THE LEGAL REGIME GOVERNING AIR PASSENGER COMPENSATION IN INDIA: EVOLUTION AND CONDITIONS OF APPLICABILITY

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Introduction

With the recent tragic crash of the Air India Express at Mangalore, one of the major growing concerns of Aviation law is the liability of the carrier towards the victims. The Carriage by Air Act, 1972, amended in 2009 pursuant to India's accession to the Montreal Convention, serves as the legal regime governing passenger compensation in India in the event of air accidents in international carriage.

The Carriage by Air Act, 1972, as amended by the Carriage by Air (Amendment) Act, 2009, consists of three schedules.

Schedule I consists within it the provisions of the Warsaw Convention signed on the 12th October, 1929. Schedule II of the Act consists of the provisions of the Warsaw Convention, as amended by the Hague Protocol signed on the 28th September, 1955. The last schedule i.e. schedule III consists of the provisions of the Montreal Convention signed on 28th May, 1999.

The researcher aims to deal with two main issues by means of this paper:

(1) The increase in the extent of liability of the carriers in international carriage in the event of death and bodily injuries of passengers by the inclusion of the provisions of the Montreal Convention, 1999 into the Carriage by Air Act, 1972.

(2) The increase in the number of jurisdictions, where suits for compensation for death and bodily injuries of passengers arising out of accidents in international carriages be filed, by the inclusion of the provisions of the Montreal Convention, 1999 into the Carriage by Air Act, 1972.

The first test for the applicability of the Montreal Convention is to determine whether the operation was an 'international carriage' or not. 'International carriage' is defined in Article 1(2) of the Convention as a carriage in which the place of departure and place of destination are situated either within the territories of two State parties or within the territory of a single State party if there is an agreed stopping place within the territory of another state, even if that state is not a party to the Montreal Convention.[1] Broadly speaking, taking the example of the Air India Express flight from UAE to Mangalore, there

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were three categories of passengers: (a) those whose contract was for carriage on the India-UAE-India route, (b) those whose contract was for carriage on the UAE-India-UAE route, and (c) those whose contract was for one way carriage on the UAE-India route. Going by the definition of "international carriage", passengers falling in all three categories are covered under the Montreal Convention as both India and UAE are parties to the Convention.[2]

Before going into the extent and limits of the liability of the carriers, it is essential to understand the wording of Article 17 (1) of the Convention.

Article 17(1) says,

> "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 or injury took place on board the aircraft or in the course of any of the operations of embarking and disembarking."[3]

Bodily Injury

Article 17(1) of the Montreal Convention only applies in the event of death or bodily injury. There has been a long running controversy as to whether mental injury (eg.fright) is actionable in itself or whether it must be accompanied by physical injury. However, the decisions in *Eastern Airlines v. Floyd*[4] and *Ehrlich v. American Airlines*[5] have seemed to resolve this controversy. It was held that the original term '*lesoin corporelle*' as used in Article 17 of the Warsaw Convention meant bodily injury, and accordingly, damages for mental injury were not recoverable under the convention.

Accident

The death or bodily injury must have been caused by an accident otherwise a claim cannot be made under Article 17.[6] The Montreal Convention does not define what is meant by the term 'accident'.

Many American courts prefer a broad approach. A situation which appears to be an accident is treated accordingly and precise definitions are rarely considered. However, they are occasionally used. For example, 'An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an aeroplane is an ordinary, expected and usual concurrence, then it cannot be termed as an accident.'[7] It was not until the case of *Air France v. Saks*[8] that the US Supreme Court made a detailed analysis of the term before concluding that an accident occurs where bodily injury or death is caused 'by an unexpected or unusual event or happening that is external to the passenger.'

