

Passenger claims for damages against international air carriers under Montreal Convention

July 19 2016 | Contributed by [Dentons](#)

Introduction

Liability for injuries arising from accidents

Passenger claims arising from international flights

Comment

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The proliferation of passenger air travel has forced the aviation industry to consistently refine its policies and procedures for managing passengers onboard flights in order to ensure safety and comply with ever-changing rules and regulations. Air carriers conducting flights into and out of Canada are subject to potential liability to passengers for any physical injury incurred while planing and deplaning or during flight. On international flights, the Montreal Convention⁽¹⁾ governs this potential liability of international air carriers to passengers. This update summarises the potential liability for passenger claims and provides recommendations for international air carriers to minimise their potential exposure in the face of these claims.

Liability for injuries arising from accidents

The Montreal Convention is a comprehensive international treaty that addresses the rights of passengers, cargo owners and air carriers involved in commercial international air carriage. Article 17 of the Montreal Convention provides for liability arising from death or bodily injuries caused by an accident sustained onboard an aircraft. It is generally held that a finding of liability under Article 17 requires three elements:

- an accident;
- a death or bodily injury; and
- an occurrence onboard the aircraft or during any of the operations of embarking or disembarking.

The scope of the Montreal Convention covers all aspects involving an air carrier's potential liability for damages.⁽²⁾

When faced with passenger claims for damages, Canadian courts generally uphold US decisions, citing the need for certainty, consistency and uniformity of international air carriage law.⁽³⁾ This was recently explained in the 2013 Ontario Superior Court decision in *O'Mara v Air Canada*:

"Given that a major purpose of the Conventions [the Montreal Convention and its predecessors] was to introduce consistency and uniformity in the international law applicable to air carriage, in interpreting the Conventions, it is important that there be consistency in interpretation from one country to another, and, thus, there must be a very sound reason to depart from the precedents established from around the world."⁽⁴⁾

Key to determinations of liability against international air carriers by Canadian courts is whether the injuries complained of constitute accidents and whether the actions of flight attendants or crew members caused or contributed to a plaintiff's injury. Also frequently examined is whether the air

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carrier's cabin equipment and cabin safety procedures were adequate and reasonable in the circumstances.

The plaintiff's injury must amount to physical injury; courts have not permitted recovery for purely psychological, mental or emotional distress unless it was caused by or resulted from a physical injury. Where passenger plaintiffs claim damages for emotional distress, worry and anxiety (or aggravated or punitive damages arising therefrom), Canadian courts are often inclined to dismiss those aspects of a plaintiff's claim on a summary basis. International air carriers would be well advised to seek this early dismissal of the barred aspects of a plaintiff's claim as a means of taking control of the litigation and reaching early resolution of the matter as a whole.

Passenger claims arising from international flights

Though somewhat rare, passenger claims in Canada assist international air carriers in analysing the potential liability risks for operating in Canada.

Gontcharov v Canjet

In *Gontcharov v Canjet*(5) the plaintiff sued for damages for alleged mistreatment by flight attendants which resulted in his arrest and detention when the aircraft arrived in Toronto. The plaintiff claimed aggravated and punitive damages for pain and suffering and the infliction of mental distress. In addition, he claimed damages for severe bronchitis arising from the incident.

On a return flight to Toronto from the Dominican Republic, the plaintiff complained that he was cold and asked the flight attendants either for a blanket or that the cabin temperature be adjusted. Both requests were refused by the air carrier's flight attendants. When he repeated his request, the plaintiff alleged he was told that he would be charged a fee and that he was being considered a 'high maintenance passenger' by the staff. Based on the passenger's behaviour during the flight, he was escorted off the aircraft on arrival and met at the gate by officers with sub-machine guns. The plaintiff was required to stand aside in the presence of the four armed officers while the other passengers disembarked the aircraft and was detained until 4:00am, when he was released by the officers with an apology. Based on his experience, the plaintiff alleged that he was unable to sleep for 10 to 12 days after the "forcible confinement", and that he contracted severe bronchitis because of the conditions on the aircraft during flight.

