transport.*"

- *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169.

  Mr Edwards was within a helicopter operated by Precision Helicopters that was contracted by his employer, Endeavour Energy, to convey him and others to perform aerial surveying and inspection of powerlines in NSW.

  While engaged in this surveying the helicopter struck an aerial line (the property of Telstra), resulting in a forced landing in which Mr Edwards received significant head injuries.

  This appeal involved separate contribution proceedings only involving Endeavour, Precision and Telstra.

  Here Baston J (with whom Sackville AJA and Macfarlan JA agreed) applied *Herd* and concluded that Mr Edwards was a *passenger* of the helicopter operator because, (notwithstanding his role as an observer), like sergeant Herd, he had *no physical control over flying the helicopter*.[54]

  He was therefore, in ordinary usage of the word, still a *"passenger"*.

  Sackville AJA added (footnotes omitted):

  > "[192] Moreover, the words "crew" and "passenger" are not necessarily mutually exclusive. "Crew" is capable of a variety of meanings. The word can mean "the persons operating an aircraft in flight" (Macquarie Dictionary), although that definition leaves open the meaning of "operating". It can also mean a "group of people engaged upon a particular work". While it may have been accurate enough to describe the observer as a member of the flight crew for certain purposes, that did not exclude him from being a "passenger" within s 4 of the State Carriers' Liability Act. For the reasons given by Basten JA, which reflect the approach of the House of Lords in *Fellowes (or Herd) v Clyde*

[53] *Disley v Levine* [2001] EWCA Civ 1087; [2002] 1 WLR 785, per Buxton LJ at [67].

[54] Per Basten JA at [93].

> *Helicopters Ltd*, Mr Edwards was such a passenger."

- *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; 98 NSWLR 1; 356 ALR 63; 327 FLR.

  Parkes Shire Council had engaged South West Helicopters to perform aerial weed surveying.

  While in the process of doing so the helicopter, piloted by an employee of Southwest, collided with an overhead wire and crashed killing all on board.

  Among those on board were two council employees, one of whom was Mr Stephenson, the Council's noxious weeds officer.

  The widow and two children of Mr Stephenson sued both the Council and Southwest for damages for nervous shock. The widow also brought dependency proceedings for herself and the children under the NSW *Compensation of Relatives Act 1897*.

  At the trial Bellew J concluded that Mr Stepenson was *acting as a member of the crew and was therefore not a passenger*.[55]

  This finding (inter alia) was reversed on appeal.

  Basten JA, (with Payne JA agreeing) applied *Herd* and held that person on board an aircraft who can give directions as to where the aircraft is to fly, *but has no control over its operation, is not a member of the crew or a person operating the aircraft*, and therefore is a passenger.[56]

In final analysis, the line between passenger and crew, and the significance of any such distinction, while clear in some situations, in others remains less so.

In most of the cases the *purpose and functions of the persons on the aircraft* will determine the issue.

Two situations may be contrasted:

- If the *dominant purpose* is for *carriage between different destinations,* regardless of whether the destinations are known in advance, then it matters not that some activity is being performed on behalf of the pilot or the crew.

  The person will in those instances probably be considered to be a *passenger* (as in *Herd* and *Endeavour*).

  The extent of a person's *control* over the operations of the aircraft is the critical element here in determining whether the person is part of the *crew* or is instead a *passenger*.

- But if the purpose of the person's presence on the aircraft is:

55 *Stephenson et al v Parkes Shire Council & Anor [2014] NSWSC 1758.* I have abbreviated the party citation for the sake of brevity.

56 *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; 98 NSWLR 1; 356 ALR 63; 327 FLR. Per Basten JA at [60-61], [68-69], [78].

- to perform actual work for the carrier that is *integral to that flight* (as in *In re Mexico City Aircrash* or *Demanes*; or
- for a reason completely unrelated to any purpose for *carriage* (as in *Gauvain* or *Disley)*;

then the person *might* be regarded as *not being a passenger*.

(c) Meaning of "Carrier".

The liability under both *Montreal 1999* and also under CACLA and State and Territorial analogues rests with the *carrier*.

It is important therefore to ensure that any action is against the *correct defendant*.

The ticket should always be examined and cited for the flight number and other identification, together with other contract and itinerary documents (if any) issued by or on behalf of the carrier.

Article 3 of *Montreal 1999* specifies *what* documents of carriage should be delivered to a passenger. Non-compliance with these requirements does not affect the validity of the contract of carriage or the application of the convention to the carriage.[57]

It is common for international (and domestic) carriage to often involve carriers' other than the entity with whom the passenger initially contracts, and regularly involves several different carriers throughout different legs of the same journey.

Sometimes travellers in the course of an *international journey* (from their perspective) also travel domestically in one or more countries during their trip.

Careful attention must therefore be paid to the conditions of the contract of carriage and the *objectively ascertainable intentions of the parties*.

Article 1.3 and 1.4 of *Montreal 1999* make clear the importance of proving what the *intentions* of the parties were with respect to international carriage.:

> "3. Carriage to be performed by *several successive carriers* is deemed, for the purposes of this Convention, to be one undivided carriage *if it has been regarded by the parties as a single operation*, whether it had been agreed upon under the form of a single contract or of a series of contracts, and *it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State*.
>
> 4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein."

It cannot be assumed (merely because all flights were booked at the same time and/or with the same travel agent) that all domestic legs of an

[57] Article 3.5 Montreal 1999.

international journey will *necessarily* be *intended by the carrier* to form part of its *international carriage*.

If the matter becomes an issue, it will become necessary to actually *prove what the carrier's intentions were*.

Such was the case in *Auster et al v Ghana Airways* decided by the United States Court of Appeals DC on the 1st February 2008. The appeal involved a claim for damages under Article 17 of the Warsaw Convention for death and injury arising in a crash on final approach at Accra in Ghana.

The flight had commenced at another airport in Ghana. The three plaintiffs gave evidence that they all intended their flight to be part of their international travel. Two of the plaintiffs had purchased round-trip tickets on Ghana Airways from New York before their departure. Unfortunately, the Ghana internal tickets were labelled "Domestic" and none of these flights was identified as an international connecting flight.

Randolph J found:

> "Despite this lack of documentary support, Auster-Rosen and Prakash say they believed Airlink Flight 200 was operated by Ghana Airways. Their objective evidence for this belief is that Ghana Airways issued their boarding passes for that flight. *We will assume that the passengers intended their flight on Airlink to be international transportation under the Convention. Even so, the Convention will not apply unless Ghana Airways and Airlink also regarded the passengers' itineraries "as a single operation."* Convention art. 1(3); *Pimentel v. Polskie Linie Lotnicze* (*In re Air Crash Disaster at Warsaw*, Poland, on March 14, 1980), 748 F.2d 94, 96 (2d Cir.1984); see Robertson, 401 F.3d at 502-04.
>
> *There is no proof that Airlink intended to provide anything but a ticket for domestic transportation.* Airlink operated only domestic flights and had no operations outside Ghana. In fact, there was no reason for Airlink to know of the passengers' international itinerary. Auster-Rosen claims that she and Rosen informed an Airlink representative that they needed to return from Tamale to Accra in time to catch their flight from Accra to New York. Prakash claims that the travel agent who booked his ticket knew that Prakash was a foreigner in international travel because his employer, the World Bank, purchased the ticket. However, M&J Travel & Tours, not Airlink, dealt with Rosen, his daughter, and Prakash's employer. Even if we were to impute the travel agent's knowledge to Airlink, as plaintiffs urge, we would still agree that to "hold [an air carrier] to Warsaw convention liability for supposed comments made in passing to a single employee is wholly unreasonable. Stray remarks do not alert an airline of its duties and liabilities. The convention requires notice, not clairvoyance." *Santleben v. Continental Airlines, Inc.,* 178 F.Supp.2d 752, 757 (S.D.Tex.2001) (quoted with approval in *Coyle v. P.T. Garuda Indon*., 363 F.3d 979, 993 (9th Cir.2004)). Under these circumstances, Airlink did not have the knowledge necessary to intend the passengers' flight to be international transportation under the Convention. See *Haldimann*, 168 F.3d at 1325 ("[I]n the rare case where there has been evidence of the traveller's subjective intent, and it contradicted the court's inference from specific documentary indicia, courts have held that the indicia trump subjective evidence.")"

Other provisions of *Montreal 1999* relevantly provide:

> **"Article 36—Successive Carriage**
>
> 1. In the case of carriage to be *performed by various successive carriers* and falling within the definition set out in paragraph 3 of Article 1, *each carrier* which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage *in so far as the contract deals*

> *with that part of the carriage which is performed under its supervision.*
>
> 2. In the case of *carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred*, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey."

Chapter V extends the carrier's liability to a *contracting carrier*, that is one who engages entity another to perform the *actual carriage.* The most relevant provisions of Chapter V are extracted below:

> "***Carriage by Air Performed by a Person other than the Contracting Carrier***
>
> **Article 39—Contracting Carrier—Actual Carrier**
>
> The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.
>
> **Article 40—Respective Liability of Contracting and Actual Carriers**
>
> If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.
>
> **Article 41—Mutual Liability**
>
> 1. *The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.*
>
> 2. *The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier.* Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it."

It has been held in a number of USA cases that "agent" in this context can extend to a sub-contractor of the carrier For example see *Waxman v CIS Mexicana De Aviacion SA De CV* 13 F.Supp 2d 508 (4 July 1998). Mr Waxman was injured when he sat on a hypodermic protruding from his airline seat which the airline's cleaning *subcontractor* had failed to remove during usual ground cleaning.

Similarly, *In Re Air Disaster at Lockerbie Scotland on December 21, 1988* 776, F.Supp 710 (1991), which then reviewed the prior decisions in this area. Lockerbie involved a preliminary issue as to, *inter alia*, whether co-defendants, including Alert Management Systems (which was contracted to Pan Am to provide airport screening services) were covered by the liability

limits in the Warsaw Convention. It will be recalled that the flight exploded over Lockerbie Scotland as a result of a bomb, killing all 243 passengers.

Occasionally an issue may arise as to the identity of the correct carrier. In this context see *Air Tahiti Nui Pty Limited v McKenzie* [2009] NSWCA 429 (21 December 2009) per Allsop P and Handley AJA at [28]:

> [28] The identity of the contracting party is to be *determined looking at the matter objectively, examining and construing any relevant documents in the factual matrix in which they were created and ascertaining between whom the parties objectively intended to contract.* This is, to a point, a process of construction similar to the task of identifying whether a clearly contractual document (such as a bill of lading) is made with one party or another (such as a shipowner or time charterer): *The Starsin* at 770 and the cases considered in Wilford et al *Time Charters* (5th Ed Informa Publishing 2003) Ch 21. *Where the documents are silent or ambiguous, but there is undoubtedly a contract, the identity of the parties must be determined objectively from the surrounding circumstances*: see *Barroora Pty Ltd v Provincial Insurance Ltd* (1992) 26 NSWLR 170 at 174; *Protean (Holdings) Ltd v American Home Assurance Co* (1985) 4 ANZ Ins Cas 60-683 at 74,055–74,056*; Coulls v Bagot's Executor and Trustee Co Ltd* [1967] HCA 3; 119 CLR 460 at 477 at 478-479 and 486.

This was an action where the party sued argued, after the expiration of the two-year limitation period, that it was not the actual carrier, but merely acting as an agent. The plea failed, but it is instructive of the potential difficulty that can attend litigation for claimants in this jurisdiction.[58]

A prudent approach, *in case of doubt*, may be for a plaintiff to commence proceedings early and force the airline to deliver its Defence well before the two-years limitation expires (thereby requiring it to either admit or deny it is the carrier before it is too late).

(d) Meaning of "Sustained by reason of the death of a passenger".

In *Parkes Shire Council v South-West Helicopters Pty Ltd*[59] the plurality of the HCA (Kiefel CJ, Bell, Keane and Edelman JJ) found that any claims for damages for psychiatric injury by family of a passenger killed in a helicopter crash were governed exclusively by s 28 CACLA.

This was because, on the literal interpretation s 28 CACLA, a psychiatric injury of a non-passenger arising from the death of a passenger occurred *"by reason of the death of"* that passenger.

Here the claims had been commenced more than two-years after the accident.

Accordingly, the entitlement to claim was already extinguished by s 34(2) of the Act before the claims were filed.[60]

---

58 Another example closer to home is *Vock v Qantas Airways Limited [2021] QDC 269* (where Qantas claimed it was *not* the carrier, notwithstanding that the flight designation was 'QF' and the ticket was booked with 'Qantas Airways').

59 *Parkes Shire Council v South-West Helicopters Pty Ltd* [2019] HCA 14; 266 CLR 212; 93 ALJR 607; 367 ALR 1.

60 *Ibid* at [5].

(e) Meaning of "Accident".

In English language, the expression *"accident"* is capable to referring to *both* the *event which causes and injury*, and also *the injury itself*.[61] But this is not how it has been judicially interpreted under Article 17.

In *Air France v. Saks*[62] the United States Supreme Court unanimously found (at pp. 405, 406) that the term *"accident"* in Article 17 does not refer to or include the hurt or loss suffered, but refers *solely* to the *event* that was the *cause* of that hurt or loss. In other words, that "*which caused the damage*."

Further, in *Saks* the court opined that the expression *"accident"* in Article 17 requires:

> *"…an unexpected or unusual event or happening that is external to the passenger"* and that *"...when the injury indisputably results 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 and Article 17 of the Warsaw Convention cannot apply."*[63]

The court's formulation in *Saks* has been adopted in Australia[64] and the UK[65] (and also widely adopted elsewhere) as the authoritative meaning of the word "accident" for the purpose of the Conventions.

