

# Aviation Liability

*Contributing editors*

Andrew J Harakas, Jeff Ellis, Chris Carlen and Kevin Sutherland



2018

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Aviation Liability 2018

*Contributing editors*

Andrew J Harakas, Jeff Ellis, Chris Carlen and Kevin Sutherland  
Clyde & Co US LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017  
No photocopying without a CLA licence.  
First published 2017  
First edition  
ISSN 2515-3757

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2017. Be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global Overview</b>	<b>5</b>	<b>Indonesia</b>	<b>52</b>
Andrew J Harakas Clyde & Co US LLP		Eri Hertawan Assegaf Hamzah & Partners	
<b>Argentina</b>	<b>7</b>	<b>Mexico</b>	<b>57</b>
Elizabeth Mireya Freidenberg Freidenberg, Freidenberg & Lifsic		Luis A Cervantes Muñiz and Alejandro Zendejas Vazquez Cervantes Sainz SC	
<b>Australia</b>	<b>13</b>	<b>Netherlands</b>	<b>60</b>
Matthew Brooks, Simon Liddy and Richard Davis HWL Ebsworth Lawyers		Gerbrich Oreel, Robert Pessers and Hanna Wielhouwer Van Traa Advocaten NV	
<b>Brazil</b>	<b>19</b>	<b>Nigeria</b>	<b>66</b>
Guilherme Amaral, Nicole Villa and Igor Baden Powell ASBZ Advogados		Etigwe Uwa, Chinasa Unaegbunam and Queenette Hogan Streamsowers & Köhn	
<b>Canada</b>	<b>25</b>	<b>Panama</b>	<b>72</b>
Michael Dery, Darryl Pankratz and Kathryn McGoldrick Alexander Holburn Beaudin + Lang LLP		Juan José Espino Sagel Pardini & Asociados	
<b>France</b>	<b>30</b>	<b>Spain</b>	<b>76</b>
Jonathan Rubinstein, Guilhem Argueyrolles and Clothilde Hernoust Gide Loyrette Nouel		Enrique Navarro and Diego Olmedo Clyde & Co LLP	
<b>Germany</b>	<b>36</b>	<b>Switzerland</b>	<b>82</b>
Rainer Amann and Claudia Hess Urwantschky Dangel Borst PartmbB		Andreas Fankhauser Baumgartner Mächler Attorneys-at-law Ltd	
<b>Greece</b>	<b>41</b>	<b>United Kingdom</b>	<b>87</b>
Stratis Georgilas G - H Law Chambers		James Healy-Pratt, Sarah Stewart, Peter Neenan and Owen Hanna Stewarts	
<b>India</b>	<b>46</b>	<b>United States</b>	<b>92</b>
Ramesh K Vaidyanathan, Laxmi Joshi and Mansi Singh Advaya Legal		Andrew J Harakas Clyde & Co US LLP	

# United Kingdom

James Healy-Pratt, Sarah Stewart, Peter Neenan and Owen Hanna

Stewarts

## Applicable treaties

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

The United Kingdom has ratified the following conventions (in reverse order):

- the Montreal Convention 1999 (entry into force 28 June 2004);
- Montreal Protocols Nos. 1–4 1975 (Protocols 1, 2 and 4 entered into force on 15 February 1996; Protocol 3 is not yet in force);
- the Tokyo Convention 1963 (entry into force 4 December 1969);
- the Guadalajara Supplementary Convention 1961 (entry into force 1 May 1964);
- the Hague Protocol 1955 (entry into force 1 June 1967); and
- the Warsaw Convention 1929 (entry into force 15 May 1933).

Implementing legislation is in place for treaties that are effective in the UK.

## International carriage – liability for passenger injury or death

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

Yes. See, for example, *Barclay v British Airways* [2010] QB 187.

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

Yes. The Montreal Convention and earlier Warsaw regime conventions provide the sole basis for liability of an air transport undertaking performing international carriage pursuant to *Sidhu v British Airways plc* [1997] AC 430. Domestic carriage forming part of successive international carriage also falls within the regime. The liability of community air carriers is governed by European regulations, specifically EC 2027/97 as amended by EC 889/2002 (the latest of these regulations effectively applies the Montreal Convention to domestic transport for community air carriers) and the liability of air transport undertakings (that are not community air carriers) performing domestic carriage will be governed by the Carriage by Air Acts (Application of Provisions) Order 2004 (which applies the Montreal Convention to domestic carriage).