The deliberate choice of terminology suggests that an 'accident' must be a special event and that not every occurrence enables a claim for damages under Article 17 (1).[9] The air carrier's contractual partner i.e. passenger is entitled to expect that the air carriage will be performed to an acceptable standard. The

carrier must contract with the passenger accordingly and may only escape liability if it is unable to avoid an inevitable risk.[10] The passenger may not realistically hope to avoid hazards such as turbulence since they constitute an inevitable risk which he automatically accepts upon purchasing a ticket. It is therefore unnecessary to consider whether such events might be described as 'accidents' by being 'expected' and/or 'exterior'. Accordingly, a passenger cannot claim damages if he suffers a heart attack during a normal landing or take off since both these events are a necessary part of air travel and are not accidents.[11]

The definition of an 'accident' is malleable. However, unavoidable aviation risks are not accidents under Article 17 of the Montreal Convention and the carrier cannot be held liable for them. It does not matter that the passenger is particularly vulnerable because of his poor state of health either. For example, the carrier will not be liable if a passenger suffers a heart attack because he panics as the aircraft passes though an area of mid- turbulence since this is a normal hazard of air travel over which the carrier has no control. Moreover, the chain of causation is broken in such a case since the passenger's injury is caused by his own fear and not directly by the turbulence.

The causal Connection between the Accident and the Operation of the Aircraft

The overall scheme of Article 17 requires a causal nexus between the death or injury, and the operation of the aircraft.[12] The carrier will only be liable for aviation accidents. This does not exclude accidents which might occur in other walks of life provided there is a causal connection between the accident and the operation of the aircraft.

Anyone who claims that a causal connection between the accident and the operation of the aircraft is not required is in effect arguing for a belated extension of the carrier's liability beyond that which was originally intended by the States Parties. The advocates of an extension to the carrier's liability of this sort argue that an aircraft does not represent a special risk but belongs to a general class of risks and therefore the carrier's liability should not be restricted according to whether the accident results from the operation of the aircraft.[13] The question to be asked here is whether the authors of the Montreal Convention really intended that the carrier should be liable for risks which bear no relation to air travel. Surely there is no reason why the carrier should be burdened with the passenger's ordinary risks of everyday life. This principle was also laid down in the case of *Hernandez v. Air France*.[14] Thus, according to this view, the carrier is not liable if one passenger hits or even shoots another during the flight.[15] Neither is hijacking a typical aviation risk. The contrary argument[16] fails to account of the fact that the same risk occurs in every other walk of like such as bank raids, school hostage taking etc.

Causation between the Accident and Injuries

According to the text of Article 17, death or bodily injury must be 'caused' by an accident. This requirement is obviously satisfied where the event which qualifies as an accident clearly causes the injury even though the injury may have occurred at a later date. However, it would be unfair to hold the carrier liable for any consequence which is not reasonably foreseeable in the ordinary course of events and therefore the principle of causation is tempered by the concept of remoteness.[17]

Furthermore, if the passenger's injuries do not amount to anything more than the normal, expected reaction to flying, they are not caused by an accident.[18]

While analysing the causal connection between the accident and the injuries, it is necessary to take into account two things. Firstly, that the voluntary intervention of third parties may break the chain of causation between the accident and the injuries caused.[19] Secondly, the cause of death or personal injury must be external to the victim in the sense that the cause for the injury suffered by the passenger should not be an internal factor such as ill health.[20]

The Period during which the Accident Must Occur

There is a broad divergence of views about the precise moment at which the carriage begins and ends.

Some authors do not precisely define the moment at which the carriage begins but content themselves with the general observation that it must be 'before the actual embarkation' or claim that everything depends upon when the passenger places himself in the 'care' of the carrier.[21] Unfortunately the precise definitions which have been provided by the courts and other writers are as numerous as the various stages through which a passenger must pass between arriving at the airport and boarding the aircraft. In any event, most authors agree that embarkation has commenced by the time the passenger enters onto the airfield whether by means of a gangway or otherwise.[22]