By necessary extension the same interpretation applies also the CACLA.[66]

It is sometimes a fine line whether an injury is found to be caused by an *accident*.

Some examples will illustrate how the *Saks'* test has been applied in practice:

(i) *Not an Accident*:

---

61 See Kirby J's analysis as to the ordinary meanings of the word 'accident' in *Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 79 ALJR 1215.

62 (1985) 470 US 392 at 405.

63 I have added the underlining for emphasis.

64 *Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 79 ALJR 1215.

65 Per House of Lords (England) in *Morris v KLM* [2002] 2 AC 628.

66 *Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 79 ALJR 1215, per joint reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ, with whom Callinan J agreed, and per the separate judgement Kirby J. McHugh J opined that the *Saks* definition was too widely expressed and should be confined to those actions or events that "…do not involve human action, eg mechanical of technological operations and "acts of nature". McHugh J believed that human acts or omissions that have "…unintended and reasonably unforeseeable consequences, and which in ordinary speech, …would constitute and "accident" ought to qualify under Article 17. For a further useful discussion of the meaning of accident see *Air Link Pty Ltd v Paterson* [2009] NSWCA 251 (20 August 2009).

- *De Marines v KLM Royal Dutch Airlines* 580 F.2d 1193. US Court of Appeals, 3d Cir., July 1978; (3 Fed. R. Evid. Serv. 5753).

  The male plaintiff suffered an inner ear injury while travelling from Amsterdam to Philadelphia. The injury allegedly resulted from a pressurisation error on the aircraft.

  The plaintiffs won at trial, and the defendant appealed seeking a new trial on grounds that there was insufficient evidence to show the injury resulted from an "accident" under the Warsaw Convention.

  In retrial the defendant succeeded, the court finding that the ordinary operational decrease in air pressure on board an aircraft was neither unusual nor unexpected.

- *Air France v Saks* (1985) 470 US 392.

  Mrs *Saks,*[67] a passenger suffered hearing loss after experiencing severe pain and pressure in her left ear while a plane was undergoing descent.

  The USA Supreme Court found that as there was nothing unusual or unexpected about the operation of the aircraft and the injury resulted solely from Mrs Saks internal reaction to events that were usual and normal during air travel.

  As noted previously, in interpreting the meaning of "accident" the court drew a distinction between the *cause* and the *effect* of an *accident*.

  It concluded that an accident within the meaning of the Montreal Convention must relate to the *cause of the injury*, and *not the injury itself.*

  Further, the Court held that there must be a causal connection between the unusual and unexpected event and the injury.

- *Povey v Qantas Airways Limited* [2005] HCA 33.

  Mr Povey, as an international passenger between Sydney and London and return, developed deep vein thrombosis ('DVT') which he alleged was caused by various *"…the conditions of and procedures"* relating to the flight, which included cramped seating, staff discouraging movement throughout the cabin, and the failure to warn about the risk of DVT and the means to mitigate that risk, etc.

  The DVT then precipitated a stroke and a pulmonary embolism.

[67] (1985) 470 US 392 at 405.

The full High Court (McHugh J dissenting as to part) distinguished *Husain* (see below) and found that none of the facts as pleaded by the appellant constituted an "accident" as there was no "event" that that was "unusual" or "unexpected" that was external to the passenger within the meaning of *Saks*.

A number of other international cases have similarly found that DVT resulting from a spontaneous internal condition is not an accident under Article 17 (e.g. *McDonald v Korean Air* (2003) 171 OAC 368; *In Re Deep Vein Thrombosis and Air Travel Litigation Group* [2005] UKHL 72, [2005] 3 WLR 1320). Attempts to reframe the "event" as a failure to advise or warn about the need to move around the cabin and/or drink lots of water, to mitigate the risk of DVT, have similarly proved unsuccessful (e.g. *McDonald v. Korean Air and China Travel (Canada) Inc* No. 01-B30373 dated 18 September 2002; also see *Rynne v Lauda-Air Luftfahrt Aktiengelsellschaft* [2003] QDC 4 7 February 2003).

- *Chaudhari v British Airways Plc* [1997] EWCA Civ 1413.

  The passenger, a very frail person, was unable to stand upright when alighting from his seat to visit the toilet. He fell and suffered injury. The Court of Appeal held this was not an accident within the Saks definition as it was not caused by any unexpected or unusual event external to the passenger. Instead, it was caused by his own reaction to the normal operation of the aircraft.

- *Barclay v British Airways plc* [2008] EWCA Civ 1 1419.

  Mrs Barclay was a passenger on an international flight from Phoenix Arizona to Heathrow London. While she was in the process of walking sideways along a row to her assigned seat she slipped on a strip embedded into the floor of the aircraft and received a ligamentous injury to her right knee. She sued relying on Article 17.1 of Montreal 1999, the applicable convention which had force of law in England under the *Carriage by Air Act 1961*.

  Laws LJ (with whom Thomas LJ and Wilson LJ concurred) found there was no accident:

  > "[35] *I conclude that Article 17.1 contemplates, by the term "accident", a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger.* This gives the term a reasonable scope which sits easily in the balance the Convention strikes. It is, I conceive, in line with all the leading authorities from *Saks* onwards which, save only, with respect, for Lady Hale's opinion in *DVT*, uniformly emphasise the importance of the causative event's being "external" to the passenger. There are some particular formulations in the cases which (without picking over the texts to the last comma, a fruitless and inappropriate exercise) especially point, as it seems to me,

> towards this approach. I have already cited paragraph 21 of Lord Phillips' judgment in *DVT*, where he referred to "an untoward event which impacts on the body...". *This suggests to my mind the happening of an event which is anterior to and separate from any involvement of the passenger. So also Lord Steyn's observation in DVT at paragraph 33 that "it is an integral part of the test of what amounts to an accident that it must have a cause external to the passenger". Assistance is also to be had from O'Connor J's observation at p. 406 of Saks itself:*
>
> > *"... [W]hen the injury indisputably results 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, and Article 17 of the Warsaw Convention cannot apply."*
>
> This was the passage which, it may be recalled, Mr Menzies submitted was "not part of the *Saks* definition". I do not agree. This statement is part and parcel of the Supreme Court's exegesis of the Convention.
>
> [36] In all these circumstances I cannot accept Mr Menzies' submissions. *There was no accident here that was external to the appellant, no event which happened independently of anything done or omitted by her. All that happened was that the appellant's foot came into contact with the inert strip and she fell.* It was an instance, to use Leggatt LJ's words in *Chaudhari*, of "the passenger's particular, personal or peculiar reaction to the normal operation of the aircraft".

- *Sethy v Malev-Hungarian Airlines* [2000] US Dist Lexis 12606.

  Here the US Federal District Court found that an injury caused when the claimant tripped over a bag in the aisle of the aircraft was not an accident within the meaning of the applicable convention. The court found the presence of a bag on the floor in an aisle was not something unusual or unexpected.

- *Craig v Air France*, 45F 3d 435 (1994).

  The US District Court for the Central District of California found that a passenger who slipped and fell (apparently on a loose shoe – on which the evidence was equivocal) while trying to climb past a sleeping passenger had not suffered an accident. The court also considered the presence of a loose shoe was not something likely to be unusual or unexpected event.

- *Schwartz v Lufthansa*, Aviation Cases 1039 3.94 24 Avi 17,841.

  Here a drunken passenger slipped and fell in a clean toilet on board a flight. The US District Court held that his inebriation, the apparent cause of the fall, was neither unusual or unexpected or an event external to the passenger.

- *Potter v Delta Airlines* (1996) 98 F 3d 88.

  A female passenger tripped and fell when her foot became stuck on the carpet while trying to move behind a fully reclined seat.

The US Court of Appeal 5th Circuit held that none of these were unusual or unexpected events.

- *Brannock v Jetstar Airways Pty Ltd* [2010] QCA 218.

  A passenger was directed to descend stairs to the tarmac during boarding. He could not find the exit door at the bottom so began to ascend the stairs when he met other passengers descending. These passengers offered to show him the way, but in the course of turning to again descend the stairs he lost his footing, fell and was injured.

  On appeal to the QCA the majority (White JA and Fraser JA) found the events resulting in injury were not an 'accident' as they were not events external to the passenger, as required by *Saks*, and the stairs were an ordinary (and hence not unexpected or unusual) feature of embarkation.

(ii) *Is an Accident*:

- *Waxman v CIS Mexicana De Aviacion SA* (1998) 13 F Supp 2d 508.

  Mr Waxman suffered a needle stick injury to his right leg on an international flight from New Jersey to Mexico. The needle, apparently left by a prior passenger, was protruding from the fabric of his seat.

  The US Federal District court found that the airlines failure to remove the hypodermic needle during normal cleaning operations was an unusual and unexpected departure from the ordinary procedure of the airline.

- *Fishman v Delta Air Lines Inc* 132 F. 3d 138 (2d Cir 1998).

  A child passenger was scalded by boiling water spilled by a flight attendant while she was attempting to relieve the child's ear-ache with a hot compress.

  The court held that this was an accident, even though it arose during the course of the airlines normal operating procedures, because that procedure was conducted in an unreasonable manner.

- *Wallace v Korean Air* 214 F.3d 293 (2000).

  Ms Wallace was sexually assaulted by a fellow passenger while travelling on a KAL flight from Seoul to Loss Angeles.

  She was aleep in a window seat and awoke to find that the adjoining passenger (Mr Park) had unbuttoned her shorts and

placed his hand under her underpants. Ms Wallace immediately resisted his advances, but he then continued his assault.

Ms Wallace then climbed over Mr Park and another passenger to escape, and reported the matter to a flight attendant who found her another seat.

The court, applying *Saks*, held that the assault was an "accident" as the events comprised an "unexpected or unusual event or happening that was external to the passenger".

- *Olympic Airways v Husain* 540 US 644 (2004).

  On an international flight Dr Husain, an asthma suffer, was seated three rows behind the smoking section of the aircraft. On three separate occasions, he asked the flight attendant that he be moved further away from the smoking section. His requests were all denied, in the end result that he had an asthma attack and died.

  The court found that there were a *number of causes* to Dr Husain's death, one of which being his own internal reaction to the second-hand cigarette smoke. That said, the flight attendant's conduct in failing to move Dr Husain was *also* a cause of his death, and there was no dispute that the attendant's conduct was unusual and unexpected.

  The US Supreme Court (Thomas J, with whom Rehnquist CJ, and Stevens Kennedy, Souter and Ginsburg JJ concurred) concluded that the flight attendant's *rejection of an explicit request to be moved were events or happenings that were unusual and unexpected within the meaning of Saks*.

- *Malaysian Airline Systems Berhard v Krum* [2005] VSCA 232 (20/9/05).

  Mr. Krum suffered an aggravation to pre-existing back injuries by sleeping in a first-class seat that had malfunctioned such that the internal lumbar adjustment was stuck, and when the seat was reclined manually this caused pressure on the plaintiff's spine causing injury.

  Plaintiff won at first instance and the defendant airline appealed, arguing that the injury was not caused by an accident within the meaning of Article 17.

  In rejecting this argument Eames, Nettle & Ashley JJA said (italics added by the writers for emphasis):

  > "27. The appellant advanced three submissions concerning "accident". There was, it was said, no accident because –
  >
  > - The respondent did not suffer injury caused by the use of a defective seat. He suffered injury as a result of sleeping on a reclining seat the cushion of which he found hard but which was not defective.

- Even if the very hard segment of the seat described by the respondent was the lumbar support, the same was positioned somewhere within its normal range of movement. In such circumstances it could not be said that lying on a seat, part of which was hard but was covered by padding, constituted an unexpected or unusual event external to the respondent.
- It was irrelevant whether the appellant had failed to relocate the respondent after the latter had identified the hardness in the seat to one of the cabin crew. This was not a case – compare *Olympic Airways v. Husain* (2004) 540 US - about confrontation and refusal. The judge had fallen into error, considering, by implication, what the appellant could or should have done in the circumstances.

28. Those submissions addressed, in the main, quite confined issues. They might perhaps have necessitated consideration of matters towards the periphery of principle. But in my opinion the question of "accident" can be resolved simply, and within well recognised boundaries. It can be resolved by considering the appellant's first two submissions.

29. The first submission must be rejected because, as I have already said, it was well-open to the learned trial judge to find that there was a direct causal relationship between the respondent lying on a seat made uncomfortable by the positioning of its lumbar support when the seat was reclined, and the respondent suffering onset of sciatica. That is the finding which, considering all the evidence, I would make.

30. I go to the appellant's second submission. In my opinion, it should also be rejected. Accepting that the lumbar support was fixed at some point within its normal range of movement, it does not follow that such point was not quite unsuitable when the seat was in its reclined position. The respondent's evidence, as understood by the learned judge, suggested that the position of the lumbar support when the seat was in its reclined position was indeed unsuitable. Recall the evidence of the respondent that he did not notice the hard segment until the seat was reclined.

31. In my opinion, *the circumstance that the lumbar support was fixed in a position which was unsuitable when the seat was reclined together with, importantly, the fact that the position of the support could not be altered because its operating mechanism was broken, can readily be described as an unusual or unexpected event or happening; one causative of damage to the respondent because it induced him to adopt an awkward posture in response to discomfort*.

32. The conjunction of circumstances which in my opinion warrant the pertinent description were not the less so because, as it appears, the seat mechanism was broken before the flight commenced. That was only part of the equation.

