

[Newsletter] The extent of liability imposed by the Warsaw Convention on international air carriers

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The exponential growth of air travel in recent years, fuelled by the rise of low cost airlines and the increasingly global nature of business, puts thousands of commercial aircraft in flight on a daily basis. While this has served as an enormous boom for the airline industry, it has also greatly increased risk exposure, for both persons and goods/cargo (and airlines). The cases below outline the parameters of the Warsaw Convention, which some may argue are not as relevant today as they were 60 years ago, particularly in light of our Constitution.

Many challenges to certain provisions of the Convention for the Unification of Certain Rules relating to International Carriage by Air (referred to as the "Warsaw Convention"), as ratified by section 2 of the Carriage by Air Act 17 of 1946 (as amended by Proclamation R294 of 1967), have taken place in the courts, both nationally and internationally.

One such particular challenge was the Supreme Court of Appeal case of *Impala Platinum Limited v Koninklijke Luchtvaart Maatschappij NV and Another 2008 (6) SA 606*, whereby the appellant, a consignor of certain cargo that was lost during air carriage between South Africa and the United States of America (USA), instituted action in the Johannesburg High Court against the airlines that handled the consignment to recover the loss of the cargo. The respondents argued that the appellant had no title (*locus standi*) to sue in terms of international carriage law, in that the loss had been made good by the appellant's insurer and thus the appellant suffered no loss. The High Court held that the appellant company had no *locus standi* to sue for the loss of the cargo and consequently dismissed its claim with costs, including the costs of two counsel. This judgment was taken on appeal to the SCA.

The SCA turned to the terms of the Warsaw Convention and for the matter to be viewed in the context of the Convention's essential character and purpose. A consideration of relevant decisions in foreign jurisdictions was deemed useful for a proper interpretation of how the Convention was to be approached and applied. It was revealed that courts from different countries stressed the desirability of attempting to attain uniformity in relation to international air transportation when the provisions of the Convention were considered.

In the matter of *Sidhu and others v British Airways PLC; Abnett (known as Sykes) v British Airways PLC 1997 1 All ER 193 (HL)* Lord Hope stated:

"The convention describes itself as a 'Convention for the Unification of Certain Rules relating to International Carriage by Air'. The aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the convention itself provides for them.

The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts ...without reference to the rules of their own domestic law. The convention does not purport to deal with all matters relating to contract of international carriage of air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."

In the *Sidhu* case the issue was whether, in relation to injuries sustained while in an airport terminal in Kuwait during the Iraqi invasion of that country, passengers could claim for damages from British Airways for the consequences of their captivity. This particular flight was en route from Heathrow to Kuala Lumpur and landed in Kuwait for refuelling (about five hours after Iraqi forces began to invade Kuwait) when the passengers and crew were taken prisoner by Iraqi armed forces. The issue for decision in this case was whether the Warsaw Convention provided the exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of international carriage by air due to the fault of the carrier under article 17¹ of the Convention. The House of Lords took the view that since the claims were not within the terms of the Convention, the claimants were held to be without a remedy.

The United States Supreme Court held in the case of *Eastern Airlines Inc v Floyd* 499 US 530 (1991) that an air carrier could not be held liable under article 17 when an accident had not caused the passenger's death or to suffer physical injury or any physical manifestation of injury.

In a subsequent decision, *El Al Israel Airlines Ltd v Tsui Yuan Tseng* 525 US 155 (1999) USSC the court was requested to consider the decision reached in *Floyd's* case in that the Convention provided for compensation only when a passenger suffered "death, physical injury or physical manifestation of injury". In the *El Al* case, the passenger claimed that she sustained psychosomatic injuries as a result of an extremely intrusive body search. She accepted that there had been no bodily injury as that was the term used in the Convention. Her claim was that, on the basis of *Floyd*, the Convention allowed no recovery, but it did not preclude her from pursuing a separate action for damages under "local law". The court held that the Convention precluded a passenger from pursuing an action for personal injury and damages under local law when the claim did not satisfy the conditions for liability under the Convention.

