
Liability in Air Travel for Real Estate Agents

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Abstract

Real estate agents who travel are subject to international conventions relating to safety and liability. This article examines the Warsaw Convention and some of the legal issues that arise out of that convention and other Australian legislation including *The Civil Aviation (Carriers Liability) Act 1959* (Cth.).

Introduction

As with most industries today, the real estate industry is spreading its business interests to other countries, and international negotiation and travel are an integral part of that business. Real estate agents travel throughout Australia in order to effect sales. Other agents have established sales offices both overseas and interstate in order to promote the real estate opportunities in Western Australia. Real estate agents also travel to conventions and conferences. These agents should therefore be aware of some of the legal issues associated with travelling.

When one considers the scope and extent of international travel nowadays, it is clear that mishaps or accidents might occur while travelling by air. Mechanical problems, human error, terrorism, high-jacking of planes, inappropriate behaviour by passengers such as smoking on board the plane, using mobile phones and computers at prohibited times and drunken and aggressive behaviour can potentially endanger the lives of passengers.

Both contract law and negligence law provides some protection for passengers in these situations. In the case of contract it is necessary to establish the existence of a contractual relationship between the parties and the law of negligence, specifically requires proof that a duty of

care is both owed and breached and that damage resulted.

Two of the greatest concerns with the rapid rise in air travel are safety and the problem of a conflict of law with other countries. International travel involves dealing with laws in different countries in addition to issues with language and culture. It would therefore seem desirable if not vital that some sort of uniformity of laws would help facilitate a smoother and safer travel industry.

Historical overview of the law and its implementation in Australia

In 1929, 128 countries gathered in Warsaw to discuss and draw up a treaty to regulate conditions of safe carriage and create uniformity within the industry. *The Warsaw Convention On The Unification of Certain Rules Applying to the International Carriage by Air 1929 (The Warsaw Convention)* is a treaty drawn up under the sponsorship of the International Civil Aviation Organisation (ICAO) and was signed at Warsaw on October 1929 by 128 countries including Australia. At that time the air transportation industry was in a fledgling stage and in danger of ruination in the event of a huge accident that could bankrupt the industry with a settlement for damages under common law.

The purpose of this treaty was to introduce uniformity and regulate the conditions of safe carriage for international air passengers and their baggage. It also defined uniform guidelines for liability limits with regard to claims for 'death or personal injury and loss or damage to baggage and cargo caused by air travel accidents'.¹ The aim behind the liability limit was to restrict the amount of liability payable by an airline in exchange for the passenger not having to prove negligence or fault when making the claim.

With the growth of travel and tourism and advances in technology, problems with the strict uniformity of the Warsaw Convention began to appear. The main problem with the Warsaw Convention was that it didn't allow for an increase in the limits in liability for passengers and baggage. Over time, piecemeal improvements were made to the Warsaw system and were adopted by some of the countries.

The Hague Protocol 1955 doubled the limits of liability. In 1961 the *Guadalajara Supplementary Convention 1961* (Guadalajara Convention) further amended the *Warsaw Convention* to cover journeys in which several airline carriers were involved (interlining). It also ensured that passengers could sue either the contracting carrier or the carrier that was carrying the passenger at the time of the accident or both. However it did not increase the limits of liability.

The application of the Warsaw system is limited to international aviation between the 128 contracting countries, which signed the Warsaw Convention and the 112 countries (excluding the United States of America) which signed the Hague Protocol. Australia is a signatory to the *Warsaw Convention* and the amendment by the *Hague Protocol 1955*. In 1959 the Commonwealth Parliament enacted the articles of the Warsaw Convention into the *Civil Aviation (Carriers*

Liability) Act 1959 (Cth) (*CACLA* (Cth)). This legislation gave effect in law to the Warsaw Convention.

The United States of America was not satisfied with the low increase to the monetary limits and refused to ratify the *Hague Protocol 1955*, instead endorsing the *Montreal Agreement 1966*. This agreement provided for special increased monetary limits for liability, for any carriers that had a stopover in the United States of America. As a result of the abstention by the United States and other countries from the *Warsaw Convention* as amended by the *Hague Protocol*, the 'uniformity' of the *Warsaw Convention* was clearly under threat. Article 22 of the *Warsaw Convention* allows carriers to agree by special contract upon a higher limit of liability for passengers. However this is a slow and cumbersome process involving complex negotiations between the government and the carriers.