33. *The appellant's argument was in my opinion flawed because it sought to isolate the position of the lumbar support from circumstances – that is, the seat being reclined and the fault in the operating mechanism – which combined with the position of the support to make the last-mentioned a particular and irremediable hazard.* Senior counsel for the appellant accepted that it was a critical element of his submissions that the lumbar support had been fixed within its normal range of movement. That meant, he said, that neither such position nor its consequences could be characterised as an unexpected or unusual event. Those submissions focused upon only a fragment of the picture. The respondent was not simply allocated a seat the operating

mechanism of which was broken. *He was allocated a seat which, when it was manually reclined, had its lumbar support positioned so as to cause him discomfort; such support, because its operating mechanism was broken, abnormally being incapable of adjustment so as to relieve his discomfort."*

- *Air Link Pty Ltd v Patterson* 27 NSWLR 354; FLR 416 [2010]; ALMD 3505.

  The passenger was injured in while disembarking from the rear exit of a small aircraft at Dubbo airport. The aircraft's fold out stairs were insufficient to reach all the way to ground level, so staff placed a light aluminium step at the foot of the stairs to bridge the gap. When the passenger stood on the step it tilted causing a fall and an injury.

  Allsop P and Ipp JA (with whom Sackville agreed) found that the event was both unusual and unexpected. Further, the requirement that the event be something occurring external to the passenger did not mean it must occur independently of anything done by the passenger.

  Sackville J went on to make the following useful observations as to this issue, and the onus of proving occurrence of an event in general:

  > "[120] *It is not necessary, in my view, in order for a passenger to succeed in a claim under Art 17(1) of the Warsaw Convention or s 28 of the Civil Aviation (Carriers' Liability) Act (Cth), to show that the event causing injury occurred independently of anything done or omitted by the passenger.* The conduct of the passenger may disentitle him or her from recovery if, for example, it is so out of the ordinary that the operations of the airline cannot be expected to deal with the conduct. An airline, for example, cannot necessarily be expected to provide a portable step sturdy enough to withstand the weight of a passenger who chooses to leap from the aircraft door directly onto the step, bypassing the steps attached to the aircraft. But the mere fact that the passenger has brought himself or herself into contact with a piece of equipment that is not operating in the usual, normal and expected way does not prevent the event from being an "accident" for the purposes of the Warsaw Convention and s 28 of the *Civil Aviation (Carriers' Liability) Act* (Cth).
  >
  > [212] Equally, in my opinion, *it is not essential for a passenger to establish the reason why the aircraft, or the airline's equipment or services, did not operate in the usual or expected manner.* What is required is proof that the injury was caused by an unexpected or unusual event that is external to the passenger: *Povey* (at 203 [28]). Moreover, as was pointed out in *Air France v Saks* (at 406), any injury is the product of a chain of causes and it is only necessary for the passenger to prove that some link in the chain was an unusual or unexpected event external to the passenger: see also *Olympic Airways v Husain* 540 US 644 (2004) at 653. Doubtless, in many cases,

> the passenger will adduce evidence of the reason or reasons why the aircraft, equipment or services did not operate in the usual or expected manner. *But in some cases, for example when an aircraft simply disappears over an ocean and all passengers are lost, evidence as to the precise cause or causes of the catastrophe may not be available. Yet the crash of an aircraft in such circumstances is clearly an unexpected and unusual event external to the passenger.*
>
> [122] These conclusions are consistent with the observations of Marrero DJ in *Fulop v Malev-Hungarian Airlines* 175 F Supp 2d 651 (2001) at 657, quoted with approval by Lord Mance in *Re Deep Vein Thrombosis Group Litigation* [2006] 1 AC 495 at 521 [69]:
>
>> "In so far as any decisive pattern may be discerned … the fulcrum of these considerations often rests on the extent to which the circumstances giving rise to the claimed accident fall within the causal purview or control of the carrier — or at least within its practical ability to influence — as an aspect of the operations of the aircraft or airline. The larger the role of the airline in the causal chain, and the greater the knowledge and involvement of its personnel and operations in bringing about the harmful event, the more likely it is that liability will be found. Conversely, as the causal balance shifts towards acts and conditions that are independent of the knowledge or will of the carrier, or not associated with the operation of the aircraft or airline nor arising from risks characteristic of air travel, and instead are more unique to the passenger alleging injury, the lesser the claimant's probability [of recovery]."
>
> [123] For these reasons, the fact that the respondent placed his weight on the portable step does not prevent the *Air France v Saks* test from being satisfied. On the findings made by the primary judge, the respondent did nothing more than disembark from the aircraft in the usual way. The portable step did not, as the primary judge found, "behav[e] normally". The appellant has not established that the primary judge misinterpreted or misapplied s 28 of the *Civil Aviation (Carriers' Liability) Act* (Cth)."

The matter went on appeal to the HCA but *on a different point*, namely whether the pleadings (which were framed in negligence instead of under CACLA and filed shortly prior to the expiration of the two-year limitation in the Act) were able to be amended after the limitation had expired.[68]

(f) Meaning of "Bodily Injury".

[68] *Air Link Pty Ltd v Paterson* [2005] HCA 39; 223 CLR 283; 79 ALJR 1407; 218 ALR 700 (205); Aust Torts Reports ¶81-791.

The air carriage conventions each refer to *"bodily injury"*.[69]

Prior to 2012 s 28 in Part IV CACLA used the expression *"personal injury"* which was then amended to *"bodily injury"*. This was to ensure consistency with the jurisprudence that had developed with respect to carriage to which an international air carriage convention applied.

For some years a debate has ensured about whether *pure mental harm*, un-associated with any underlying physical injury, comprises *"bodily injury"* within the Convention and the Act.

There are two instances where mental harm to a *passenger* may arise in an air accident:

- as a result of physical injury;
- as a result of pure nervous shock (not associated with any physical injury) experienced in the accident.

Mental harm of the first sort is generally considered to be a bodily injury under the Act and the Convention.[70]

But harm of the second sort is more difficult – largely because of the difficulty, in cases involving PTSD at least, in attributing any psychological changes to a physiological "injury".

In *Eastern Airlines Inc v Floyd* 499 US 530 (1991) the US Supreme Court considered a passenger claim under the *Warsaw Convention* for damages for pure mental distress resulting from a near ditching event. The court held that the convention did not permit recovery for pure mental harm.

In *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110 Meagher JA (with whom Powell and Stein JJA concurred) found that the psychological sequelae of severe nervous shock to a passenger on an international flight from Athens to Sydney as a result of an engine fire and subsequent emergency landing did not constitute *bodily injury* under the *Warsaw Convention* (the applicable convention in this case). Meagher JA followed *Floyd* and concluded (at [114]) that *"…the adjective 'bodily' is a word of qualification or limitation"* and *"…the draftsmen of the Convention did not intend to impose absolute liability in respect of all forms of injury"*.

Later that year, in *South Pacific Air Motive Pty Ltd v Magnus & Ors* [1998] FCA 1107 the Federal Court on Appeal considered the same issue, *albeit* with respect to s 28 in Part IV of CACLA, which then used the expression "personal injury" (in lieu of "bodily injury" used in the conventions).

---

69 Article 17(1) Montreal 1999.

70 *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110 per Stein JA at [115, 121] - whose opinion on this issue was recently cited with approval in *American Airlines Inc v Georgeopoulos (No. 2)* [1998] NSWCA 273 per Sheller JA (with whom Meagher JA and Beazley JA concurred) at [6]. Also see *Ehrlich v American Airlines Inc* 360 F 3d 366 (ad Cir 2004) where the US Court of Appeals 2nd Circuit found that Article 17 of the Warsaw Convention permitted recovery for mental harm caused by physical injuries resulting from the accident, but not otherwise.

This matter involved an aircraft that had been chartered to carry a school group from Sydney to Norfolk Island. Soon after take-off in Sydney the aircraft ditched in Botany Bay.

Representative proceedings were commenced after the expiration of the two-year limitation period in CACLA, claiming damages under the *Trade Practices Act* and in common law negligence. The carrier applied to strike out the action. *One* of the issues for determination was whether pure mental injury, (i.e. nervous shock) not resulting from any physical injury was *"personal injury"* under the Act.

Justices Hill and Sackville JJ found that "personal injury" encompassed pure mental harm. Their Honours referred to the convention decisions dealing with the expression "bodily injury" and attached significance to the legislature's use of "personal injury", which ordinarily included all types of injury.

The Act was subsequently changed in 2012 in response to this aspect of the decision.

This issue was revisited more recently by the NSW Court of Appeal in *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32; 93 NSWLR 438, Macfarlan JA (which whom Ward and Gleason JJA agreed).

The respondent, Ms Casey, had been a Care Flight (NSW) nurse on a charter flight to evacuate a patient from Samoa to Melbourne. The aircraft was supposed to refuel at Norfolk Island on the return trip, but was forced to ditch due to bad weather. In the process Ms Casey suffered significant physical and psychiatric injuries.

The injuries that Ms Casey sustained comprised physical injuries to her spine and right knee, together with PTSD, a major depressive disorder, and anxiety disorder and complex regional pain syndrome.

The relevant issue (for this paper's purposes) was whether the PTSD component was compensable.

After reviewing the international and local authorities, the Court again concluded, on the evidence, that PTSD here was not a result of any *reaction to physical injury*, and therefore was not "bodily injury" under *Montreal 1999* (the applicable convention in this case).

The outcome was dependant on evidence that while Ms Casey's brain was malfunctioning due to biomechanical changes to her brain, as a result of the accident, these changes did not involve and *physical change to her brain* – and hence did not constitute 'bodily' injury.

Scientific improvements in the understanding of PTSD, or even the way that science is presented in court, might *possibly* result in a different outcome in an appropriate case.[71]

[71] *King v Bristow Helicopters Ltd* [2002] UKHL 7; [2002] 2 AC 628. See Lord Nicholls of Birkenhead at [3]; Lord Mackay of Clashfern at [8]; Lord Hope of Craighead at [49] and [145]; Lord Hobhouse of Woodborough [141-143] and [152].

To date however, legal attempts to attribute PTSD to physical bodily injury have generally proved unsuccessful.[72]

It should be noted that nervous shock suffered to a *third person* (i.e. non-passenger) as a result of an *injury* to a passenger *arguably* remains compensable by action in tort - as the air liability regime only limits liability as between a *passenger* and the *carrier*.[73]

But nervous shock resulting from the death of a passenger is governed exclusively by s 28 CACLA.[74]

Griffiths J recently summarised the general requirements of the expression *"bodily injury"* in *Grueff v Virgin Australia Airlines Pty Ltd* [2021] FCA 501.

Here the applicants claimed they had suffered injury from drinking tainted bottled water that was served to them on a flight from Denpasar to Sydney.

At issue was whether the ailments suffered by the applicants (sore throat, nausea, diahorrea, head cold, temporary weight loss, food intolerances) were "bodily injury" and whether they were caused by the consumption of the water.

His Honour referred to prior decisions and was not satisfied that the applicants complaints qualified as "bodily injury" under the Act, or that they were caused by the ingestion of tainted water as alleged.

While strictly unnecessary for the disposition of the claim, (given his finding on causation), His Honour opined about the scope of complaints that might fall within the meaning of "bodily injury".

In the process he adopted the following passages from Lord Hobhouse of Woodborough in *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7; 2 AC 628:

> "140 The composite expression *bodily injury* involves a combination of two elements. *The word injury in the context of personal injury involves a condition which departs from the normal, which is not a mere transitory discomfort or inconvenience and which, whilst not permanent or incurable, has, in conjunction with its degree of seriousness, a sufficient duration.* It includes a loss of function. A person who is concussed or who is in clinical shock or who is made deaf or blind is properly described as injured. (As to deafness, see, for example, *Air France v Saks* 470 US 392.) *A condition which requires treatment to enable the person to return to the normal is typical of an injury though not essential; many injuries heal over time without intervention. Contracting an illness may amount to an injury depending upon the degree to which the illness departs from the normal. One would not normally describe a person who caught a cold as having suffered an injury*

---

72 See, for example, *In re Air Crash at Little Rock Arkansas* 291 F 3d 503 (8th Cir 2002); *Terrafranca v Virgin Atlantic Airways Ltd* 151 F 3d 108 (3d Cir 1998); *Rosman v Trans World Airlines Inc* 34 NY 2d 385 (1974); *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32; 93 NSWLR 438.

73 See *South Pacific Air Motive Pty Ltd v Magnus & Ors* [1998] FCA 1107, per Beaumont, Hill and Sackville JJ.

74 *Parkes Shire Council v South-West Helicopters Pty Ltd* [2019] HCA 14; 266 CLR 212; 93 ALJR 607; 367 ALR 1.

but, on the other hand, one would certainly describe someone who contracted a serious disease or condition, say, AIDS or hepatitis, as the result of the deliberate or negligent act of another as having suffered an injury.

141 The word *bodily* is simpler. It means pertaining to the body. *There must be an injury to the body*. It is, as it must be, accepted that the brain, the central nervous system and the glands which secrete the hormones which enable the brain and the rest of the central nervous system to operate are all integral parts of the body just as much as are the toes, heart, stomach and liver. They are all susceptible to injury. The mechanisms by which they can be injured vary. An ingested poison might injure the stomach or liver. A lack of oxygen will injure the brain by causing the death of brain cells. An injury to the heart may be caused by a blow or by a traumatic experience or by over-exertion. In every case there is a cause, external to the organ in question, which produces a change in the structure or ability to function of the organ. If the change, either alone or in conjunction with changes in other organs, is properly described as an injury, it is a *bodily* injury. Since the body is a complex organism depending for its functioning and survival upon the interaction of a large number of parts, the injury may be subtle and a matter of inference not direct observation. The medical science of diagnosis exists to enable the appropriate inferences to be drawn from the observed evidence. Medicinal treatments (as with drugs) are prescribed on the basis that there is a physical condition which can be reversed or alleviated by physical means.