There are an equally large number of views about when the carriage terminates. Several French Courts have concluded that it terminates once the passengers have left the aircraft and its immediate vicinity whereas some authors argue that carriage continues until the passengers have crossed the airfield using the passenger gangway or otherwise, and that the operation of disembarking does not end until they enter the airport building.[23] It is agreed that the carriage is over once the passenger enters the terminal and proceeds to the baggage claim area or subsequently arrives at customs.[24]

The best test to apply while dealing with the questions of embarking and disembarking is the widely used three prong test laid down in the case of *Day v. Trans World Airlines Inc*.[25] The *Day* test considers: (a) what activity the plaintiff was doing at the time; (b) who was controlling plaintiff's activity; and (c) the location where the injury occurred.

Given the overall sense and purpose of the Convention, the carrier's liability surely extends to any period in which its passengers are exposed to any risk particular to air travel and the concept of 'embarking' and 'disembarking' should be considered in this context. The key point to remember is whether or not and to what extent the passenger is exposed to typical aviation risks.

However, there is an obvious implication that the passenger must surrender himself to the care and supervision of the carrier and must obey the carrier's instructions since it is to avoid the typical aviation risks which could injure the passenger.[26]

1. For addressing the first research issue which pertains to the extent of liability of carriers in international carriage in the event of death or bodily injuries to passengers, it is necessary to look into the provisions of the Warsaw Convention.

The Montreal Convention is the successor to the Warsaw Convention and unifies and replaces the system of liability that derives from the Warsaw Convention.[27] For the most part, the cases that have discussed the Montreal Convention have referenced its predecessor, the Warsaw Convention. Most of these cases discussing the Montreal Convention have relied upon similar provisions contained in the Warsaw Convention.[28]

Article 21 of the Montreal Convention provides for compensation in case of death or injury of passengers. The Montreal Convention introduces the idea of 'Strict Liability' of the carrier. Strict liability simply means that the carrier cannot escape its liability up to the prescribed level of damage, which is 100000 SDR (roughly Rs 69.42 lakh) for damage due to death or bodily injury as provided under Article 21(1) of Montreal Convention, even if it is not responsible for the cause of such damage.[29] Under Article 21 (1) of the Montreal Convention, the carrier incurs unlimited liability in excess of 100,000 SDR on the basis of presumed fault where damage results from the death or bodily injury of the passenger. By contrast, the Warsaw Convention renders the carrier liable for all damage on the basis of presumed fault irrespective of whether it exceeds SDR 100,000.[30]

The Warsaw and the Montreal convention permit the carries to rebut the presumption of fault by proving that the carrier was not to be blamed for the accident. However, the difference between the provisions under both the conventions is that whereas the carrier can completely avoid liability by discharging the burden of proof under Article 20 of the Warsaw Convention, the carrier can only avoid liability in excess of 100,000 SDR by discharging the burden of proof under Article 21(2) of the Montreal Convention. In other words, the presumption raised by the Montreal Convention that the carrier is to blamed for damage which does not exceed 100,000 SDR per passenger is irrebuttable whereas the presumption that the carrier is to blame for damage in excess of 100,000 SDR per passenger may be rebutted and liability avoided in

circumstances where the carrier can prove (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.[31]

Article 21 (2) (a) of the Montreal Convention states that the carrier is not liable for claims for damages under Article 17 (1) which are in excess of 100, 000 SDR per passenger if it proves that such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents. The carrier's burden of proof is substantially different under Article 20 of the Warsaw Convention which provides a complete defence if the carrier can prove that it and its agents gave taken all necessary measures to avoid the damage or that it was impossible to take such measures.[32]

The effect of Article 20 of the Warsaw Convention is to impose an express obligation upon the carrier and its agents to take all necessary measures where possible to avoid damage, the carrier avoids liability if it proves that it has complied with this obligation even though it commits some positive act which contributes to the damage.[33] By contrast the carrier avoids liability under Article 21 (2) of the Montreal convention by proving that the damage was not caused by the negligence or wrongful act or omission of itself or its agents or that it was solely caused by negligence or wrongful act or omission of a third party.