### 4 In your state, who is considered to be a ‘carrier’ under the Montreal and Warsaw Conventions?

Ground handling agents and other service providers will not be considered as a ‘carrier’, but they do have the benefit of the liability framework of the Montreal Convention and earlier Warsaw regime (see for example *Rolls-Royce plc & Anor v Heavylift-Volga Dnepr Ltd & Anor* [2000] CLC 1120).

The courts take into account a variety of factors when determining whether carriage is successive carriage including the intention of the parties, the structure of the successive flights and physical ticketing evidence.

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

The English Supreme Court has followed the definition employed in *Air France v Saks* 470 US 392 (1985) and has held that an accident must be an ‘event’ or ‘happening’ that is ‘unexpected’ or ‘unusual’ and ‘external’ to the passenger. See, for example, *Deep Vein Thrombosis and Air Travel Litigation* [2005] UKHL 72, [2006] 1 AC 495.

The Supreme Court held in *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7 an ‘injury’ to mean a departure from the normal, which is not mere transitory in nature, including a loss of function. The court found ‘bodily’ to mean a physical injury to body, organs, glands and all other elements of the body. Consequently, the courts found bodily injury to mean ‘a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury’. The court distinguished mere emotional upset. The English courts have had few cases dealing with the situation of embarking and disembarking and those that have been heard have had contradictory judgments. It is probable that the cases will turn on the evidence, but would be expected to generally follow other jurisdictions. The guiding test appears to be whether the passenger is under the control of the carrier. There was a discussion of this in *Adatia v Air Canada* (CA 4th June 1992). In *Dr Susan Phillips v Air New Zealand Ltd* [2002] EWHC 800 (Comm), it was held that the air carrier regime did not apply when the passenger was being transported to an embarkation gate after the flight had been called.

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

The exoneration defence will be successful if sufficient evidence exists of the passenger’s contributory negligence; however, this is rarely achieved. See, for example, *Singhal v British Airways PLC County Court* (Wandsworth) 2008 WL 4820370.

English courts have construed the article 20 ‘all reasonable measures’ defence extremely narrowly, finding that it is ‘a very rare case when a carrier is able to establish a defence under article 20’ (see *Antwerp United Diamond BVBA v Air Europe* [1993] All ER 469).

The older concept of wilful misconduct has been interpreted in various English cases to mean knowledge of the correct conduct, actual conduct far outside of that range, and intention to act in that way knowing that it would be misconduct. It is far outside of negligence, however grossly negligent that conduct might be. See, for example, *Horabin v British Airways* [1952] 2 All ER 1016.

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

Yes, in the case of injury, pursuant to article 5 of EU Reg 2027/1997 as amended by EU Reg 889/2002, operators are required to make an advance payment within 15 days to cover immediate economic needs. In the case of death, article 5 provides that the payment should be for not less than 16,000 special drawing rights (SDR).

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

Domicile of the carrier: there is no definitive case under English law to determine the domicile (or ordinary residence) of the carrier. However, following *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corpn* [1980] All ER 359, CA, it is likely to be either the seat of the board of directors or the place of incorporation.

Principal place of business of the carrier: this will be the place where the main part of the executive and managerial work is carried out. See, for example, *Cesena Sulphur Co v Nicholson* (1876) 1 Ex D 428.

Place of business through which the contract has been made: this is still a disputed question (see *Noble Caledonia Ltd v Air Niugini Ltd* [2017] EWHC 1095, which is on appeal) and may depend on several factors including where the passenger was when the contract was made, where the ticket was issued and where the passenger collected or received the ticket. The normalisation of e-ticketing has changed the commercial landscape, and the legal framework will need to catch up.

Place of destination: this will be the place of destination on the ticket. For return flights, it will be the ultimate destination of the return flight. See, for example, *Grein v Imperial Airways Ltd* [1936] 2 All ER 1258.

The fifth jurisdiction (article 33(2)): there are limited English decisions relating to the fifth jurisdiction. US case law on the point would be persuasive but not binding. That case law has found the intention to return to a country to be a factor in determining principal and permanent residence.

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

The limit is absolute.

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

Pursuant to the Montreal Convention, articles 40 and 41, both the actual carrier and the contracting carrier shall be liable for the portions of carriage performed by the actual carrier.