Recently in Australia, IATA² introduced the *Intercarrier Agreement on Passenger Liability (IIA)* which permits carriers to voluntarily waive the limits for fault based liability. This agreement has operated since 1996. It bypassed the Warsaw system in order to make the following reforms:

- Increase the limit of liability for carriers, that are party to the (IIA) agreement, to 1000,000 SRD³ per passenger;
- Allow unlimited damages for strict liability and presumed liability; and
- Reserve all the defences under the Convention, but allow a carrier to waive any defence if it so chooses.

² International Air Transport Association.

³ (SRD) Special Drawing Right is the currency unit used by the International Monetary Fund. It is used by all IMF countries and replaces gold Poincare Franc that was provided by the Warsaw Convention. See Atherton T, *Travel Tourism and Hospitality Law*, Sydney, Law Book Co., 1998, footnote 360 p 378.

¹ Anthony J Cordato, *Australian Travel and Tourism Law*, 3rd Edition, Sydney: Butterworths, 1999, p162.

The *Transport Legislation Amendment Act 1995* (Cth) amended the *CACLA* (Cth) by increasing the monetary limit of liability per passenger and requiring carriers to provide insurance cover for compensation up to the limit of the increase for each passenger to cover the gap difference between the old and new limits. *CACLA* (Cth) also applies to domestic legs of an 'international' journey. Similar *CACLA* legislation has been enacted by the various states and similar amendments apply to domestic travel.

Important Definitions and principles of the Warsaw Convention

International Journey

The *Warsaw Convention* applies to all international air carriage.⁴ International air carriage means any flight where the place of departure on the ticket and the final destination are in the same country with a stopover in another country, or in two different countries.

The *Warsaw Convention* only applies to international air travel, although a journey consisting of domestic and international flights will be defined as international if all sectors are ticketed as one journey or booked with connecting flights. For example a journey departing from Perth to Sydney, San Francisco, New York, would be an 'international journey' provided it was ticketed as one journey. The place of departure and the ultimate destination must both be two 'contracting states'. That is, they are parties to the *Warsaw Convention* and or any of the amendments. Unless both are parties to the *Hague Protocol*, the *Warsaw Convention* alone applies. So, in the above example involving the United States of America, the *Warsaw Convention* and the *Montreal Agreement* would apply to any leg of the journey that was on an American carrier.⁵ The *Hague Protocol* would not apply, as the United States of America is not a party to that agreement.

⁴ *Warsaw Convention 1929 (WC)*, Article 1, Articles 37-38, *Hague Protocol 1955*, Article 40A.

Proper documentation

A properly completed ticket and baggage check must be given to the passenger before boarding.⁶ The prescribed information required on the ticket includes:

- Places of departure and destination;
- Stopovers in another country if place of departure and destination are in the same country; and
- A notice that the *Warsaw Convention* may apply, to limit the carrier's liability for death, personal injury, and loss or damage to baggage.

Unlike conditions in a contract, the prescribed information (notice) need not be brought to the passenger's attention. The information on the ticket must warn that liability is limited. This warning must be in print large enough to be noticeable or in different coloured ink. If the notice is not included on the ticket, the limits to liability will not apply. In 1976 the High Court held that a domestic air ticket was not a contract and the contract with the carrier is made when the passenger checks in or boards the plane.⁷ It would appear that a contract for an international ticket is also only made after checking on to the carrier.

The carriers' liability

The *Warsaw Convention* presumes international air carrier liability for:

- Bodily injury to, or death of, passengers resulting from an accident occurring 'on board the aircraft or in the course of any of the operations of embarking or disembarking';⁸
- Destruction, loss or damage to registered baggage or cargo while the goods are in the control of the carrier either on the ground or in the air;⁹ and
- Damage or loss caused by delay.¹⁰

⁵ The *Montreal Agreement* applies to carriers not states.

⁶ *WC* Article 3 (1).

⁷ *Mac Robertson Miller Airlines v Commissioner of Taxation (WA)* (1975) 133 CLR 125.

⁸ *WC* Article 17.