Article 21 (2) (b) states that the carrier is not liable for claims for damage under Article 17 (1) which are in excess of 100, 000 SDR per passenger if it proves that such damage is solely due to the negligence or other wrongful act or omission of a third party. This provision merely restates the burden of proof requires under the sub-paragraph (a) since damage which is solely due to the unlawful and blameworthy conduct of a third party cannot have been caused by the negligence or other wrongful act or omission of the carrier or its servants or agents.[34]

Article 21 (1) prevents the carrier from excluding or limiting its liability for death or bodily injury which does not exceed 100,000 SDR per passenger. This rule should be read in conjunction with Article 26 of the Montreal Convention which states that any (contractual) provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the convention shall be null and void.[35] These two articles ensure that the provisions of the Montreal Convention which make it easier for the passengers to sue airlines are not circumvented by private contractual agreements. If the situation were otherwise and the parties could vary the balance of burdens and advantages not only would the scheme and purpose of the individual rules be lost but the objective of creating a standardised system of international rules which properly balance competing interests would be compromised.[36]

Conclusion

In some ways, the two-tier liability structure for passenger death and injury has always existed. However, by the inclusion of the provisions of the Montreal Convention into the Carriage by Air Act, the increase in the extent of liability of carriers and the increase in compensation are indeed radical. First, the basis of the carrier's liability of the first tier has been changed from rebuttable presumed fault which was provided under Article 20 of the Warsaw Convention to 'strict', 'upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking', with all defences removed, except contributory negligence as provided in Article 20 of the Montreal Convention. Secondly, the limit is raised to SDR 100,000.

Even more importantly, insofar as the second tier is concerned, which technically has always been without any limit, the basis of liability is changed from 'wilful misconduct' as was a requisite under Article 25 of the Warsaw Convention, which was always difficult to prove, to a rebuttable presumption of 'negligence or other wrongful act or omission' and thus, in a monumental move, the burden of proof was moved from the claimant to the carrier.

2. The second research issue deals with jurisdiction that is where exactly a claim for damages can be made. As the Warsaw Convention used to do, the Montreal Convention makes various places of jurisdiction available to the claimant, in order to bring a claim for compensation against the air carrier on the basis of the Convention. In addition to the four places of jurisdiction of the Warsaw Convention, the Montreal Convention has created a fifth place of jurisdiction at the last place of domicile of the passenger in the case of personal injury or death.[37]

The wording of Article 33 of the Montreal Convention shows that the choice between the different places of jurisdiction is to be seen as alternative and not cumulative.[38] The alternative of having five places of jurisdiction does not mean that the claimant will have five forums at his disposal in each case. Where the locations differ, the claimant has a choice of where he wants to file his claim; it is for the applicable international or national procedural law to resolve any conflict between different proceedings, where the claimant in respect of the same carriage simultaneously asserts claims against the air carrier or carriers involved in the carriage at different locations.[39]

The five places of jurisdiction are as follows:

1. The Domicile of the Air Carrier

The Convention stipulates one place of jurisdiction 'at the court of the domicile of the carrier'. The convention does not define the term 'domicile'. This needs to be determined according to the law of the *lex fori*.[40]

The Montreal Convention does define the term 'domicile' in respect of a natural person in the context of the fifth place of jurisdiction at the domicile of the passenger; accordingly, it is justified to also take this definition into account when interpreting the domicile for the purposes of Article 33(1).[41]

In Germany and Switzerland, the domicile is determined according to the articles of association of the business whereas in France, the assumption is that the domicile and the principle place of business refer to the same location.[42] As far as the United Sates in concerned, in the case of legal persons, the location of incorporation equates to the domicile of the air carrier.[43]

2. The Principle Place of Business

Like the Warsaw Convention, the Montreal Convention offers a further place of jurisdiction at the location where the principle place of business of the air carrier is situated. This refers to the location where the airline has its central administration and where the actual administration of the business is concentrated.[44]

In practice, the predominant assumption is that an air carrier only has once principal place of business.[45] In contrast the US District Court in the matter of *Winsor v. United Airlines*,[46] allowed that there was a branch office of some significance at the location of the court seized, while the principal place f business was situated in another federal US state.

