

aspect of practice with a view to assisting plaintiffs - but if one was forced to choose between whether or not it was the plaintiffs who have had the upper hand in the last 18 months or so or the defendants, there are many arguments to justify that putting one's money on the defence would have been the better bet.

3. RECENT DEVELOPMENTS IN AVIATION LAW **by Tim Scorer, Barlow, Lyde and Gilbert**

The Warsaw Convention System

This year marks the 60th anniversary of the Warsaw Convention, an international convention signed in 1929 between most of the developed countries of the world. It aimed to provide a liability and compensation framework for the world's infant air transport industry, and an internationally enforceable strict liability regime. In short, member states agreed on behalf of their air carriers to accept strict liability for injury to passengers, and loss of baggage and cargo, in return for a financial limitation on that liability. Defences would be strictly limited, limitations could only be broken in the event of the carrier's wilful misconduct, and the jurisdictions in which claims could be made were prescribed.

Considering the declared intention of the Warsaw drafters, to provide a unified liability system for international air transport, it could today be said in some quarters that the intention has failed. The system frequently comes under attack and new and imaginative ways are attempted to circumvent the limits, or eliminate them altogether. The arguments tend to centre mainly on whether the airline has behaved with wilful misconduct or whether there has been some fundamental irregularity in the ticket which would exclude the application of the limits. Needless to say the USA is top of the league when it comes to the challenge to the Warsaw Convention.

On the other hand it could equally be said that the Convention has served the airline transport industry well, has protected it in its "fledgling" years and beyond and has for the most part been upheld and implemented worldwide as was its design. It might then be said that it has now really served its purpose. Why should airlines continue to enjoy this limitation of liability which is not enjoyed by aircraft manufacturers, by airport authorities or by air traffic controllers? Has the time not come for a change? Keep the strict liability framework, especially jurisdictional provisions but discard the limits. Let a passenger be compensated in the same way as if he suffered the death or injury in a road accident in his own country of residence. What argument can there be for saying he should receive less (or perhaps, more) than that, just because he dies or is killed in an air disaster? If the airline can establish that some other party was

responsible for the accident, let them and their insurers fight that battle for indemnity or contribution at another time and place, but let the passenger or his dependants be adequately and expeditiously compensated.

So the pressure for changes to the Convention continues. Some of these take the form of pressure for the USA to ratify the Montreal protocols Nos. 3 and 4. These protocols cannot be brought into force until ratified by the USA although the UK and most other European countries have already ratified them. They would provide increased limits of liability which would be unbreakable and the jurisdictional requirements would be expanded. Only the strength of the Congressional lobby on behalf of the US Plaintiff bar had prevented these protocols being ratified, but now there are more positive signs of progress, albeit that in the USA they would be accompanied by a supplementary compensation plan to boost the new 100,000 SDR limit. The implementation of these protocols would give a new impetus to the Convention and would hopefully see an end to the apparently endless round of air disaster litigation that continues principally in the USA and in doing so frustrates the purpose and intent of the original drafters.

Holmes v. Bangladesh Biman Corporation

It is appropriate to move on to demonstrate one example of a particular anomaly in the application of liability limits. This example comes from the final round in the battle between Mrs. Keiko Holmes, and the Bangladesh Biman Airline, which took place at the end of 1988 in the House of Lords. The case went to the House of Lords after the High Court and the Court of Appeal both held that Schedule 1 to the Carriage by Air Acts (Application of Provisions) Order 1967 has extra-territorial effect which would govern the damages payable following an air crash. Just to summarise the facts behind this case, Mr. Holmes, a British citizen, was killed on an internal domestic flight in Bangladesh in 1984 while travelling in an aircraft operated by Bangladesh Biman Corporation. This airline had an office in London which acted as a place for service of legal process. However Mr. Holmes' ticket was purchased and issued in Bangladesh. Its Terms and Conditions included a reference to the Carriage by Air Act in Bangladesh. Clearly the law of the contract was Bangladesh and nowhere else.

A claim was brought by the widow of the deceased, claiming damages under the Fatal Accidents Act 1976 and on behalf of her husband's Estate under the Law Reform Act. The airline admitted liability and the only point at issue was the amount of damages which would be recoverable. Under Bangladesh law, damages were limited to the equivalent of £913. However if British law was to be applied by virtue of Schedule 1 of the 1967 Order, the damages recoverable would be 100,000 SDRs, equivalent then to approximately £83,763.