### Domestic carriage – liability for passenger injury or death

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

Liability for domestic carriage by an air carrier is governed by the domestic equivalent of the Montreal Convention as a consequence of EC 2027/97, as amended by EC 889/2002 and/or the Carriage by Air Acts (Application of Provisions) Order 2004.

Private domestic carriage is governed by common law rules of negligence.

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

Pursuant to the domestic version of the Montreal Convention, liability is strict up to 113,100 SDR with a reversed burden of proof thereafter.

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

The carrier's liability is unlimited unless it can prove the following:

- the damage was not due to the negligence or other wrongful act or omission of the carrier, or its servants or agents under article 21(2)(a); and
- the damage was solely due to the negligence or other wrongful act or omission of a third party under article 21(2)(b).

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

Defences that are available to an air carrier are the various defences in the Montreal Convention:

- if the claim is not brought within the limitation period under article 35;
- if the carrier can prove that the damage was caused by the negligence or other wrongful act or omission of the person claiming under article 20;

- if the carrier can prove that the damage was not due to the negligence or other wrongful act or omission of the carrier, or its servants or agents under article 21(2)(a); and
- if the carrier can prove that the damage was solely owing to the negligence or other wrongful act or omission of a third party under article 21(2)(b).

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

Yes, see article 36 of the Montreal Convention and the Civil Liability (Contribution) Act 1978.

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

Pursuant to article 20 of the Montreal Convention, if the carrier can prove that the passenger or person claiming compensation caused or contributed to the negligence then the carrier can be wholly or partially exonerated from liability. However, this is rarely invoked and seldom successful. See, for example, *Singhal v British Airways PLC*, County Court (Wandsworth) 2008 WL 4820370.

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

A claim must be brought within two years pursuant to article 35 of the Montreal Convention. Tolling is not allowed.

### Third-party actions

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

For commercial flights, the Montreal Convention 1999 (incorporated into UK law and extended to UK domestic commercial flights) provides the right of recourse against third parties at article 37. The procedure for bringing a contribution or indemnity claim can, if litigation is underway, be found under Part 20 of the Civil Procedure Rules 1998. Under these rules, a defendant who wishes to counterclaim against someone other than the claimant (ie, a third party) may need to apply to the court for an order that that person be added as an additional party.

#### 19 What time limits apply?

The time limits that apply will depend on the class of defendant as set out below.

- If the defendant is an air carrier, and contribution is claimed by another air carrier or a third party, then section 1(3) of the Civil Liability (Contributions) Act 1978 applies and the time limit will be two years, as per article 35 of the Montreal Convention 1999.
- If the contribution is sought by an air carrier or a third party against a servant or agent of an air carrier acting within the scope of their employment, then section 5(1) of the Carriage by Air Act 1961 applies and the time limit will be two years, as per article 35 of the Convention.
- If the air carrier is bringing a claim against a third party for contribution, section 10 of the Limitation Act 1980 provides a two-year time limit from the date on which the right to recover contribution accrued, which will be the date of the relevant judgment, arbitration award or settlement.

### Liability for ground damage

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

Section 76(2) of the Civil Aviation Act 1982 governs air carrier liability for injury or damage caused to persons on the ground. The section, which is relatively self-explanatory, provides that where loss or damage is caused to any person on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, shall be recoverable without proof of negligence, as if the loss or damage had been caused by the owner of the aircraft (which is usually the air carrier).

---

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

The result of section 76(2) of the Civil Aviation Act 1982 is that there is generally strict liability against the owner (which is usually the air carrier), subject to various defences referred to at question 23.

---

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

No.

---

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

There are two main defences:

- section 76(2) of the Civil Aviation Act 1982 confirms that strict liability does not apply if the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered; and
- section 76(4) confirms that where the aircraft has been demised, let or hired for a period of over 14 days and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, the person to whom the aircraft was demised, let or hired is considered the owner. It is for this reason that air carriers rather than lessors are usually liable.

While not a defence as such, it is important to note that section 76(3)(b) confirms that the owner is entitled to be indemnified by another person if a legal liability is created in that other person.

---

**Liability for unruly passengers and terrorist events**


---

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

It is possible for the behaviour of another passenger to be deemed an 'accident' for the purposes of carrier liability under the Montreal Convention 1999. If it is, the carrier is liable to its passengers for the acts of an unruly passenger in the normal way, under article 17 of the Convention. However, whether the behaviour constitutes an 'accident' will be decided by the court on a case-by-case basis. By way of example, in *Morris v KLM Dutch Airlines* [2002] UKHL 7, it was confirmed that an indecent assault on a female passenger by another passenger was an 'accident'.