…

174 … In two cases *Terrafranca v Virgin Atlantic Airways Ltd* (1998) 151 F Supp 3d 108, Third Circuit Court of Appeals, and *Carey v United Airlines* (2001) 28 Avi 15,408, Ninth Circuit Court of Appeals, the passenger sought to satisfy the criteria in *Floyd* by saying that the accident had caused emotional distress and the emotional distress had caused physical symptoms like, in *Terrafranca*, loss of weight and, in *Carey*, sleeplessness, nausea, perspiration etc. These consequences it was argued amounted to "physical manifestations" for the purpose of article 17 so as to bring what would otherwise be mere emotional stress within the terms of that article. It will be appreciated at once that I myself would not accept that argument. *What the passenger has to prove is a bodily injury, not something less but with physical manifestations. The argument was based upon the language used in Floyd: but the phrase used there is "physical injury or physical manifestation of injury"(499 US 530; 552-553. If it is simply emotional stress which is causing the person to lose weight, no injury, bodily or otherwise, is proved. For the argument to succeed the plaintiff must prove either that the manifestation proves that there is or has been an underlying bodily injury or that the manifestation itself is a bodily injury. As Rosman 34 NY 2d 385 shows, provided that causation by the accident can also be proved, in the former instance the plaintiff can recover damages for the underlying bodily injury and its consequences and in the latter for the bodily injury but not what preceded it.* What I have said corresponds to the reasoning of the Court of Appeals in *Terrafranca*: see 151 F Supp 3d 108, 110–111 where *Rosman* is cited. In *Carey* 28 Avi 15,408, 15,414, Circuit Judge Nelson followed *Terrafranca*, saying,

> "The Third Circuit concluded … that there was no support for the argument that the plaintiff's physical manifestations of her emotional injury satisfied the 'bodily injury' requirement. Because the plaintiff could not 'demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety', the court held that she did not satisfy the conditions for liability under article 17 and thus could not recover for her emotional distress. For reasons similar to those articulated by the Third Circuit in *Terrafranca*, we hold that physical manifestations of emotional and mental distress do not satisfy the 'bodily injury' requirement in article 17."

Carey came after *Weaver* 56 Fed Supp 2d 1190 and the Court of Appeals referred to it, at p 15,415, in footnote 47 to its opinion without expressing either approval or disapproval. The value of *Terrafranca* and *Carey* is that they implicitly approve *Rosman* and confirm the primacy of the simple bodily injury criterion, not any gloss or paraphrase of it."

(g) Meaning of "…on board the aircraft or in the course of any of the operations of embarking or disembarking".

The structure of both the Conventions and CACLA is to exclude liability in a *blanket manner* for anything occurring during the course of the "*international carriage"* (which obviously includes embarkation and disembarkation) and substitute it with a limited right to claim for certain losses (i.e. "bodily injury") arising from a defined event (i.e. "accident") that occur during *embarkation*, on board the aircraft and during *disembarkation*.

The process of "international carriage" clearly subsumes the acts of *embarkation* and *disembarkation* in Article 17.

But, as these two expressions are concerned with defining temporal boundaries on the limited remedy for certain accidents (and not with defining the scope of the net of *liability exclusion* cast by the Convention) – then there is no reason why the expression "international carriage" may not extend *beyond* events occurring outside the ordinary narrow scope of these operations.[75]

That might leave a claimant without a remedy in some cases.[76]

It is usually pretty clear whether an accident occurs on board the aircraft. It is sometimes less clear whether an accident occurs in the course of *"embarking"* or *"disembarking"*.

The process of an international air trip involves a range of activities from travelling to the airport, checking in and ticketing, passing through customs, waiting for departure in the terminal, boarding and disembarking via a variety

[75] This issue was discussed by Morrison J in *Phillips v Air New Zealand* [2002] 2 Lloyds Rep 408 at p. 414.

[76] *Sidhu & Ors v British Airways plc* [1997] 1 All ER 193; [1997] AC 430 was probably one such case.

of structures (i.e. air bridges, stairs, ramps) at points of departure, stopover and arrival, sometimes re-ticketing and changing terminals at stopover locations, collecting luggage, passing through customs, and leaving the airport.

Many of these activities take place while a traveller is in premises, using facilities and being attended by staff belonging to, leased by, or employed by the air carrier.

At what point therefore, does the carrier's liability begin and where does it end?

(i) *Embarkation*:

The meaning of *"embarkation"* in the *Warsaw Convention* as modified by *Montreal No. 2* was considered by the USA Supreme Court of Appeal in *Day v Trans World Airlines Inc Kersen* [1975] USCA2 816; 528 F.2d 31; 36 A.L.R. Fed. 477 (22 December 1975).

The opinion succinctly summarized the facts as follows:

> "On August 5, 1973, at Hellenikon Airport in Athens, Greece, two Palestinian terrorists hurled three grenades and unleashed a salvo of small-arms fire into a line of passengers preparing to board TWA Flight 881 to New York. Three people died and more than forty others were injured by this senseless act of violence."

The Court examined the boarding procedures in order to determine whether the passengers were in the process of *embarking* within the meaning of the convention: [77]

> "It is necessary that we briefly describe the boarding procedures for international flights at Hellenikon Airport in August, 1973 as an aid to the resolution of the controversy before us. The prospective passenger, after entering the terminal, proceeded to the check-in counter of the airline whose aircraft he was to utilize. There, he presented his ticket, deposited his luggage, and paid the departure tax. In return, he was given a boarding pass and baggage check. *The passenger then passed through Greek passport and currency control after which he descended a flight of stairs into the Transit Lounge. Only passengers waiting to board international flights were allowed inside the lounge area where they were required to remain until boarding.* While the traveler waited for his flight to be called, he secured his seat assignment at the transfer desk located inside the lounge. *When his flight was announced, he proceeded to the designated departure gate, where he and his hand baggage were searched by Greek policemen*. The passenger then walked through the doors of the terminal building and crossed a short terrace outside. Finally, he boarded a bus which transported him to the waiting airplane.
>
> *The attack on the passengers of TWA Flight 881 occurred after they had gone through several of the required steps recited above and while they were standing in line at the departure gate*, *to which a TWA representative had summoned them, waiting to be searched*. After seven passengers had been searched, *the terrorists made their assault upon those standing in line*."

[77] Emphasis added by the writer.

And later in the decision (at [39]):

> "*At the time of the attack, plaintiffs Aristedes and Constantine Day were being escorted by a TWA passenger relations agent to the departure gate*. All the other plaintiffs were standing in line waiting to be searched. We agree with Judge Brieant that these differences in location have no significance to the outcome of this case."

The Court then relevantly found: [78]

> "[10] TWA contended, both before Judge Brieant and on this appeal, that the application of Article 17 should be determined by reference only to the area where the accident occurred. Liability under the Convention should not attach, it urges, while the passenger is inside the terminal building. The very earliest time at which liability can commence, the appellant argues, is when the passenger steps through the terminal gate. *Judge Brieant, however, believed that 'the issue . . . is not where (the plaintiff's) feet were planted when the killing began, but, rather, in what activity was he engaged.' 393 F. Supp., at 220. Applying a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location, the district judge determined that Article 17 covered the attack at the departure gate. We agree with this conclusion*.
>
> [11] It seems elementary to us that the language employed in Article 17 must be the logical starting point. See Article 31(1), Vienna Convention on the Law of Treaties (hereinafter 'Vienna Convention'). *We are of the view that the words 'in the course of any of the operations of embarking' do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location. Rather, the drafters of the Convention looked to whether the passenger's actions were a part of the operation or process of embarkation*, as did Judge Brieant.
>
> [12] It is clear that *Article 17 does not define the period of time before passengers enter the interior of the airplane when the 'operations of embarking' commence*. It is, nevertheless, *appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase*. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. *The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were 'in the course of embarking*.'"

In *Phillips v Air New Zealand* [2002] 2 Lloyds Rep 408 at p. 414 Morrison J took a different but not inconsistent approach to the issue.

Dr Phillips had checked into an Air New Zealand flight at Nadi International Airport in Fiji. Soon after checking in she was being assisted up an escalator by wheelchair when the chair fell back a couple of steps resulting in a whiplash. The wheelchair was being pushed by

[78] Emphasis and underlining added by the writer.

an employee of Air Terminal Services (Fiji) Limited, which Air New Zealand had contracted for ground handling services.

Dr Phillips thereafter commenced proceedings outside the two-years provided for in the Warsaw Convention, but within the three-year period provided by the UK *Limitation Act 1981*.

Morrison J (Queens Bench Division) found (at p. 414) that her exclusive remedy was for damages under the Convention and under the Convention that claim was statute barred.

In arriving at this conclusion His Honour first had to determine whether the matter was covered by the Convention. In so doing he stated:

> "14. *The Convention applies as soon as the passenger has presented a valid ticket for travel and the ticket has been accepted and a boarding pass issued. In other words, the carriage begins when the passenger has successfully completed the check-in procedure*. That is the beginning of the contract of carriage. *In my view the question as to when the carriage begins is different from the question as to when art. 17 come into effect*.
>
> *Does art.* 17 *apply?*
>
> 15. This is a hypothetical question since the reason why the claimant has lost her right under the Convention is entirely due to the delay in issuing proceedings. The Convention time limits apply and she has lost the right to sue her carrier for the damages she sustained as a result of the injury at Nadi Airport. The issue is whether she would have had a claim under art. 17. And that question hinges on the issue as to whether, on the facts, it can be said that the claimant suffered her admitted bodily injury "in the course of any of the operations of embarking" the aircraft.
>
> 16. The structure of the article leads to the following conclusions:
>
> (1) Before a person could be said to be in the course of any of the processes of embarkation there must be a particular identified aircraft and flight.
>
> (2) There may be a number of "operations" of embarkation. The word "operations" is plural. This suggests that art. 17 cannot be confined in its application to the process of actually climbing over the threshold of the aircraft at the point of embarkation or walking up to the steps to the aircraft if the aircraft is loaded from the ground.
>
> (3) *The U.S. case law in particular emphasis that the question of art. 17s application is best answered by reference to three criteria: where, geographically, did the accident occur; what was the passenger doing at the relevant time; was the passenger under the carrier's control. In my judgment each of those factors must be borne in mind, but it would be wrong, as a matter of law, to focus on them as though they tell the answer to the question*. Those factors are simply ones to which regard will be had but the focus of attention is on the words of the article itself, which makes no reference to them. *In fact, they are best applied so as to exclude the potential operation of art. 17, rather than to prove that it applies*. As was said in the Irish case *(Helen Galvin v. AER Rianta and AER Charter,* Mar. 18, 1993, a judgment of Mr. Justice Barr) "whether or not the location as so defined is within the ambit of Article 17 will depend upon the circumstances of each individual case." The

Judge applied the three criteria test in this way, in the context of an *embarkation* case:

> As to embarkation, I am satisfied that to make a *prima facie* case that a particular claim is within Article 17 it must be established
>
> (1) that the accident to the passenger is related to a specific flight; and
>
> (2) that it happened while the latter was actually entering or about to enter the aircraft; or
>
> (3) *if it happened in the terminal building or otherwise on the airport premises, that the location of the accident is a place where the injured party was obliged to be in the process of embarkation*.

17. In this case, the accident happened at a time when a specific flight had been called and during a necessary process towards embarkation. Dr. Phillips was going upstairs because the airline had called passengers to go to the embarkation point, namely the departure gates. Standing back, *it seems to me that going to the embarkation gate after the flight has been called is one of the several processes which passengers must perform in order to embark on their flight. The processes of embarkation will, I think, include the checking-in; the passage through security and passport control and the "departure routine", that is, going to the gate to be cleared for embarkation and proceeding thereafter to embark. In the most general sense, these activities are required by the airline of its passengers*. In a perfect world, one would arrive at an airport or aerodrome, as it was when the Convention was agreed, and go straight on board. The fact that air travel is bedeviled by security checks and waiting time does not alter the gist of what I think the draftsmen of the Convention intended to be covered by art.

17. *If a passenger is required to take a particular step or go to a particular place for boarding then he or she is engaged in a process of embarkation*. That means, I think, that during the many minutes a passenger spends in the public or private lounges or goes shopping or eats or drinks in restaurants or cafes, he or she could not be said to be in the process of embarkation. At this stage the passenger is waiting, more or less reluctantly. *But he or she may have already been through a process of embarkation (e.g. security, boarding card check and passport control) and will inevitably have to go through other such processes, such as going to the gate and getting on the aircraft. The process of embarkation does not have to be a continuous one*. In my judgment this makes good sense of the realities of modern air travel. For some of the time a passenger is able to do what he or she wants; for some of the time he or she has to comply with directions and requirements imposed by the carrier. In the light of the *Sidhu* decision, I see no reason to give a restrictive interpretation to art. 17.

18. Accordingly, I am satisfied that Dr. Phillips was injured in an accident which occurred in the course of one of the processes of embarkation. Had she brought proceedings in time, she would have been entitled to judgment against the carrier regardless of fault and regardless of whether Mr. Temo was someone for whom ANZ were legally responsible. He was their agent, at the very least."