⁹ *WC* Article 18.

The effect of these provisions is that there is no need to show a breach of contract, negligence or any other fault. The liability for the carrier is strict and an injured party need only show that loss or damage occurred while in the control of the airline. The term 'presumed liability' means that a carrier is not liable for injury, loss or damage if it has used its 'best endeavours' to ensure that every effort to avoid accidents, injury or loss.¹¹ The effect of this defence is to water down the strict liability applied by the *Warsaw Convention*.

Article 17: Death or Bodily Injury to Passengers

Article 17 requires death or bodily injury to occur before damages will be paid. It is uncertain whether this includes nervous shock, as the cases are conflicting. In *Kalish v Trans World Airlines*¹² a passenger succeeded in recovering damages for mental anguish resulting from efforts to evacuate an airplane with an engine on fire after an emergency landing. The Supreme Court of Israel has also held that damages for mental injury are recoverable.¹³ In contrast, the United States of America has held that damages for purely mental injury were not recoverable when all three engines failed and the aircraft plummeted several thousand feet, and passengers were warned that the plane would ditch before the crew brought the plane under control and landed safely.¹⁴ In Australia the Supreme Court of NSW held that nervous injury that was not a consequence of physical injury was not covered by Article 17 of the *Warsaw Convention*.¹⁵



In the course of embarking or disembarking

Accidents that occur while passengers are on the plane or while entering the plane or leaving the plane are clearly within the definition of embarking or disembarking. Less clear is whether the definition extends to the airport terminal, tarmac, or airport departure lounge. International courts have examined the problem and have developed three tests:

- Whether the activity the passenger was engaged in at the time of the accident was linked to air travel;
- The extent to which the carrier had control over the passenger; and
- The location of the accident.

The courts have held that an accident occurring in the queue while waiting for a baggage check is included in the definition of 'location' as defined in Article 17 of the *Warsaw Convention*.¹⁶ In *Adatia v Air Canada*,¹⁷ a

¹⁰ WC Article 19.

¹¹ WC Article 20 and see also under the heading Defences, in this article.

¹² 14 Avi 17,936 (1977),344.

¹³ *Air France v Teichner* (1988) ETL 187. In this case it was held that passengers on the flight to Entebbe which was high-jacked could recover for mental distress even though they themselves were not physically injured.

¹⁴ *Floyd v Eastern Airlines* 23 Avi 17,367(1992).

¹⁵ *American Airlines v Geogeopoulos* (no 2) (1998) NSWSC 463.

¹⁶ *Day v TWA* 13 Avi 17,645 (1975).

¹⁷ (1992) 2 S&B AV RV11/63.

case dealing with disembarkation the court held that the passenger was no longer under the control of the carrier when she was caught between her mother's wheelchair and the side of a moving travelator. It would appear that transit passengers who wait to board the plane in the departure lounge would be remaining in the control of the carrier. However, passengers who leave the departure lounge, for example to shop in duty free, would not come within the definition of 'location of the accident' as they would be out of the control of the carrier.¹⁸

Baggage

The *Warsaw Convention* provides compensation for registered 'checked-in' baggage or goods that have been lost, stolen or damaged while the goods are under the care and control of the carrier. There is no need to show fault, only that damage or loss occurred. Personal luggage that is carried onto the plane by the passengers on an international flight does not appear to be covered, as it is not under the control of the carrier.¹⁹ In this case, 'carry-on' luggage should be covered by travel insurance. The law is not clear as to whether this includes luggage lost or stolen from the baggage carousel. *CACLA* makes no distinction between 'checked-in' luggage and 'carry-on' luggage, however it has placed the onus of proving that the luggage was lost or damaged during air transportation, on the passenger.²⁰

Delay

There is presumed carrier liability for 'damage occasioned by delay' in the transportation of passengers, goods and baggage because carriers can avail themselves of the 'best endeavours' defence.²¹ 'Delay' is not defined in the *Convention* and the common law definition of what is reasonable and foreseeable in negligence applies. Therefore, if a passenger has a

special commitment or appointment at their final destination, they should advise the agent or carrier of the special circumstances before they depart.