Air carriers have generally been made liable for terrorist attacks, with such attacks (eg, hijacking, terrorist attacks, and bomb threats) being considered an 'accident' under article 17 of the Montreal Convention 1999, as interpreted by the courts of countries that are signatories of the Convention. However, the question is considered by the courts on a case-by-case basis.

---

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

If the event in question is considered an 'accident', then the air carrier is strictly liable for injury or death under article 17 of the Montreal Convention 1999 up to SDR 100,000 (revised to 113,100) per passenger.

The air carrier can be liable for unlimited damages on top of this amount, but only if it is unable to prove one of the defences as referred to below at question 27. It is important to note here that the onus is not on the passenger to prove fault, but rather the air carrier to prove one of the defences as referred to at question 27.

---

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

The carrier's liability is unlimited, unless it can successfully prove one of the defences (referred to below at question 27). If the air carrier can prove any of those defences, then damages are limited to SDR 100,000 (revised to 113,100) per passenger.

---

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

The only defences under the Montreal Convention 1999 are:

- if the claim is not brought within the limitation period under article 35;

- if the carrier can prove that the damage was caused by the negligence or other wrongful act or omission of the person claiming under article 20;
- if the carrier can prove that the damage was not due to the negligence or other wrongful act or omission of the carrier, or its servants or agents under article 21(2)(a); and
- if the carrier can prove that the damage was solely owing to the negligence or other wrongful act or omission of a third party under article 21(2)(b).

For example, in relation to a terrorist attack, an air carrier would need to show that there were no weaknesses in its own security arrangements to be completely successful with a defence under article 21(2)(a) and (b).

---

**Consumer protection and passenger rights**


---

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

There are various laws relating to consumer protection and passenger rights. One of the most prominent is Regulation (EC) 261/2004 (which was implemented in the UK under The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975)). These rights can assist passengers who have suffered serious flight delays (of over three hours), have had their flight cancelled and have been denied boarding. The remedies involved can range from the payment of compensation (from €250 to €600), the right to reimbursement or rerouting, and the right to care (eg, accommodation, meals and refreshments, transport between airport and accommodation and two free telephone calls or emails).

The Regulation at article 11 also provides protection to persons with reduced mobility or special needs, stating that air carriers shall give priority to them. More specific laws relating to passengers with reduced mobility can be found in Regulation 1107/2006 (implemented into UK law by the Civil Aviation (Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014).

---

**Liability of government entities providing services to carriers**


---

**29 What laws apply to the liability of the government entities that provide services to the air carrier?**

Generally speaking, the liability of government entities in this area will be covered by general tort law and will usually require proof by the claimant of negligence.

---

**30 What is the nature of, and conditions for, the government's liability?**

Government liability will, generally, be fault-based. It must be shown that the duty of care between service provider and air carrier has been breached with the government shown to be negligent in its acts or omission.

---

**31 Are there any limitations to seeking recovery from the government entity?**

No.

---

**Criminal proceedings**


---

**32 Can an air carrier be criminally responsible for an aviation accident?**

In some jurisdictions it is routine for a criminal prosecution to follow an aviation accident, but not in England. In England and Wales, the police will pursue their own line of inquiries to ascertain whether sufficient evidence exists for the initiation of criminal proceedings and the Department of Transport usually authorises the Civil Aviation Authority to investigate and prosecute non-compliance of rules and regulations concerning safety and consumer protection. Criminal proceedings may be brought against individuals (eg, a pilot), against companies in certain circumstances (see *Corporate Manslaughter and Corporate Homicide Act 2007*), or may be instigated against company directors (gross negligence manslaughter not corporate homicide) if they as individuals committed all the requisite parts of an offence.

---

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

Usually the civil proceedings will be stayed until the conclusion of the criminal case. In a fatal accident, the coroner's inquest will also be stayed until conclusion of the criminal case.

---

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

No.

---

**Effect of carrier's conditions of carriage and tariffs**

---

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

The passenger ticket containing the terms and conditions of carriage forms a contract of carriage by virtue of the Carriage by Air Act 1961. If such a contract is signed by a party, then he or she will be bound by it (subject to the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015). In modern airline practice, the passenger will accept the terms by clicking on an internet button confirming that the terms and conditions have been read and accepted. IATA members must use a standard form of conditions of contract specified in IATA Resolution 724. This resolution required government approval, which was sufficient to bring the IATA conditions of contract within the concept of contractual terms that reflect regulatory provisions, and to exclude them from the EC Directive on unfair terms in consumer contracts. A carrier's conditions of carriage that are more advantageous to the carrier than under the requirements of the Montreal Convention will be null and void (Montreal Convention article 47).