The 1967 Order had been made under Section 10 (1) of the Carriage by Air Act 1961 which gave power by Order in Council to apply Schedule 1 of the Act: "To carriage by air not being carriage to which the Convention applies, of such description as may be specified in the Order". Article 3 and Schedule 1 of the 1967 Order provided rules for "All carriage by air, not being carriage to which the Warsaw and Hague Conventions applies". The question was, whether the rules contained in Schedule 1 to the 1967 Order applied to domestic air carriage in a foreign country, i.e. within the territory of a foreign state.

It was clear, because the carriage was domestic Bangladesh carriage, that Article 1 of the Warsaw and Hague Conventions did not apply because the carriage was not "international". Hence the terms of the carriage fell to be governed by national law. However by virtue of the 1967 Order and Schedule 1, the provisions of the Warsaw Convention as amended by the Hague protocol are made part of the domestic law of the United Kingdom but with two important differences, namely that the carrier's limit of liability is increased to 100,000 SDRs and the jurisdictional provisions in Article 28 of Warsaw/Hague are omitted.

The House of Lords comprising Lords Bridge, Griffiths, Ackner, Jauncey and Lowry held that the 1967 Order could have no wider scope and effect than was duly authorised by the power conferred by Section 10 of the 1961 Act and that the "presumption against extra-territorial legislation" would be upheld. Section 10 was to be construed as authorising legislation limited to carriage wholly within the U.K. or non-convention carriage involving a place of departure or destination or an agreed stopping place in a foreign state and a place of departure or destination or an agreed stopping place in the United Kingdom or other British territory. A contract of carriage made and to be performed wholly within the territory of a single foreign state or between two foreign states was excluded from the effect of the 1967 Order.

Hence the appeal by the airline was allowed. Commenting on the predecessor to the 1961 Act (Section 4 of the Carriage by Air Act 1932) Lord Bridge commented:-

"In my view, the rule (the presumption against extra-territorial effect) applies to this wording with equal force to prevent the power being construed to apply to domestic carriage by air in the United States. It is not legitimate to say that because this country and the United States have agreed to adopt the same rules for certain types of international carriage by air, our Parliament should now be free to legislate for the domestic affairs of the United States. The very fact that the Warsaw Convention did not apply to purely domestic carriage shows that it was the intention of the signatories to retain the right to legislate for carriage by air

within their own boundaries, and we should apply a construction to our own legislation that does not violate that right”.

Various noble Lords commented on the preoccupation of the Court of Appeal with the construction of the 1967 Order to the detriment of the crucial question which was to decide whether Parliament ever intended to give the power to make Orders governing domestic air law in other countries. Again, commenting on the limit of recovery in Bangladesh, it was said that while this seemed a “pitifully inadequate sum by European standards” it may have a wholly different significance in the context of the Bangladesh economy. Lord Bridge added “It surely cannot be the concern of this country to substitute for that limit of £913, the sum of £83,763 which could be the result of giving extra-territorial effect to our legislation”. One shudders to think of the reaction of a number of U.S. Courts had this case related to an internal domestic U.S. flight. The final outcome of this case obviously caused considerable relief to international air carriers everywhere.

Cases in the USA

Bearing out what I have said earlier about the continuing attempts in the USA to challenge the Warsaw system, the following summaries of relatively recent US cases may be of interest:

- i) The 1974 Pan Am disaster at Bali continues to promote litigation particularly on the basis of Article 25 of the Warsaw Convention. The Court of Appeals for the Ninth Circuit at the end of last year affirmed a Jury finding that the management of Pan Am was guilty of wilful misconduct in entrusting the aircraft into the care of the Captain. An earlier decision had held that Pan Am was liable for negligence but not wilful misconduct. Notwithstanding that the Convention applied to this “international carriage”, the District Court held that the damages limitation did not apply and entered judgment for the full amount awarded by the Jury. On the first appeal the Ninth Circuit held that the trial court had erred in ruling that Convention limits did not apply and remanded the case for a second trial on two issues as to whether there was wilful misconduct by Pan Am’s management or the crew and whether Pan Am had complied with the notice requirements of the Convention in the tickets. On the first issue the Jury had found that the crew were not liable for wilful misconduct but the Pan Am management was so liable. On the second issue the passenger ticket was found to contain adequate warning of the Convention’s damages limitation but the Jury felt that Pan Am had failed to display signs warning of the limitation. The Judgment entered on the second trial Jury verdict was affirmed on appeal and

since there was wilful misconduct on the part of Pan Am's management, the limitation of liability would not apply and the question of the Warsaw notice in the ticket was then an irrelevant issue.