In *Matveychuk v Deutsche Lufthansa*, AG, No. 08-VC-3108 (JG)(RML), 2010 WL 3540921 (E.D.N.Y. Sept. 7, 2010)[79] the Plaintiff

[79] A summary judgement application of the Eastern District Court of New York.

was in the process of changing to a connecting flight in Frankfurt while travelling between Newark USA and Minsk in Belarus. When she arrived at the departure gate she was told that boarding had stopped and she would have to return to the booking desk to get a new flight. On the way she stopped at the restroom where she was injured.

The court applied the three factors identified in *Fedelich v American Airlines* 724 F. Spp. 2d 274, 284 (D.P.R. 2010),[80] namely (1) the nature of the passenger's activity at the time of the injury (2) where the injury occurred and (3) the extent to which the carrier was exercising control over the passenger at the time of the injury.

The court found that missed flights were usual and predictable facets of travel and, notwithstanding the plaintiff had missed her connecting flight, she was still engaged in the activity of disembarkation.

(ii) *Disembarkation*:

In *MacDonald v Air Canada*, [1971] USCA1 47; 439 F.2d 1402 (1st Cir. 1971)[81] the US Court of Appeals First Circuit considered a claim by an elderly passenger who had travelled from Canada to Boston. Mrs MacDonald and her daughter had exited the aircraft and walked to the baggage delivery and customs clearance area of the terminal (leased by the carrier together with some other carriers).

While waiting for her daughter to retrieve their luggage she tripped over some bags that had been taken off the carousel by other passengers.

The Court found (at p. 1405), *inter alia*, that the *disembarkation* had completed before the time of the accident:[82]

> "Be this as it may, the Convention requires that the accident occur in the course of disembarking operations. *If these words are given their ordinary meaning, it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building.* Examination of the Convention's original purposes reinforces this view. The most important purpose of the Warsaw Conference was the protection of air carriers from the crushing consequences of a catastrophic accident, a protection thought necessary for the economic health of the then emerging industry. Partially in return for the imposition of recovery limits, and partially out of recognition of the difficulty of establishing the cause of an air transportation accident, the Conference also placed the burden on the carrier of disproving negligence when an accident occurred. …*Neither the*

---

80 This was a *disembarkation* case. The facts of this case are summarised to under the next heading.

81 Case cited with approval, *albeit* on a different point, in *Air Link Pty Ltd v Paterson* [2009] NSWCA 251 (20 August 2009).

82 Emphasis added by the writer.

> *economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft. Without determining where the exact line occurs, it had been crossed in the case at bar.*"

This decision was considered and distinguished in *Day v Trans World Airlines Inc Kersen* [1975] USCA2 816; 528 F.2d 31; 36 A.L.R. Fed. 477 (22 December 1975), which is more often cited in the USA for the relevant principles it established on to this issue.

In distinguishing *McDonald v Air Canada* the court said:[83]

> "[39.8] We find *MacDonald v. Air Canada*, [1971] USCA1 47; 439 F.2d 1402 (1st Cir. 1971), cited to us by the appellant, clearly distinguishable. In MacDonald, the court declined to construe Article 17 as covering an elderly passenger who fell after disembarking. *Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation.* We do not, of course, indicate any views on the correctness of the MacDonald decision."

In *Fedelich v American Airlines* 724 F. Spp. 2d 274, 284 (D.P.R. 2010) the plaintiff fell and was injured at the international baggage carousel of the San Juan International Airport Puerto Rico, while on her way home from the Dominican Republic. She sued American Airlines in tort for negligence, the airline claimed her only action was under the Warsaw Convention and at the material time she was in the process of "disembarkation".

The court opined three factors were relevant to determination of the issue, namely: (1) the nature of the passenger's activity at the time of the injury (2) where the injury occurred and (3) the extent to which the carrier was exercising control over the passenger at the time of the injury.

In final analysis the court found that the collecting baggage was not an activity essential to leaving the plane, and as the plaintiff was at the time free to move about the area, she was not under the control of the airline staff.

4.2.4 Exclusive remedy.

Articles 29 and 30 of Montreal 1999 state:

> "**Article 29 – Basis of Claims**
>
> *In the carriage of passengers*, baggage and cargo, *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 this Convention without*

[83] Emphasis added by the writer.

prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30 – Servants, Agents – Aggregation of Claims

1. If an action is brought against a *servant or agent* of the carrier arising out of damage to which the Convention relates, such servant or agent, *if they prove that they acted within the scope of their employment*, shall be entitled to *avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention*.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, *the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result*."

Section 9D(2), 9E and 9F of CACLA (appertaining to Montreal 1999 – but similar provisions apply to the other conventions) state:

"**9D Liability in respect of death**

(1) …

(2) Subject to section 9F, the *liability under the Convention* is *in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger*.

(3-11) …

9E Liability in respect of injury

Subject to section 9F, the *liability of a carrier under the Convention*, in respect of *personal injury* suffered by a *passenger* that has not 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.*

9F Certain liabilities not excluded

Nothing in the Convention or in this Part is to be taken to exclude any liability of a carrier:

(a) to indemnify an employer of a passenger or any other person in respect of any liability of, or payments made by, that employer or other person under a law of the Commonwealth or of a State or Territory relating to workers' compensation; or

(b) to pay contribution to a tortfeasor who is liable in respect of the death of, or injury to, the passenger;

but this section does not increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by, or in accordance with, the Convention."

Liability under Part IV CACLA is *"…in substitution for any civil liability of the carrier under any law in respect of"*:

- *injury* – pursuant to s 36 CACLA.
- *death* – pursuant to s 35(2) CACLA.

In *Sidhu & Ors v British Airways plc* [1997] 1 All ER 193; [1997] AC 430, the House of Lords unanimously decided that Schedule 1 of the *Carriage by Air Act 1961 (UK)* provided the *sole remedy* for a *passenger* who claimed against a *carrier*

for injury arising out of international carriage by air, notwithstanding that might leave claimants without a remedy.

Sidhu involved claims for damages by passengers who were in transit from the UK to Malaysia via Kuwait in 1991 who were stranded in Kuwait when Iraq invaded (which invasion provoked the first gulf war). They claimed damages against the carrier for their detention by Iraq forces and their removal to Bagdad.

No claim was made for damages under the applicable Montreal Convention (Montreal 4) as the parties conceded they had not suffered an *accident* on board the aircraft or during disembarkation.

The House of Lords concluded that because the events occurred during the course of international carriage by air and *the convention provided the exclusive remedy, then all other liability in contract or at common law against the carrier was excluded.*

See also *El Al Israel Airlines Ltd v Tyui Yuan Tseng* 525 US 155 (1999). There the plaintiff-respondent was subjected to an intrusive security search at JFK Airport New York immediately prior to boarding an international flight to Tel Aviv. She sued for damages for psychological trauma but did not seek damages for bodily injury under the relevant convention (Montreal No 4). On appeal Ms Tseng conceded that her claim was not one falling within the convention (as there was no accident and she did not claim to have suffered any bodily injury). In short, as with *Sidhu*, she sought to maintain an action independently of the convention.

Ginsberg J, (delivering the opinion for the whole court) approved and applied *Sidhi* and said:

> “Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's pre-emptive effect. In *Sidhu*, the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an "accident" under Article 17. See 1 All E. R., at 201, 207. Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to "ensure that, in all questions relating to the carrier's liability, it is the provisions of the [C]onvention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action." *Ibid.* Courts of other nations bound by the Convention have also recognized the treaty's encompassing pre-emptive effect.16 The "opinions of our sister signatories," we have observed, are "entitled to considerable weight." *Saks, 470* U. S., at 404 (internal quotation marks omitted). The text, drafting history, and underlying purpose of the Convention, in sum, counsel us to adhere to a view of the treaty's exclusivity shared by our treaty partners.”

Sidhu was also cited with approval in *Povey v Qantas* per Gleeson CJ *et al.,* at 431 and Kirby J at 452. That said, the plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) observed that it was not necessary for them to decide anything about the correctness of *Sidhu* (and other cases which had held that the convention provided an exclusive remedy).

Note however, any exclusion of other liability at common law, only operates with respect to the *liability* of the *carrier* (and by extension in Article 30, its servants or agents acting within the scope of their employment) to the *passenger*.

The passenger is entitled to pursue any other remedies he or she may have against *any other party*.

Similarly, a non-passenger is often entitled to sue a carrier for common law damages arising from an air accident, such as, for example a bystander injured by the aircraft, or a family member suffering nervous shock arising from an *injury* to a passenger (as canvassed previously in this paper).

In this regard see *South Pacific Air Motive Pty Ltd v Magnus & Ors* [1998] FCA 1107 where Sackville J (with whom Hill J concurred) opined, when considering the position of non-passengers under the *Warsaw Convention*:

> "From a contractual perspective, the non-passenger is ordinarily in a very different position from that of a passenger. The non-passenger does not receive a ticket and thus does not receive direct notice of the limitations on the carrier's liability imposed by the *Warsaw Convention.* The non-passenger does not ordinarily have the same opportunity as the passenger to insure against the relevant risk. In *Sidhu,* Lord Hope stressed the importance of the restrictions on the "great principle" of freedom of contract as an element in the reasoning supporting the conclusion that the *Warsaw Convention* is, in effect, *a code governing the carrier's liability to a passenger injured or killed in the course of aircraft operations. That consideration does not apply in the case of non-derivative claims by non- passengers*."

His Honour then went on to discuss the position under Part IV of CACLA (which was the part under consideration in *Magnus*) and said:

> "The duty of care owed by a carrier to a non-passenger, not to expose him or her to a risk of nervous shock, is independent of the carrier's duty to the passenger: *Jaensch v Coffey,* at 560. While this may not be a major consideration in the interpretation of the *Warsaw Convention,* the drafters of the *CA Act* must have been aware of the distinct nature of the duties owed to a passenger and a non-passenger under Australian law. Had the drafters intended to bring nervous shock claims by non-passengers within s 35 of the *CA Act,* much clearer language than that used in s 35(8) would have been used."

Magnus was disapproved, in part at least, by the HCA in In *Parkes Shire Council v South-West Helicopters Pty Ltd,*[84] insofar as claims for damages for psychiatric injury by members of the family of a deceased passenger. There the plurality found that the claims of non-passengers were, on a literal interpretation of the Act, governed exclusively by s 28 CACLA.

4.2.5 Damages Assessment & Limits.

The nature and amount of damages that may be awarded to a passenger against a carrier depends on the type of carriage and when the accident occurred:

(a) International Air Carriage Conventions.

[84] *Parkes Shire Council v South-West Helicopters Pty Ltd* [2019] HCA 14; 266 CLR 212; 93 ALJR 607; 367 ALR 1.

Liability under each of the conventions is capped at defined monetary limits.[85]

These limits are variously defined according to *Special Drawing Rights*, (usually abbreviated to 'SDR'), within the meaning of the *International Monetary Agreements Act 1947*.[86]

SDR's are converted into Australian dollars using the exchange rate published by the Reserve Bank as at the day when any judgement is given.[87]

Prior to the commencement of *Montreal 1999* some of the larger international carriers began to waive the liability caps under their contract of carriage.

Article 21 of *Montreal 1999* introduced a different regime than that used under the prior conventions.

Montreal 1999 replaced the strict maximum damages limits found in the prior conventions with a *presumption* that the carrier will be liable for all damages *unless* it proves that the damage was a result of *some other person's negligence* – in which event the no fault liability will be capped at 100,000 SDR.

The cap is *Montreal 1999* specifies as follows:

> "**Article 21—Compensation in Case of Death or Injury of Passengers**
>
> 1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
> 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
>   (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
>   (b) such damage was solely due to the negligence or other wrongful act or omission of a third party."

Article 24 provides for revisions to the monetary liability cap.

That liability cap is to be applied *unless*:[88]

- regulations under CACLA prescribed higher monetary limits with respect to Australian international carriers (i.e., then 260,000 SDRs); or
- the contract of carriage prescribed higher limits.

---

85 I.E. the Warsaw Convention; the Warsaw Convention as amended by The Hague, the Guadalajara Convention; and Montreal No 4; Montreal 1999.

86 See s 5 CACLA.

87 See s 9 CACLA.

88 See, for example, sections 9C, 11A, 21A.

At the time of writing this paper the IMF SDR Australian dollar value of 1 SDR is $2.03131.

(b) Other Air Carriage under Part IV Civil Aviation (Carriers' Liability) Act (Cwth).

As noted previously, Part IV CACLA applies to *domestic air carriage* (as defined in s 26 CACLA) and also *relevant international carriage* originating in Australia (*to the extent that it is not governed by a treaty*).[89]

Section 31 CACLA currently limits Part IV liability for a *domestic carrier* to $925,000 AUD.

(c) Procedure for enforcing Liability for Death.

See sections 9D and 35 CACLA for the requirements of enforcing liability (under each of Montreal 1999 and under Part IV respectively) in death claims.

Essentially there is one action for death, which may be brought by the personal representative of the passenger or by a person for whose benefit the liability is enforceable, for the benefit of all persons entitled and express a desire to benefit in the action.[90]

(d) Applicability of Local Civil Liability Acts to Assessing Damages.

Where an action is commenced in federal jurisdiction the applicability of the State *Civil liability Acts* (the 'CLA') is often raised.