---

**Damages**

---

**36 What damages are recoverable for the personal injury of a passenger?**

Under English law, there are no limitations or caps on damages. Punitive damages are not allowed in Montreal Convention cases, but exemplary damages (a diluted form of punitive damages) are permissible in non-commercial aviation personal injury claims.

The claimant is entitled to claim damages made up of:

- general damages for pain, suffering and loss of amenity, supported by medical evidence and assessed by comparing those with similar previous cases and taking into account factors including age, occupation and life expectancy. The court will also have regard to Judicial College Guidelines when assessing levels of damages under this head; and
- past and future financial loss, subject to reasonableness and evidence in support.

The court may also award interest.

Where the claimant is a child or patient, the claim must be brought through a litigation friend and settlement of such claims require approval of the court.

---

**37 What damages are recoverable for the death of a passenger?**

Under English law, bereavement damages are capped. Punitive damages are not allowed.

There are two main causes of action:

- an action may be brought for the benefit of the deceased's estate in accordance with rules laid down in The Law Reform (Miscellaneous Provisions) Act 1934. Damages are based on the losses for which the deceased could have claimed at the instant before he or she died. In essence, the estate inherits the deceased's right to sue. In cases of instantaneous death, damages under this Act will normally be limited to funeral expenses and damage to personal property; and
- an action may be brought for the benefit of the deceased's dependants in accordance with the rules laid down in the Fatal Accidents Act 1976, which allows a claim for the benefit of the dependants and those entitled to an award of bereavement damages (currently set by statute at £12,980). Damages are recoverable provided the

claimant is a dependant as defined by statute, and can show that there is a reasonable likelihood that he has or will suffer financial loss as a result of the death of the deceased. Speculative possibilities are disregarded.

The English court will not take into account the remarriage of the widow(er) nor the prospects of remarriage, and will disregard any benefits which have accrued from the estate or otherwise as a result of his death.

The action must be brought by the executor or administrator and the administrator must have obtained letters of administration before proceedings are commenced. Where the executor or administrator does not bring the action within six months after death, or where there is no executor or administrator, all or any of the dependants may bring the action in their own name.

---

**Accident investigation and family assistance**

---

**38 Who is responsible in your state for investigating aviation accidents?**

The Air Accidents Investigation Branch (AAIB), a unit within the Department for Transport, investigates civil air accidents and serious incidents within the UK, its overseas territories and crown dependencies.

---

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

Under English law the final AAIB report is a public document but the relevant records are not. In accordance with Regulation (EU) 996/2010, flight data recorder information or cockpit voice recordings must not be made available, or used for purposes other than those of the safety investigation, airworthiness or maintenance purposes, except when these records are anonymised and disclosed under secure procedures as directed by the court.

A request for disclosure can be made to the High Court, which considers these on a case-by-case basis. See, *Chief Constable of Sussex Police v Secretary of State for Transport & Anr* [2016] EWHC 2280 (QB) and the decision of the Outer House of the Court of Session in Scotland in *Lord Advocate* [2015] SLT 450.

---

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

Regulation (EU) 996/2010 requires member states to establish a civil aviation accident emergency plan at national level, which must cover assistance to victims of civil aviation accidents and their families. Article 21(2) requires that plan to take particular account of psychological support needed for victims and relatives. This Regulation also requires the UK, if it is in charge of the investigation, or if its nationals were a large number of those on board the aircraft, to appoint a point of contact for the victims and their relatives, and entitles the UK to appoint an expert who has the right to visit the accident site, access relevant information from the investigating authority and receive a copy of the final report.

---

**Insurance requirements**

---

**41 Are there mandatory insurance requirements for air carriers?**

In the UK, an operator applying for an air transport licence under the Civil Aviation Act 1982 is required to produce evidence satisfactory to the CAA of adequate insurance cover to meet potential liabilities.

Additionally, Regulation (EC) 785/2004 (as amended) specifies minimum insurance requirements for all aircraft operators and air carriers flying within, into, out of or over the territory of an EU member state in respect of liability for passengers, baggage and cargo, and third parties. The Civil Aviation (Insurance) Regulations 2005 create sanctions for non-compliance with various provisions of Regulation 785/2004, including a number of criminal offences.