Carriers, however, effectively avoid liability for delay by referring to the 'best endeavours' defence and excluding out of their responsibility under the *IATA General Conditions of Carriage* - Condition 9.²² Atherton²³ is highly critical of this for the following reasons:

- Condition 9 comes very close to offending Article 23 of the *Warsaw Convention* which prohibits contractual provisions which purport to relieve the carrier of liability under the convention, in this case such as Article 19;
- Under contract law and the *MMA case*²⁴ there may be problems as to the time that a contract is made and exactly when the condition applies; and
- It appears to breach the *Trade Practices Act 1976* (Cth), as it is misleading and deceptive as the convention is subject to the Condition 9.

Article 19 of the *Warsaw Convention* does not apply to *CACLA* and domestic aviation that is governed by contract law and the conditions of carriage.

Defences

The *Warsaw Convention* provide defences based upon 'best endeavours' and 'contributory negligence' to carriers, for claims by passengers for baggage and delay.

Best Endeavours

²² Condition 9 provides: Carrier undertakes to use its best endeavours to carry the passengers and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carriers may without notice substitute alternative carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

²³ Atherton T & T, *Tourism Travel and Hospitality Law*, Sydney, Law Book Co, 1998, p376.

²⁴ *Mac Robertson Miller Airlines v The Commissioner of Taxation (WA)* 1975 133 CLR 125.

¹⁸ *Kotsambasis v Singapore Airlines Ltd* (CA (NSW) 40154/96, 13 August 1997, unreported).

¹⁹ *WC* Article 18.

²⁰ Section (29)4 *CACLA*.

²¹ *WC* Article 19.

A carrier is not liable if it proves that all necessary measures were taken by it and its agents to avoid the damage or that it was impossible to take such measures.²⁵ Where this defence is applied the liability is presumed rather than strict. This defence is waived in the United States of America. In Australia it is waived for strict liability up to the limits set under the IATA (IIA) agreement.

Contributory Negligence

Damages for loss or injury will be either wholly or partially reduced if a carrier proves that the damage was caused by or contributed to by the injured passenger. An example of contributory negligence is where passengers fail to fasten their seatbelt.

Avoiding the limits of liability

The limits of liability ...do not apply if it is proved that the damage resulted from an act or omission of the carrier ...done with intent to cause damage or recklessly and with the knowledge that damage would probably result.²⁶

The two types of conduct that are prohibited are:

- Intentional misconduct done with the intention of causing trespass or criminal conduct; and
- Reckless conduct with the knowledge of probable adverse consequences.

An example of this is a case in which an elderly couple, the Newalls, wanted to take their two dogs Patachou and Bon Bon with them on a holiday to Mexico.²⁷ They wanted the dogs to travel in the first class passenger seats with them. The carrier would not allow this and instead they were carried as 'excess baggage'. The Newalls were assured that the dogs would be safe,

however they were placed next to containers of dry ice which gave off toxic fumes. On arrival in Mexico City Bon Bon was dead and Patachou unconscious. The Newalls sued the carrier. The County Court of Ontario held that the carrier's cargo service knew of the risk of placing animals and dry ice in the same compartment and had failed to inform the ground crew. In the circumstances, the carrier could not rely on the liability limits set by Article 22, as the damage was the result of reckless and intentional conduct within the meaning of Article 25. The carrier was therefore liable to pay the full compensation to the Newalls.

Conclusion

Air travel is an important method of bridging gaps in communication, in the business world, both domestically and internationally. Business travellers including real estate agents are protected from the dangers associated with air travel by insurance, common law contract and tort, criminal law, consumer law, the Warsaw Convention and select air safety legislation.

Although there have been problems with the Warsaw system it does offer protection to the passenger /consumer and at the same time is not a stone around the neck of the carriers. The travel industry is a self-regulated industry. Its main objectives are to maintain high standards of safety and quality control, offer maximum compensation to consumers in the case of accidents while at the same time avoiding compensation claims that could bankrupt the industry. It also aims to create a uniform international system and a practical system for litigation in foreign countries. The Warsaw Convention and subsequent legislation, protocols and treaties have developed and are continuing to develop these goals.

²⁵ WC Article 20.

²⁶ WC Article 25.

²⁷ *Newall v Canadian Pacific Airlines* 74 DLR 3rd 574 (1976).