Sections 79 of the *Judiciary Act 1903 (Cth)* provides that the laws of each State and Territory shall be laws of the Commonwealth and binding on courts exercising federal Jurisdiction. Section 80 states that where the laws of the Commonwealth are *"…insufficient to carry them into effect, or as to provide adequate remedies… the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which Court the jurisdiction is exervised … shall be applicable…'*

In NSW that damages assessments under CACLA proceed in accordance with the provisions of the NSW *Civil Liability Act 2002*. This approach is consistent with the scope of s 11A in Part 2 of the Act, which relates to assessment of "Personal Injury Damages".

---

[89] Section 27 CACLA.

[90] Sections 9D and 35(6) CACLA.

In short, that section provides that the Part applies to "…*an award of personal injury damages*"[91] made "…*regardless of whether the claim for damages is brought in tort, in contract, under statute or otherwise*."[92] The expressions "personal injury damages" and "injury" are defined widely in s 11.

In *Bradshaw v Emirates* [2021] FCA 1407 Stewart J found that the law of the Commonwealth was not "insufficient" and did not fail to provide "adequate remedies" (both threshold issues required in s 80 of the Judiciary Act 1903 (Cth).

His Honour found further that the Montreal Convention itself provided the remedy, namely damages for bodily injury, and therefore there was no need to resort to the common law to carry the Montreal provisions into effect. He further held that the CLA damages provisions were inconsistent with articles 17 and 21 of the Montreal Convention, which was intended to provide a regime of no fault liability between carriers and passengers of international application.

The decision in *Bradshaw* is consistent with similar conclusions reached by Keogh J in *Di Falco v Emirates* [2018] VSC 472 (24 August 2018); 57 VR 394; 338 FLR 300.

Further, there Keogh J found that the threshold for personal injury damages for non-economic loss under s 28LE of the Victorian *Wrongs Act*, only applied to proceedings based on the *"fault"* of another person, and did not apply to *strict liability* actions under CACLA.[93]

Recently in *Greuff v Virgin Australia Airlines Pty Ltd* [2021] FCA 501; 395 ALR 249 Griffiths J opined (in *dicta*) that s 80 of the *Judiciary Act* there picked up the provisions of the Victorian *Wrongs Act* (it being the applicable choice of law in that case).

To this extent His Honour demurred with the contrary conclusions in *Bradshaw* and *Keogh* as to the application of State law under s 79 and 80 of the *Judiciary Act*, but nonetheless acknowledged that the matter would ultimately depend on whether any given State CLA in fact applied to strict liability actions.

His Honour went on to dispose of the matter on different grounds, by agreeing with Keogh J that the *Wrongs Act*, being confined to actions based on fault, did not apply to a strict liability action under brought CACLA.[94]

The Queensland CLA (not unlike the Victorian *Wrongs Act*) differs from that in NSW in that some Qld provisions only relate to claims for damages for a *"breach of duty"* (which cannot logically apply to a claim based on strict liability under the various *Carriers Liability Acts*).

[91] See s 11A(1) *Civil Liability Act 2002* NSW.

[92] See s 11A(2) *Ibid*.

[93] *Ibid*, at [26-28], [36]

[94] *Greuff v Virgin Australia Airlines Pty Ltd* [2021] FCA 501.

In Qld the following appears apposite:

(a) the CLA *will* apply to the assessment of *General Damages* (s 61 CLA);

(b) but the following CLA provisions do *not* appear to apply:[95]

- the 5% discount rate for *Griffiths v Kirkenmeyer* ('G&K') damages (s 57 CLA);[96]
- the '6 X 6' threshold for gratuitous care (G&K) damages (s 59 CLA);
- the abolition of interest on general damages and the prescribed 10-year RBA Bond rate of interest on damages (s 60 CLA);
- threshold applicable before damages can be awarded for loss of consortium (s 58 CLA).

The prior common law applies in Qld to the extent that the Qld CLA or other written law[97] does not.

(e) Applicability of Personal Injuries Proceedings Act 2002 (Qld) to Claims under the Air Carrier Regimes.

The Queensland *Personal Injuries Proceedings Act 2002*, (which is expressed to apply to *all persons*[98] and *all personal injury* arising out of an *"incident"*[99]) requires compliance with mandatory procedures (i.e. notice of claims, disclosure or documents and reports, and completion of a settlement conference) before any proceedings can be commenced.

Section 7(2) of the Act (herein 'PIPA') says that the pre-action provisions in Part 1 Chapter 2 are intended to be "substantive".

This Act occasionally bedevils inter-state practitioners, who lack similar regimes in their local jurisdictions. This is something of relevance to all practitioners who may have to issue proceedings in Queensland.

Section 6(5) PIPA expressly *excludes* claims under, *inter alia*, the *Civil Aviation (Carriers' Liability) Act 1964*." That Act regulating the *local* regime for *domestic intra-state carriage by air* within Queensland.

But PIPA does *not* mention the *Commonwealth CACLA* (that is, carriage

95 *See s 4(4) Civil Liability Act 2003.*

96 Although, on that basis, the same discount rate would be picked up by reason of s 61 of the QLD *Civil Proceedings ACT 2011*.

97 See, for example, s 61 of the *Civil Proceedings ACT 2011* QLD, which prescribes a 5% discount rate (to the extent the CLA does not apply) on damages for *"…deprivation or impairment of earning capacity, or for liability to incur expenditure in the future"*.

98 Section 5(1) PIPA.

99 Section 6(1) PIPA.

under an international convention with force of law in Australia and inter-state carriage under Part IV of the Act).

The question therefore arises whether the PIPA applies to these claims by reason of s 79(1) of the Commonwealth *Judiciary Act 1903*, which provides:

> "79(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, *except as otherwise provided by the Constitution or the laws of the Commonwealth*, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

In *Walker-Eyre v Emirates* [2012] QDC 364 the plaintiff, on an international flight from UK to Australia, was injured at the Brisbane airport when she was struck in the head by baggage falling from an overloaded overhead locker. She subsequently commenced proceedings without complying with PIPA. The defendant applied to strike the proceedings out for non-compliance.

McGill DCJ concluded, after a thorough and careful analysis of the authorities dealing with s 109 of the Constitution,[100] that the PIPA regime was inconsistent with both the express words of Article 17(1) of *Montreal 1999* and the general intent of the scheme of *exclusive liability* created by both the Convention and Chapter IV of CACLA.

His Honour concluded that the PIPA was *not* picked up as applicable to claims under the Commonwealth CACLA by s 79 of the Commonwealth *Judiciary Act 1903* because they fell within the exception *"…except as otherwise provided"* in s 79.

His Honour further found, consistent with *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, that even if the PIPA had applied, he would not have struck the proceedings out for non-compliance with PIPA, but would have exercised his discretion to stay the proceedings pending compliance.[101]

The decision has been cited and followed since then, each time in the District Court of Queensland, but in each case on the *Berowra* discretion point. The decision has not been reconsidered at the Supreme Court level.

In my opinion, Mr Justice McGill's decision is sound and would likely be confirmed if the matter comes before the Supreme Court.

In my experience, carriers are not keen to agitate the matter, and given the principle in *Berowra*, there is little utility in so doing.

Practitioners sometimes comply with PIPA in CACLA claims nonetheless, (whether out of an abundance of caution, or in an attempt to save some litigation costs, or to take advantage of the mandatory pre-proceedings disclosure in the legislation).

Whether they do or not, they must *make sure proceedings are issued within*

---

[100] In particular *Agtrack (NT) Pty Ltd v Hatfield* (2005) CLR 251 refer to comments by the plurality at p. 257-258.

[101] There relying on *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, applied by the Court of Appeal of *Queensland in Hamling v Australian Meat Holdings Pty Ltd* [2007] 1 Qd R 315; and also on *Phipps v Australian Leisure and Hospitality Group Ltd* [2007]2 Qd R 555.

the two-year limitation period.

This is critical here as the limitation extension provisions in the PIPA and the Qld *Limitation Act 1974* do *not apply to claims under the CACLA*.

The two-year limitation period under CACLA cannot be extended.

4.2.6 Contributory Negligence.

Article 20 Montreal provides:

> "If the carrier proves that the damage was caused or contributed to by *the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights*, the carrier shall be wholly or partly exonerated from its liability to the claimant *to the extent that such negligence or wrongful act or omission caused or contributed to the damage*. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21."

Section 9H CACLA (with respect to Montreal 1999 liability) states that if the court finds contributory negligence then it *must* reduce damages recoverable under a convention by:[102]

(i) first determining what damages would have been recoverable if there was no liability cap and the claimant were not negligent;

(ii) second, reduce those damages according to what the court considers is "just and equitable" according to the passengers "…responsibility for the damage";

(iii) but if the reduced damages then exceed the cap, then the carriers' liability is limited to the cap.

A similar provision and approach appertains to contributory negligence under Part IV CACLA claims.[103]

It will be noticed that these provisions allow contributory negligence to be pleaded even in dependency proceedings.

4.3 Australian State & Territorial Implementation.

As noted previously, each of the Australian States have introduced similar Acts that invoke the key liability provisions of Part IV of CACLA (with some sections excluded) to purely *intra-state* carriage.[104]

102 See s 9H CACLA.

103 See s 39 CACLA.

104 *Civil Aviation (Carriers Liability) Act 1967* (NSW); *Civil Aviation (Carriers Liability) Act 1964* (Qld); *Civil Aviation (Carriers Liability) Act 1962* (SA); *Civil Aviation (Carriers Liability) Act 1963* (Tas); *Civil Aviation (Carriers Liability) Act 1961* (Vic); *Civil Aviation (Carriers Liability) Act 1961* (WA).

Part IV of CACLA, including the liability caps in s 31 CACLA, also apply to purely *intra-territorial* carriage by virtue of s 6 CACLA.

The end result is a matrix of laws that provide a similar (though not identical) *strict liability* regime for actions *against airline carriers*, and as noted previously, does so to the *exclusion of all other forms of liability*.[105]

4.4 Commonwealth Air Carriage and Commonwealth Employee Air Carriage.

The *Air Accidents (Commonwealth Government Liability) Act 1963* (herein the *'Air Accidents Act'*) creates an analogous regime of strict liability for capped damages for bodily injury with respect to:

(a) carriage in aircraft *operated* by the *Commonwealth* or a *Commonwealth authority*;[106]

(b) carriage of:[107]

  (i) *Commonwealth employees* travelling in the course of their employment;

  (ii) persons whose cost of carriage is *borne by the Commonwealth or a Commonwealth authority*;

  (iii) persons travelling for *purposes of the Commonwealth or a Commonwealth authority* pursuant to arrangements made by that entity.

The objects of the Act are set out in the long title as:

> "An Act to provide for the payment of damages by the Commonwealth and Authorities of the Commonwealth in respect of the death of, or personal injury to, certain persons travelling as passengers in aircraft".

The *Air Accidents Act'* does not apply to carriage to which Part IV of CACLA applies, *or* in relation to death or injury of any person in in circumstances giving rise to any entitlement to a pension (for the injured person or any dependants) under the *Veterans' Entitlements Act 1986* (other than Part IV).

The strict liability provisions of s 28 of Part IV CACLA are imported by reference to apply to carriage referred to in (a) above. Section 12 of the *Air Accidents' Act* sets out the strict liability provisions for death or injury applicable to carriage referred to in (b) above.

Suffice it to say, and subject to one qualification referred to in the next paragraph, the general formula for liability arising under both the *Air Carriers' Conventions* and Part IV CACLA also applies here (i.e. damage suffered by reason of injury suffered by a person in an accident taking place *on board the aircraft* or in the *course of embarking or disembarking*).

Part II, which relates to the Commonwealth liability for injury on an aircraft operated by the Commonwealth or a Commonwealth authority, imports and relies on the liability

105 Section 36 CACLA.

106 See Part II *Air Accidents (Commonwealth Government Liability) Act 1963*.

107 See Part III *Air Accidents (Commonwealth Government Liability) Act 1963*.

provision in s 28 of CACLA, which *now* refers to *"bodily injury"*. But the liability provision with respect to Part III is in s 12 of the *Air Accidents' Act*, which still refers to *"personal injury"*.

Query whether, in wake of the appeal decision in *Endeavour*, this covers compensation for *pure* mental harm. I suggest it does.

The strict two-year limitation also applies to these claims.

The maximum liability of the Commonwealth or Commonwealth authority under both Parts II or III of the Act is capped by reference to the amount as prescribed by regulation under the CACLA.[108]

Similarly, to the extent that it applies, the Act excludes all other civil liability for *carriage in an aircraft operated by the Commonwealth or Commonwealth authority* - save for liability arising under international air carriage convention or liability arising "otherwise than by reason of operation of the aircraft".[109]

But where the liability relates to the carriage of Commonwealth employees and others referred to in Part III of the Air Accidents' Act (as referred to in (b) above) then other claims and causes of action are *not excluded*, but to the extent that any damages are recovered or recoverable from the Commonwealth or a Commonwealth authority then the amount under the Act is to be reduced.[110]

4.5 Applying the correct Air Carriers' Regime.

Strict liability does not mean liability in all circumstances, it merely means liability without proof of negligence (which necessarily involves an antecedent duty of care).

It is critical to ensure any action against a carrier both invokes the correct law and adequately pleads the facts applicable to the unique elements of these causes of action.

Failure to do so may result in the carrier attempting to strike the claim out for failing to disclose a cause of action.

Strike out applications are usually commenced soon *after* the CACLA limitation period has expired, or where proceedings were issued after the expiration of the two-years – for obvious reasons.

The case law is full of instances where lawyers have made a mess of the pleadings, often failing to appreciate that negligence is irrelevant to these claims, and sometimes ignoring CACLA entirely.