- ii) In *Chan v. Korean Airlines* the same issue of ticket wording came up, arising from the KAL Sakhalin disaster. All parties had agreed that their rights and liabilities were governed by the Convention, provided that the tickets included the proper notice which is required to be given to passengers warning of the application of the Convention to their flight, and the consequential limits of liability. KAL was also subject to the Montreal Inter Carriers Agreement. Their "Notice to Passengers" appeared in only 8 point type rather than 10 point type as required by the Montreal Agreement. This case went to the U.S. Supreme Court, who held that an international air carrier does not lose the benefit of the Convention's damages limitation by failure to provide a notice of that limitation in passenger tickets.

The Court pointed out that nothing in Article 3 of the Convention imposed a sanction for failure to provide an adequate statement. The only sanction provided in that Article, and which subjected an air carrier to unlimited liability, was if the airline accepted a passenger without a passenger ticket having been delivered. "The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall nonetheless be subject to the rules of this Convention": Article 3 (2). The Court of Appeal in England reached a similar conclusion eight years previously in *Collins & Anor. v. British Airways Board* before Lord Denning and Lord Justices Eveleigh and Kerr.

- iii) With some relevance to the Lockerbie case, the United States District Court for the Southern District of New York denied Pan Am's motion for partial dismissal from law suits arising out of the hijacking of Pan Am flight 73 in Karachi, Pakistan in September 1986. Against Pan Am the Plaintiffs had claimed wilful misconduct in (i) fraudulently inducing passengers to fly on Pan Am "With promises of heightened security" and (ii) failing to provide adequate security. The Court held that the issue of wilful misconduct should be considered by the "trier of fact" and that a Jury trial would be appropriate because of the "hotly disputed facts" as to the extent to which Pan Am was obliged to provide security at Karachi Airport. Pan Am had contended that the level of security provided at the airport "was solely within the discretion of the Pakistani Government". The plaintiffs however alleged that Pan Am should have provided additional security guards as it and other airlines had done in the past. The Court refused to rule on

Pan Am's submission that: "Failure to provide additional security if it could have done so, did not rise to the level of reckless disregard for the probable consequences of its omission, sufficient to constitute wilful misconduct". What undoubtedly the Court would have had in mind was Pan Am's advertising campaign shortly before the hijacking, which stressed its heightened security programme, designed to lure passengers onto its aircraft in the face of increasing fears about terrorist activity.

- iv) Finally in a case giving some comfort to airlines, the Eleventh Circuit Court of Appeal in *Floyd v. Eastern Airlines* ruled that damages for purely emotional injuries may be awarded under the Warsaw Convention but punitive damages may not and moreover the Convention pre-empted any claim for punitive damages under State law. The underlying point that came clearly from the recent United Airlines accident at Sioux City is starkly illustrated in this case also, namely that it sometimes appears that the right to a damage claim under US law often seems to be more highly regarded than the gift of life itself.

During the flight from Miami to Nassau, one of the aircraft's three engines developed problems and had to be shut down. The plane headed back to Miami. Shortly after, the two remaining engines also failed. The crew advised passengers that they would have to ditch in the Atlantic. Fortunately however the crew managed to re-start the engine that failed initially and the plane landed safely at Miami. Passengers sued for intentional infliction of emotional distress and sought compensatory and punitive damages.

The Appellate Court considered Article 17 of the Convention, creating the cause of action for personal injury and then considered at some length the official French text of the Convention. "Lesion Corporelle" in Article 17 was not held to prohibit compensation for any particular type of damage and "Corporelle" did not by implication exclude what is mental as opposed to physical. If "Lesion Corporelle" was intended only to refer to injury caused by physical impact, it seemed more likely that the drafters of the 1929 Convention would have singled out and specifically referred to a particular case of physical impact using the word "Blessure". While rejecting the restrictive interpretation of Article 17, and allowing claims for purely emotional injuries, unaccompanied by physical trauma, the Court pointed out that this did not mean that Courts will allow a recovery of U.S, \$75,000 for every claim for mental injury because the damages actually sustained by each Plaintiff must be proved.

The Court went on to rule that the Convention pre-empted the plaintiff's State

law cause of action and hence pre-empted the punitive damages claim which may have otherwise succeeded on the basis of the Florida State cause of action for intentional infliction of emotional distress. The Court said neither Article 17 nor Article 25 authorised the recovery of punitive damages. Damages for injuries to passengers, damage to baggage and cargo and delay were entirely compensatory in tone and structure. Further, Article 25 simply removed the Article 22 compensatory damages limitation, and did not create an independent cause of action contemplating punitive damages. The Court said "Allowing punitive damages in Warsaw Convention cases would undermine this strict limitation of liability which was the central feature of the Warsaw system." The Court remanded the case to the District Court to address whether the plaintiffs had sustained emotional distress and whether the conduct of Eastern could amount to wilful misconduct. So in this case at least one sees some acknowledgement of the continuing integrity of the Warsaw system, and one decision that preserved a reasonable status quo.