**Litigation procedure****42 Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.**

The UK has three legal jurisdictions: England and Wales, Scotland and Northern Ireland. Each has a separate court system with its own rules of procedure, but all three are under the civil jurisdiction of the UK Supreme Court, the court of last resort and the highest appellate court in the UK. There is some variation between the substantive law in each jurisdiction, in terms of both applicable domestic statute and common law. In each jurisdiction, civil proceedings may be commenced in one of two levels of court depending on the value and complexity of the claim: in England and Wales, the High Court of Justice or County Court; in Scotland, the Outer House of the Court of Session or Sheriff Court; and in Northern Ireland, the High Court of Justice or County Court. In all of these courts the determination is usually by one judge sitting alone. Appeal lies to the Court of Appeal whose function it is to consider whether the judge below has erred and whether that error made a material difference to the outcome. The appeal is usually heard by a two or three-judge court. There is currently no compulsory alternative dispute resolution scheme in force in the UK with regard to any class of aviation dispute, including in respect of claims against carriers by consumers.

**43 What is the nature and extent of allowable discovery/disclosure?**

Part 31 of the Civil Procedure Rules 1998 sets out the rules on disclosure and inspection of documents applicable to all claims, except a claim on the small claims track (CPR rule 31.1(2)). Disclosure extends to all documents on which a party relies, and the documents that adversely affect either party's case or support either party's case (CPR rule 31.6).

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

See Practice Direction 31B to CPR Part 31, which provides:

*As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include electronic documents that would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.*

**45 Are attorneys' fees and litigation costs recoverable?**

Yes, generally fees and costs 'follow the event' so that the successful party is entitled to seek an order that the unsuccessful party pay his or

her fees and costs. Should a case settle prior to commencing proceedings the parties will seek to agree fees and costs with the general rule that the losing party pays. In injury claims the general costs rules have been moderated by the introduction of qualified one-way costs shifting, the effect of which is that even if an injury claimant loses, ordinarily (subject to certain exceptions) the defendant will not be able to enforce any costs order against them (see CPR 44.13-44.17).

**Judgments and settlement****46 Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?**

See section 69 County Courts Act 1984 and section 35A Senior Courts Act 1981. There is a general presumption that interest will apply. However, this remains at the court's discretion. On awards for general damages for pain, suffering and loss of amenity interest runs at 2 per cent from the date of service of proceedings, and on past and future financial losses at half the special account rate from date of injury to date of trial.

Post-judgment interest is awarded on a final judgment, usually payable from the date of the judgment until the date of payment: see the Judgments Act 1838 and the Judgment Debts (Rate of Interest) Orders made under the Administration of Justice Act 1970.

**47 Is court approval required for settlements?**

Where the claimant is a child or patient, an application must be made for the court's approval of the settlement pursuant to CPR 21.

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

Pursuant to the Civil Liability (Contribution) Act 1978, a party who has settled can still seek a contribution from others liable in respect of the same damage. Under section 10 of the Limitation Act 1980, no action to recover a contribution can be brought more than two years after the date when the right to a contribution accrues. The right to a contribution accrues when the defendant is held liable by a judgment or award in respect of the damage, or when he or she agrees to make a payment in compensation for that damage (see *Chief Constable of Hampshire v Southampton CC* [2014] EWCA Civ 1541).

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

No.

# STEWARTS

James Healy-Pratt  
Sarah Stewart  
Peter Neenan  
Owen Hanna

jhealy-pratt@stewartslaw.com  
sstewart@stewartslaw.com  
pneenan@stewartslaw.com  
ohanna@stewartslaw.com

5 New Street Square  
London  
EC4A 3BF  
United Kingdom

Tel: +44 20 7822 8000  
Fax: +44 20 7822 8080  
www.stewartslaw.com



## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Appeals  
Arbitration  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Aviation Liability  
Banking Regulation  
Cartel Regulation  
Class Actions  
Cloud Computing  
Commercial Contracts  
Competition Compliance  
Complex Commercial Litigation  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Joint Ventures  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Private M&A  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Real Estate M&A  
Renewable Energy  
Restructuring & Insolvency  
Right of Publicity  
Risk & Compliance Management  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Aviation Liability  
ISSN 02515-3757



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law