108 See ss 8, 14, *Ibid*.

109 See s 9 *Ibid*.

110 See s 15 *Ibid*.

In the past courts have attempted to construe poorly drafted pleadings broadly,[111] (either to get them across the line in strike out applications or to enable an amendment after expiration of limitation periods).

But it is best not to depend on this, as many jurisdictions adopt a stricter approach to applications to add a new cause of action after expiration of a limitation period.

4.6 Two-Year Limitation Period Cannot be Extended.

As noted above, the limitation period for these claims (regardless of whether they are based on Commonwealth, State or Territory Acts) is limited to *two-years.*

Neither the *Montreal 1999*, or the Commonwealth, State and Territorial *Civil Aviation (Carriers Liability) Acts* contain any provisions authorising *any extension of these limitation periods*.[112]

In *Timeny v British Airways plc* (1991) 102 ALR 565 the Full Court of the South Australian Supreme Court held that the two-year limitation period under an air carriage convention, given force of law by CACLA, cannot be extended.[113]

While s 59 of the Queensland *Personal Injury Proceedings Act 2002* ('PIPA') authorises extension of a personal injury limitation period in certain circumstances, that provision cannot apply to the two-year limitation in the *Queensland Civil Aviation (Carriers Liability) Act 1964* - by reason of s 5(b) of PIPA.

Similarly, the provisions of s 31 of the Qld *Limitation of Actions Act 1974* do not permit an extension under CACLA.

Further, s 6A of the Qld CACLA states: *"It is Parliament's intention that the applied provisions should be administered and enforced as if they were provisions applying as laws of the Commonwealth instead of being provisions applying as laws of the State."*

This leaves little room to argue that Queensland law authorising an extension of local personal injury limitation period is intended to extend also to the Commonwealth provisions that the state CACLA adopts by reference.[114]

The position in other States is likely to be similar.

Claimants should therefore be aware that they *must* commence any action under *Montreal 1999* and the State and Federal *Civil Aviation (Carriers Liability) Acts within two years*.

---

111 See, for example*, Air Link Pty Ltd v Paterson* [2005] HCA 39; (2005) 218 ALR 700; (2005) 79 ALJR 1407 (10 August 2005).

112 See Article 35(1) *Montreal 1999*; also see section 34 CACLA, and state Acts which incorporate and apply locally the provisions of, *inter alia*, s 34 of the Commonwealth Act (such as, for example, s 5 of the *Civil Aviation (Carriers Liability) Act 1964* Qld).

113 *Timeny v British Airways plc* (1991) 102 ALR 565.

114 Specifically, s 5(1) *Civil Aviation (Carriers' Liability) Act 1964* (Qld).

5 Liability from things that fall out of the air.

Occasionally man-made objects fall from the sky.

This section briefly discusses the liability for injuries caused by these unfortunate events.

5.1 Australian Commonwealth Law.

Before 1999 liability for air to ground impacts was governed by a multilateral treaty known as the *Rome Convention 1952*, which was given force of law in Australia by s 8(1) of the Damage by *Aircraft Act 1958*. The convention imposed liability caps which insulated air operators from the full costs of harm caused by these accidents.

In 1999 the Commonwealth withdrew from the convention, repealed the 1958 Act and replaced it with the *Damage by Aircraft Act 1999* (the 'DBAA'). The 1999 Act does not impose any liability caps.

The DBAA applies to all aircraft (other than Defence Force aircraft) owned by the Commonwealth, or a corporation, or engaged in various forms of air navigation.[115]

The Act confers benefits to persons on the ground or in the water who are killed injured or suffer other loss caused by an impact from an aircraft in flight, or from parts of an aircraft that was destroyed in flight, or things that have fallen from an aircraft (including persons, animals and other things).[116]

The act also applies to property damages - but that topic is beyond the scope of this paper.

The Act generally makes the *operator* and *owner* (subject to some exceptions) jointly and severally liable for the any injury, loss or damage.[117]

That liability is also *strict*, but it takes a completely different form to the strict liability under the CACLA.

Specifically, the DBAA provides that damages are recoverable in any Australian court of competent jurisdiction:

> *"…without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants"*.[118]

Liability for *pure* mental injury is, unfortunately, excluded under this Act.[119]

Unlike CACLA, liability under the DBAA is *not exclusive* of other entitlements or rights - so any other rights or remedies can also be pursued in tandem.

The DBAA is remedial in nature and it will be interpreted broadly.

---

115 Section 9 Commonwealth *Damages by Aircraft Act 1999*.

116 *Ibid*, s 10(1).

117 *Ibid*, s 10(2, 2A, & 3).

118 *Ibid*, s 11.

119 *Ibid*, s 10(1A).

For example, in *Cook v Aircare*[120] Mr Cook, a power utility linesman, was injured when he touched a live power cable that had earlier been damaged by impact from a crop dusting aircraft. Mr Cook sued both his employer (Northpower) and the aircraft operator (Aircare). The NSWCA and the HCA each held that the Act applied notwithstanding there was no direct geographic and temporal connection between the point of the aircraft impact and the receipt of the electric shock injury.

The trial court reduced Mr Cooks damages against Northpower by 40% for contributory negligence, but as the Commonwealth Act did not then provide for any contributory reduction he was able to recover all of his loss against the operator.

The DBAA was amended following *Aircare*, such that contributory negligence will now reduce damages awarded under the DBAA.[121]

The reference in s 10(1A) to “wilful act” is curious and leads to the question whether State laws restricting access to exemplary and aggravated damages will apply here.

5.2 Australian State Law.

Separate legislation imposing strict liability for falling aircraft and other things also exists in each of the Australian States.[122]

These Acts are not uniform so you should refer to the specific provisions as the need arises.

It is sufficient, for present purposes, that you are aware of this.

6 Injury Caused by Others.

6.1 Introduction.

The provisions of *Montreal 1999* and/or the CACLA and the various state and territorial analogues do not have anything to say about the liability of a third party to a passenger arising out of an incident that occurs on an aircraft.

Nor do they apply to events falling outside the strict confines of the regime. For example, they do not apply to non-commercial carriage that is outside the scope of the inclusive definitions in the Acts and Conventions.

Montreal 1999 expressly states:

> “**Article 37—Right of Recourse against Third Parties**

120 See *Cook v Aircare Moree Pty Ltd* [2007] NSWDC 164; [2008] NSW CA 161, and 237 CLR 656; and *Aircare Moree Pty Ltd v Cook* 83 ALJR 986; ALR 58 (5 August 2009).

121 *Ibid*, 11A. This amendment was inserted following the decision in *Cook v Aircare Moree* [2008] NSW CA 161 and [2009] HCA 28.

122 *Damage by Aircraft Act 1952* (NSW); *Wrongs Act 1958* (Vic); *Air Navigation Act 1937* (Qld); *Civil Liability Act 1936* (SA); *Damage by Aircraft Act 1963* (Tas); *Damage by Aircraft Act 1964* (WA).

> 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."

Not infrequently an injured passenger does not become aware of the strict two-year limitation period applicable to a claim against the carrier until after the limitation period has expired.

In such cases the passenger may still have a viable action against a *third party* arising out of the same incident, or even an argument that their carriage in an aircraft is not covered by the provisions of the Conventions or CACLA.

Such claims often involve issues of jurisdiction and choice of law.

Some examples of viable third-party actions are discussed below.

6.2 Examples.

6.1.1 Other Passengers.

If a person is injured by the conduct of another passenger then action in tort may *also* be brought *directly* against that party.

These events occur with surprising regularity.

Of course, litigation against a passenger may be futile if that person:

- lacks the capacity to otherwise satisfy any judgment (either personally or from insurance);[123] or
- is normally domiciled in another jurisdiction where he or she is not easily amenable to enforcement.

Fortunately, the scope of liability of a carrier under the *Montreal Convention* is sufficiently broad that it is often unnecessary to consider action *directly against a passenger*.

As a general rule the law of the country applies to aircraft within that countries airspace. Where an aircraft is in international airspace then the law of the flag (that is the country in which the aircraft is registered) will usually govern acts and omissions resulting in injury.[124]

For example, a New Zealand resident who negligently causes injury to a UK tourist on an Air New Zealand flight from Auckland to Sydney may be left without any remedy against the tortfeasor (consequential upon the abolition of

---

123 That said, many, perhaps most, travelling adults from developed countries are likely to have some form of public risk insurance that will respond to a claim. Further, most forms of travel insurance also contain some public risk cover.

124 Davis, Bell & Brereton, *Nygh's Conflict of Laws in Australia*, 9th Edition, Lexis Nexis Butterworths Australia, 2014, p 509.

common law rights in NZ),[125] but if the event occurs while the aircraft is circling to land in Sydney then Australian tort law will probably apply.

6.1.2 Employers.

An action may be brought *against the employer of the injured person* or *the employer of another tortfeasor* (if the employer is *no*t also the *carrier* of the injured person as a *passenger*) and the employer is otherwise liable, either:

- directly;
- vicariously; or
- under the principle of non-delegable duty.

Today it is common for employment to involve air transport operations.

Examples of this are pilots and air crews, medical evacuation flights, FIFO charter flights, surveying, operations requiring helicopter use (e.g. news flights, police helicopters, areal mustering, areal feral pest eradication, power line inspection), etc.

If the claimant *also has a claim against a carrier* out of the same incident, then care must be taken to ensure that all rights are reserved carefully *against the non-carrier party* in any settlement of the CACLA claim.

Any amount previously recovered from the carrier under the CACLA (or equivalent) must be deducted from any damages paid under *Workers Compensation Legislation* and to avoid an allegation of double compensation.

One point of caution needs to be recognised.

A person *may* still be a ‘passenger’ even though he or she is performing work or activities on board an aircraft for the benefit of the carrier.[126] In such instances, arguing that your client is not covered by the strict carriers’ liability regime in any action against *the carrier* may be to no avail.

Examples of this were discussed previously in this paper.

6.1.3 Equipment Suppliers (Product Liability).

In appropriate cases actions may lie against the manufacturers of aircraft and or aircraft components and aviation software for death or injury resulting to persons from an aircraft accident.

---

[125] The writer is not an expert on the NZ Accident Compensation Act regime, so it may not operate in the manner this example suggests.

[126] *Fellows (or Herd) v Clyde Helicopters Ltd* [1997] AC 534; *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169, per Sackville AJA at [192]; *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; 98 NSWLR 1; 356 ALR 63; 327 FLR.

A competent analysis of the law on these topics is well beyond the scope of the limited undertaking of this paper.

What follows is a very brief overview of the main source of these laws.

For more detailed information, at least with respect to foreign sources of law, you should engage the services of an expert in the appropriate jurisdiction.

It should be remembered that *a passenger cannot sue a carrier that is also manufacturer*[127] – as the air carriage conventions, the CACLA and the domestic air carriage provisions in each Australian state exclude all other liability of the carrier.

But product liability actions by *third parties* against air *carriers* are viable (to the extent they are not excluded by the air carriers' provisions – i.e. nervous shock claims consequential upon the death of a passenger, etc.,) – as discussed previously.

Further, *passengers* may also sue manufacturers provided they are not also the air carrier.

(a) USA Product Liability Law.

(i) *Source of Product Liability Law in the USA*:

The USA is a major manufacturer of commercial aircraft, aircraft components and aviation software.

Not surprisingly, a substantial amount of litigation related to aviation accidents is conducted in that country. Much of that litigation is based on USA strict defective product law (herein 'product liability').

Product liability gradually evolved in the USA from developments in case based warranty law, ultimately given coherence and new form, by the Supreme Court of California, in *Greenman v Yuba Power Products,* 59 Cal 2d 57 (1963).

Essentially the court created a form of warranty based strict liability released from the requirements of privity in contract.

Since then most (if not all) USA States have followed and applied *Greenman*, including the US Supreme Court.

Unlike the more recent developments in Australia and the EU, in the USA *strict* product liability is *not* a creature of statute, though in many States legislation has modified aspects of that product liability remedy.

[127] By, for example, relying on the *deemed manufacturer* provisions of the Australian ACL – discussed later in this paper.

In 1965 the American Law Institute (herein 'ALI') summarised the state of product liability law, as it had then evolved into, in §402A *Restatement of Torts (Second)*:

> "(1) One who *sells* any product in a *defective condition unreasonably dangerous to the user or consumer* or to his property is subject to liability for physical harm thereby *caused to the ultimate user or consumer*, or to his property, if
>
> (a) the seller is *engaged in the business of selling such a product*, and
>
> (b) *it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold*.
>
> (2) This rule applies even though
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Subsequently many US State courts adopted the ALI's formulation of the remedy – though some differences existed between States as they have continued to refine the remedy – not always in a claimant friendly manner.

In particular courts found it difficult to apply the remedy to cases in which the *design*, or *instructions*, rather than the *manufacturer* of the product, was the cause of the injury.

Over time this difficulty has caused incoherence in the decisions of different jurisdictions.

In 1997 the ALI voted to adopt the text of a *revised* restatement of the remedy, herein called the *Third Restatement Products Liability*.

Many courts have since then adopted aspects of the *Third Restatement Products*, and some completely applying it.

Suffice it to say however that differences still exist at a local State level and this necessitates local advice whenever considering this type of action in the USA.

The last ALI summary of the product liability action is contained in the *American Law Institute Restatement of the Law, Third, Torts: Product Liability*:[128] The following extract contains only part of the relevant restatement:

> "§ 1 *Liability of Commercial Seller or Distributor for Harm Caused by Defective Products*

[128] *Restatement of the Law, Third, Torts: Products Liability*, Copyright (c) 1998, The American Law Institute.