Product Liability

As all of you will know the UK legislation giving effect to the EEC Directive came about as the Consumer Protection Act 1987. The product liability aspects came into force on 1st March 1988. The Act is not retrospective and applies only to a product supplied to any person by its producer after the coming into force of the Act. The scheme of liability is a system of strict rather than fault based liability for certain injury or loss caused by a defective product. The cause of action is available to injured parties against the "producers and certain other persons" and is in addition to any other rights of action available at law.

"Products" are widely defined and include goods or electricity and a product which is comprised in another product. Similarly "producers" are widely defined and there is a scheme for joint and several liability where two or more persons are responsible for the same damage. Airlines and other carriers are not by reason only of having issued a passenger ticket and/or air waybill and/or having entered into charter agreements to be regarded as subject to these provisions, but of course there is considerable exposure for manufacturers, and perhaps more significantly repairs and maintainers who import parts that are supplied to customers' aircraft.

Claimants need to prove (i) that there was a defect in the product; and (ii) that the damage covered by the Act was caused by the defect. A product is defective if "The safety of the product is not such as persons generally are entitled to expect". The damage covered is that caused by death or personal injury, or loss of or damage to

property of a type ordinarily intended to be used by the injured person mainly for his own private use or consumption but must exceed £275. Hence damage to civil airliners would not be covered nor most situations concerning the grounding of aircraft.

A claimant need only show that the damage was caused partly or wholly by a defect in the product and the care taken by the “producer” whether he be manufacturer, wholesaler, retailer or otherwise is irrelevant. Much of the publicity given to the Act arises from the inevitable conclusion that “Strict liability U.S. style = punitive and compensatory damages - U.S. style”. This is obviously not correct. However the claimant’s burden of proof is considerably eased except, as consumer groups have reiterated, where it is necessary to overcome the “state of the art” defence which was an option taken by the U.K. government in formulating its domestic laws on the Directive. At least in the aviation field, it is probably too early to say what impact the Act has had. It is notable that despite the expiry of the time limit imposed by the EEC Commission for the implementation of their Directive by Member States, the majority of other states have not yet implemented the Directive nor incorporated it into their domestic laws.

In relation to military products, in the U.K., manufacturers of such products have not, except in isolated cases, been made defendants in actions for damages by injured servicemen and/or their Estate and dependants. However, this situation is likely to change in view of the Crown Proceedings (Armed Forces) Act 1987 which repealed Section 10 of the Crown Proceedings Act 1947. Under the former Act injury and/or death to servicemen was exempted from the general rule that the Crown is broadly liable in tort in respect of duties attaching at common law to ownership, occupation, possession or control of property if a private person in such circumstances would be liable. In particular, no proceedings lay against the Crown if such death or personal injury was suffered in consequence of the nature or condition of any aircraft being used for the purposes of the armed forces of the crown. While the former law did not prevent a claim by servicemen or civilians against a manufacturer directly, the effect of the 1987 Act is to place members of the armed forces in normal peacetime conditions in the same position as civilians so far as recovery of damages for personal injury or death against the Crown is concerned.

Hence, with the possibility of an increased level of claims by members of the armed forces against the Crown, there is the potential now for manufacturers to be more readily joined in any such claim for damages. Given that the Crown could not be sued directly before and that by virtue of the Civil Liability (Contribution) Act 1978 could not be sued indirectly by the manufacturer claiming indemnity or contribution, it is

likely that those claims made against manufacturers will now involve the Crown being joined in proceedings. In turn, this is likely to lead to greater attention being paid to the contracts between manufacturers and the Crown for the supply of military equipment and some possible consequential changes being made to the understandings and agreements between the military and their equipment manufacturers relating to recovery of losses to military personnel and equipment arising from some fault on the part of the manufacturer.

A Future Development?

In conclusion, one of the likely developments over the next year or so will be the introduction of compulsory insurance for light aircraft. This topic has been an intermittent "live" issue since the Report of the Royal Commission on Civil Compensation in Personal Injury Actions - the Pearson Commission in 1977. Now it seems the subject has risen to prominence again although quite why is not clear. Certainly it is anomalous that every motorist must by law have unlimited third party insurance but every pilot of a light aircraft can decide his own level of coverage or whether he has it at all. So we can anticipate a consultative document from the CAA and can expect a prolonged debate on (a) whether third party and passenger legal liability insurance should be compulsory; (b) whether it is to be required on a blanket principle - the same for, a light twin engined aircraft and a microlight or glider; and (c) perhaps most crucially, how much cover there should be? These will be interesting questions to consider on another occasion.