On a motion by the air carrier to dismiss the plaintiff's action, the court found that the incident, when viewed as a whole, was an 'accident' within the meaning of Article 17 of the Montreal Convention. Accordingly, the Montreal Convention was applicable and pursuant to Article 17, the plaintiff was precluded from recovering any purely mental or emotional injury caused by the accident. Further, the plaintiff was precluded from claiming punitive and exemplary damages by operation of Article 29, which expressly excludes recovery of these types of damages. However, the court found that the claim for general damages for the bodily injury of bronchitis could be pursued as these damages were arguably arising from physical injury which occurred during the time the plaintiff was on the aircraft. If the action had proceeded, it is likely that evidence of the conduct of the air carrier's flight attendants would have been central to the court's determination of causation of the plaintiff's injuries.(6)

O'Mara v Air Canada

In *O'Mara v Air Canada*(7) the plaintiff launched a proposed class action for damages on behalf of 95 passengers on an Air Canada flight. The plaintiff alleged that the passengers suffered physical injury and/or psychological injury from a harrowing experience during a flight from Toronto to Zurich: On this flight, a miscommunication between the flight crew caused severe and abrupt changes in altitude while flying across the Atlantic Ocean.

The plaintiff alleged that the flight crew failed to adequately and properly communicate the reason for the event to the passengers. In addition to compensatory damages for the stress caused by the event, the plaintiff claimed punitive or exemplary damages, stating that the flight crew's behaviour "departed to a marked degree from the ordinary standards of behaviour".

The defendant air carrier brought a motion to strike the plaintiff's claim. Among other things, the court was asked to decide whether the Montreal Convention excludes recovery for damages for any

purely psychological injury not caused directly by 'bodily injury', and whether the convention permits recovery for punitive or exemplary or any other non-compensatory damages.

On the first issue, the court again confirmed that compensation for purely psychological injuries that did not arise due to physical injury is not recoverable under the Montreal Convention. Therefore, the claims of those passengers based purely on emotional or psychological injuries were not compensable under the convention. On the second issue, the court noted that Article 29 of the convention expressly excludes recovery for punitive, exemplary or any other non-compensatory damages for claims that fall within its scope.

Comment

International air carriers should consider adopting a number of key practices to reduce their exposure to potential liability to passengers (or indeed, to the Ministry of Transport, for breach of compliance with applicable regulations), including:

- Ensure that crew members regularly review all airline cabin safety policies and procedures to ensure compliance with applicable legal and regulatory guidelines and standards;
- Evaluate flight attendant manuals and training programmes to ensure that they meet the objectives of ensuring aircraft occupant safety creating a safe environment for passengers and crew members in and around the aircraft, and minimising hazards in the cabin;
- Where passenger requests are persistent, have flight attendants document interactions with passenger where possible;
- Ensure that flight attendants and crew members are trained to react promptly and appropriately to emergency in-flight situations; and
- Document onboard actions taken by crew members or any deviations from standard operating procedures (eg, record warning announcements made to passengers when a portable staircase, rather than a jetway, is used for planing or deplaning).

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Endnotes

(1) Convention for the Unification of Certain Rules for International Carriage by Air, May 28 1999, TIAS 13038, 2242 UNTS 350. The Montreal Convention is incorporated into Canadian law by the Carriage by Air Act, RSC 1985 C-26.

(2) *Thibodeau v Air Canada*, 2012 FCA 246.

(3) *O'Mara v Air Canada*, 2013 ONSC 2931 at 4.

(4) *O'Mara v Air Canada*, 2013 ONSC 2931, 115 OR (3d) 673 at 41.

(5) *Gontcharov v Canjet*, 2012 ONSC 2279, 111 OR (3d) 135. More recently, the proposition in *O'Mara* and *Gontcharov* that damages for pain and suffering and mental distress cannot be claimed was confirmed in *Ejidike v Ethiopian Airlines*, 2014 ONSC 1187, 2014 CarswellOnt 2771.

(6) To date, no further reported decisions had been made in respect of this action.

(7) *Supra*, note 4.

Jacob Yau, an articling student at Dentons Canada LLP, assisted with the research for this update.