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2 *Categories of Product Defect*

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a *manufacturing defect* when the product *departs from its intended design* even though *all possible care was exercised* in the preparation and marketing of the product;

(b) is *defective in design* when the *foreseeable risks of harm* posed by the product *could have been reduced or avoided* by the adoption of a *reasonable alternative design* by the seller or other distributor, or a predecessor in the commercial chain of distribution, and *the omission of the alternative design renders the product not reasonably safe*;

(c) is *defective because of inadequate instructions or warnings* when the *foreseeable risks of harm* posed by the product *could have been reduced or avoided* by the provision of *reasonable instructions or warnings* by the seller or other distributor, or a predecessor in the commercial chain of distribution, and *the omission of the instructions or warnings renders the product not reasonably safe*.

§ 3 etc., …"

Essentially, the *Third Restatement* shows the extent to which many courts have increased the claimant's burden of proof over that which existed at the time of §402A in the *Second Restatement*.

The limitation and repose (called "long stop" in Australia) periods applicable to product liability claims are based on State law (as in Australia) and sometimes these can vary between States.

These periods are often shorter than they are in Australia. Timely expert advice from a USA lawyer should be sought in each instance.

(ii) *US Damages Awards*:

The USA courts sometimes appear attractive because:

- absent some impropriety, there is no *loser pays rule* with respect to legal costs (though you don't recover costs from an unsuccessful opponent either);
- trial is almost always by jury (sometimes an advantage, though increasingly less so in the USA);
- damages awards are often higher (there are a number of reasons for this, one is that US courts do not deduct tax from economic loss damages – but award *gross* damages which are then taxed in the hands of the claimant);

- greater options exist for pre-trial discovery (particularly by deposition) and for the use of material that is obtained on discovery;
- clients can often find a lawyer willing to act on a contingency basis (which generally means they take about 1/3 of any damages recovery) – though this perhaps less a difference than it used to be since the adoption of speculative costs and uplifts in Australia.

(iii) *Jurisdiction in USA Courts*:

USA courts are reluctant to hear cases brought by non-citizens on *forum non conveniens* grounds.

It is therefore increasingly difficult for a foreign (e.g. non-US) resident to sue a USA manufacturer in the USA.

There is a heavy element of protectionism in this approach and it has received criticism from some legal academics in the USA.[129]

I will briefly discuss what I believe to be the current position, insofar as it is relevant to claims of this type. This should not be relied upon in lieu of relevant legal advice from a USA law firm.

(iv) *Federal District Court*:

The Federal District Court has subject matter jurisdiction in disputes between USA residents and foreign nationals.

In this context see the lead decision by Justice Thurgood Marshall in *Piper Aircraft Co. v Reyno.*[130] There the court dismissed the claim on *forum* grounds, finding that dismissal was justified even when the alternative forum was less favourable to the Plaintiff.

The court further noted that a foreign plaintiff's choice of a USA court was to be given less deference than that of a USA resident.

Foreign residents *may* fare better in *some* USA *State* courts.

(v) *State Supreme Courts*:

The courts of each State, which have *in personum* jurisdiction over claims against entities located in or domiciled within their borders, also have their own jurisprudence with respect to *forum non conveniens*.

129 See for example, C Webber, *Civil Procedure: Forum Non Conveniens – Convenience or Conniving? Paulownia Plantations De Panama Corp v Rajamannan,* William Mitchell Law Review, Vol 38:1, 434.

130 454 US 235 (1981).

That said, the foreigner unfriendly principles established in *Piper* have now been adopted in most US State jurisdictions.

The outcome to this issue may vary in some jurisdictions.

Local advice should be sought.

(vi) *The General USA Approach to Holding Forum*:

As a general statement, the determination of a *forum non conveniens* in USA courts is a two-step process:

(i) first the court determines whether there is an alternative forum that is available and adequate to hear the dispute; and assuming so

(ii) second the court then weighs a range of public and private considerations to determine whether it should exercise its discretion to stay or dismiss the claim so as to require the claimant to pursue the matter in the alternate forum:

(A) the *public* considerations *include*:

- work load of the courts;
- importance of ensuring local issues are decided locally where disputes arise;
- burden to juries.

(B) the *private* considerations *include*:

- nature of the dispute;
- availability of proof;
- location of witnesses;
- ability to compel witnesses;
- necessity for any view;
- enforceability of any judgment.

(b) EU Product Liability Directive.

On 30th July 1985, the European Union introduce *Directive 85/374/EEC* specifying the form of product liability laws then required to be enacted by each of its member States.

The EU is currently in the process of revising these rules.[131]

[131] A draft of the new Directive was published in September 2022. In particular, the new changes will include digital products, software and AI systems. Refer to the European Commission website for more information on the proposed changes.

The main liability provisions of the Directive are set out below:

> "Article 1
>
> The producer shall be liable for damage caused by a defect in his product.
>
> Article 2
>
> For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.
>
> Article 3
>
> 1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.
> 2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.
> 3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.
>
> Article 4
>
> The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.
>
> Article 5
>
> Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.
>
> Article 6
>
> 1. *A product is defective when it does not provide the safety which a person is entitled to expect*, taking all circumstances into account, including:
>   (a) the presentation of the product;
>   (b) the use to which it could reasonably be expected that the product would be put;
>   (c) the time when the product was put into circulation.
> 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.
>
> …"

A number of specific defences are provided for in Article 7. A *producer* has the onus of proof on these defences.

Article 10 required the Member States to introduce uniform limitation periods of 3 years, and uniform long-stop liability from date of supply of 10 years.

The nature and extent of each Member State's implementation of the Directive is beyond the scope of this paper.

The position in the UK requires special consideration (which is beyond the scope of this paper) since Brexit.

Local advice should again be sought.

(c) Australian Product Liability Law.

Strict product liability in Australia originated in Part VA of the Commonwealth *Trade Practices Act 1974* (herein the 'TPA'), which commenced on the 9th July 1992.

In 2010 the TPA was replaced by the *Competition and Consumer Act 2010* (herein the 'CCA'). That amendment relocated the consumer protection provisions (including the product liability provisions found in the former TPA and the new unfair contract provisions based on the Victorian *Fair Trading Act 1999*) to the *Schedule 2* of the Act and named *The Australian Consumer Law* (herein the 'ACL').

Subsequently each of the Australian States enacted legislation that adopted the provisions of the ACL into State law.

The intention was to create a uniform and harmonious framework of legislation for consumer protection throughout Australia.

Section 238 of the ACL provides (italics added):

> "**138 Liability for loss or damage suffered by an injured individual**
>
> (1) A *manufacturer* of *goods* is liable to compensate an individual if:
>
> (a) the manufacturer *supplies* the goods *in trade or commerce*; and
>
> (b) the goods have a *safety defect*; and
>
> (c) the individual suffers injuries *because of* the safety defect.
>
> (2) The individual may recover, by action against the manufacturer, the amount of the loss or damage suffered by the individual.
>
> (3) If the individual dies because of the injuries, a law of a State or a Territory about liability in respect of the death of individuals applies as if:
>
> (a) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
>
> (b) the safety defect were the manufacturer's wrongful act, neglect or default."

The word "goods" is given a wide definition in the s 2 ACL that specifically includes: *"…aircraft"*, *"…computer software"*, *"second hand goods"* and *"…any component part of, or accessory to, goods"*.

Section 138(1) does not require the person who suffers injury to be the same person to whom the manufacturer *directly* supplied the goods.

It is enough that at some point after the goods were placed into the stream of commerce by the manufacturer someone suffered injury as a result of a safety defect in the goods (subject to the other elements of the section being satisfied).

In other words, there is no requirement that any privity of contract exist between manufacturer and the injured consumer.

The essential element of cause of action was influenced, largely, by Article 6 of the *EU Product Liability Directive* – referred to generally as the *consumer expectations test*.

That test is contained in s 9(1) ACL which defines what is meant by a safety defect:

> **“9 Meaning of *safety defect* in relation to goods**
>
> (1) For the purposes of this Schedule, goods have a ***safety defect*** if their safety is *not such as persons generally are entitled to expect*.
>
> (2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:
>
> (a) the manner in which, and the purposes for which, they have been marketed; and
>
> (b) their packaging; and
>
> (c) the use of any mark in relation to them; and
>
> (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
>
> (e) what might reasonably be expected to be done with or in relation to them; and
>
> (f) the time when they were supplied by their manufacturer.
>
> (3) An inference that goods have a safety defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.
>
> (4) An inference that goods have a safety defect is not to be made only because:
>
> (a) there was compliance with a Commonwealth mandatory standard for them; and
>
> (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer.”

The liability rests with the “manufacturer” of the “goods”. “Manufacturer” is given an extended meaning that *encompasses those who rebrand the goods with their mark or business name before they are supplied* and those who *import the goods into Australia*.[132]

[132] Section 7 ACL.

Specifically, s 7 ACL provides:

"**7 Meaning of *manufacturer***

(1) A ***manufacturer*** includes the following:

(a) a person who grows, extracts, produces, processes or assembles goods;

(b) a person who holds himself or herself out to the public as the manufacturer of goods;

(c) a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person;

(d) a person (the ***first person***) who causes or permits another person, in connection with:

(i) the supply or possible supply of goods by that other person; or

(ii) the promotion by that other person by any means of the supply or use of goods;

to hold out the first person to the public as the manufacturer of the goods;

(e) a person who imports goods into Australia if:

(i) the person is not the manufacturer of the goods; and

(ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.

(2) For the purposes of subsection (1)(c):

(a) a name, brand or mark is taken to be applied to goods if:

(i) it is woven in, impressed on, worked into or annexed or affixed to the goods; or

(ii) it is applied to a covering, label, reel or thing in or with which the goods are supplied; and

(b) if the name of a person, a name by which a person carries on business or a brand or mark of a person is applied to goods, it is presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.

(3) If goods are imported into Australia on behalf of a person, the person is taken, for the purposes of paragraph (1)(e), to have imported the goods into Australia."

The cause of action further requires that the goods have been *supplied* by the manufacturer in the *course of trade or commerce*.

These expressions are defined in s 2 ACL as follows:

"***supply***, when used as a verb, *includes*:

(a) in relation to goods—supply (including re‑supply) by way of sale, exchange, lease, hire or hire‑purchase; and

(b) in relation to services—provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings.

Note: Section 5 deals with when a donation is a supply.

trade or commerce means:

(a) trade or commerce within Australia; or

(b) trade or commerce between Australia and places outside Australia;

and includes any business or professional activity (whether or not carried on for profit)."

Section 5 of the *Competition and Consumer Act* (the 'CCA') states:

"**5 Extended application of this Act to conduct outside Australia**

(1) Each of the following provisions:

(a) …;

(b) …;

(c) *the Australian Consumer Law (other than Part 5‑3);*

(f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));

extends to the engaging in conduct outside Australia by:

(g) *bodies corporate* incorporated or *carrying on business within Australia*; or

(h) Australian citizens; or

(i) persons ordinarily resident within Australia.

(1A) …

(2) …

(3) *Where a claim under section 82, or under section 236 of the Australian Consumer Law, is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.*

(4) A person other than the Minister, the Commission or the Director of Public Prosecutions is not entitled to make an application to the Court for an order under subsection 87(1) or (1A), or under subsection 237(1) or 238(1) of the Australian Consumer Law, in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister:

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

(b) it is not in the national interest that the consent be given."

The restriction in s 5(3) does not apply to an action for personal injury damages under the Act, as such action is not one made under s 82 CCA or s 236 ACL.

This is because such claims are to be brought under Part VIB of the CCA.

That part sets the limitation period, and the damages caps applicable to product claims under the ACL.

In this regard see s 137C(1) CCA which specifically excludes the application of s 236 ACL in claims involving *death* or *personal injury*.

Claims must be brought within three-years of the *"date of discoverability"* of the death or personal injury, and within twelve-years of the *"…act or omission alleged to have caused the death or injury"*.[133]

The latter period is called the *"long-stop"* period.[134]

The court has a discretion to extend the long-stop period for up to 3 years beyond the date of discoverability according to the "justice of the case" – but in so doing must have regard to the factors set out in s 87H(3).[135]

The three-year limitation does not run during periods of *minority* or in the event of an *incapacity* where there is no guardian or other person capable of protecting the incapacitated persons interests.[136]

Section 87G CCA defines what is meant by *"date of discoverability"*.

7 Conclusion.

Many sources of law are potentially applicable to aviation accidents.

The area contains traps for the unwary arising from:

- the international and inter-jurisdictional residence and domicile of potential defendants;
- international nature of the acts and omissions resulting in injury;
- multiplicity of legal theories;
- pre-emption of the common law in some instances (i.e. air carriers liability)
- jurisdictional issues;
- choice of law issues;
- difficulty in obtaining proof;
- complexity of the origins of air accidents;
- restrictive limitation periods;
- pleadings issues.

This paper has touched on many, but by no means all, of the issues that may arise in these cases.

Compensation for aviation accidents is a substantial topic that involves jurisprudence from many countries around the world. That law sometimes evolves rapidly.

133 Section 87F-87H CCA.

134 See the title to s 87H CCA.

135 Section 87H CCA.

136 Section 87H(3) CCA.

For most practitioners, aviation claims are an infrequent aspect of their practice.

This sometimes leads to these claims not receiving the early attention they require – occasionally resulting in unfortunate outcomes for the client.

In final analysis, if in doubt, seek assistance, and do so early.

--oOo--