In the case of *Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd (2002) 2 All ER 565 (HL)*, article 17 of the Convention was considered again, particularly the expression "bodily injury". It was held that the expression did not cover a mental injury or illness that lacked a physical cause and that, since the Convention was the sole basis on which claims could be advanced, the claimants were without a remedy.

In the matter of *Potgieter v British Airways plc 2005 (3) SA 133 (C)*, article 17 of the Convention was in the spotlight in our South African courts. In this matter, the plaintiff and his male partner on a flight to London hugged and kissed each other when they were approached by the flight attendants requesting that they desist from this behaviour as it was offensive to other passengers.

The plaintiff alleged he was humiliated and his dignity was impaired. He claimed damages without alleging any physical harm. The plaintiff argued that an action brought in terms of a ground of liability not covered by the Convention, such as the negligent causing of psychological shock to a passenger by an employee of a carrier, could be brought on the basis of domestic law as he could not be left without a remedy were it to be found that the Convention provides an exclusive cause of action. The plaintiff argued that the interpretation of article 17 in the *Sidhu* and *El Al* cases "went too far". The defendant submitted that exclusion clauses are a feature of modern contract law and have found support even within the context of our constitutional jurisprudence. The court held that the highest courts in the United Kingdom and United States together with Canadian jurisprudence have provided careful analysis of the Warsaw Convention as a whole and concluded that article 17 is definitive and the Convention is exclusive of any resort to the rules of domestic law, and thus followed the decisions of *Sidhu*, *Morris* and *El Al*.

Dealing with the issue of *locus standi*, being the debated issue in the *Impala Platinum* case mentioned above, in the case of *Western Digital Corp and Others v British Airways plc (2001) 1 All ER 109 (CA)* the Appeal Court in England had to deal with the claim for lost cargo, and had to consider whether an owner of lost items, who had not been named as consignor or consignee, had *locus standi* to sue for loss in terms of article 30² of the Convention. The court held that although the Convention did not in terms give specific rights to persons such as owners (who were not consignors or consignees) and, even though the nature and standard of any liability on the part of a carrier had to be decided in terms of the Convention, title to sue fell to be determined by domestic law. Consequently, owners and others with recognisable interests were not without remedy. The court was of the view that the decision of *Sidhu* did not preclude this conclusion. In the matter of *Gatewhite Ltd and Another v Iberia Lineas Aereas de Espana SA (1989) 1 All Er 944 (QB)*, after referring to judicial decisions in a number of countries, the court said the following:

"In my view the owner of goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the convention which deprives him of that right. As the convention does not expressly deal with the position by excluding the owner's right of action (though it could so easily have done so) the *lex fori*, as it seems to me, can fill the gap...."

The last part of the dictum of the *Gatewhite* case addressed the desirability of granting the right to sue to others who have recognisable interests so as to ensure that persons such as true owners of lost cargo are not at the mercy of person such as clearing or forwarding agents.

In the *Impala Platinum Limited* case, the carrier resisted the extension of the right to sue beyond consignors and consignees, on the basis that their liability should be restricted to the persons whose names appear on the waybill, because this would lead to certainty as these are the persons with whom they have direct dealings. The court held that the right to sue was obvious, not only because of the clear wording of the Convention, but because it is the basis on which the international air carriage industry operates. The court further held that to dismiss this appeal would be to disregard the realities of modern day international air carriage and it would make no commercial sense and would offend the need for uniformity. On this basis, the appeal was upheld.

As is evident above, while article 30 dealing with rights in relation to goods/cargo seem to be liberal in its application, article 17 pertaining to passengers can be argued to be too restrictive, as alleged in the *Potgieter* case. Section 9(3) (the right to equality – not to be discriminated against on the ground of sexual orientation), section 10 (inherent dignity and the right to have one's dignity respected and protected) and section 38 (the right to approach a competent court if a right in the Bill of Rights has been infringed or threatened) are entrenched in the South African Bill of Rights. From a South African perspective, it is probable that, sometime in the future, the provisions of article 17 of the Convention and its restriction on precluding an action under domestic law may be challenged as to whether it in fact passes Constitutional muster.

1 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 of injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2 (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subject to the rules set out in the Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who 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.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carrier will be jointly and severally liable to the passenger or the consignor or consignee.

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