3. The Place of Business Through Which the Contract has been Made

Article 33 stipulates as the third possible place of jurisdiction that place of business of the air carrier, through which the contract was concluded.

4. Place of Jurisdiction at the Destination

The Montreal Convention, like Article 28 of the Warsaw Convention, provides the clamant with a fourth place of jurisdiction at the destination. Article 33 of the Montreal Convention does not define the term. The place which the parties agreed as final destination of the entire journey corresponds to the 'destination' for the purposes of Article 33.[47]

It makes no difference for the determination of the 'destination' that the journey in face takes place differently than agreed by the parties, and terminates at a different location to the agreed destination.[48] The agreed destination is also to be referred to if the passenger intends to travel to another destination at some later point.[49]

5. Place of Jurisdiction at the Domicile of the Passenger

In case of *personal injury or death*, the Montreal convention offers the injured party a place of jurisdiction at the domicile of the passenger. It is a condition that the sued carrier offers passenger flights from or to this country, either itself or

through another carrier, and the location is in the territory of one of the state parties.[50]

The convention defines the domicile as the place where the passenger has his principal and permanent residence.[51] Materially the Montreal Convention defines domicile as follows: 'Principal and permanent residence' means the one fixed and permanent abode of the passenger at the time of the accident. It is the time of the accident which is decisive and not the time of the conclusion of the contract.

It is up to the passenger, or, as the case may be, the claimant, to prove that the conditions for a claim at a particular location are satisfied. If he wants to claim for damages under the fifth place of jurisdiction, he must prove that the passenger did indeed permanently live at the location asserted; indications may be the possession or tendency of a house or a flat, registration with the authorities, place of employment, centre of the family, duration of the stay, and the intention of remaining permanently.

The nationality of the passenger is not decisive for the interpretation of the term domicile.[52] Neither is the domicile of the claimant to be taken into consideration where the claimant and the passenger are not the same person.

According to Article 33(2) of the Montreal Convention, there is a requirement that the air carrier must be *carrying the passengers commercially* to the country concerned at the time of the accident. This means that it must be an airline company which holds a permit in order to carry passengers to the country concerned. At the time of the accident, the air carrier must be in the process of actually carrying out such a carriage. Where the flight on which the passenger suffers the accident originates or terminates in a country in which the passenger is resident, the requirements for the fifth place of jurisdiction are satisfied without further ado. However, where the flight on which the passenger suffers the accident does not go to or via that country, then the passenger must prove, on the basis of flight schedules or data provided by the registry states of the air plane (permits), that the conditions of Article 33 are met.

Finally, one must remember, that in view of the additional criteria mentioned, a place of jurisdiction at the domicile of the passenger can only exist if this is located in a contracting state. To illustrate the utility of the fifth place of jurisdiction, let us take the example of the recent Air India Express Crash which was coming from UAE to India. The final destination of the carrier was India, where the accident actually took place. In such a case, the victim or the claimant can bring action in the UAE courts (State party) and India (State party and domicile of aircraft) or in any third state provided the passenger has his permanent or principal residence in that state and that state is also a party to Montreal Convention. Therefore, a victim who is a US resident can bring action against the carrier in US courts as well.

Conclusion

The Preamble of the Montreal Convention makes it explicit that the aim is to provide 'the most adequate means of achieving an equitable balance of interests'.[53]

The place of jurisdiction at the passenger's place of residence is a concession to consumer protection: in the case of personal injury, the injured passenger should be in a position where he can sue the air carrier in a place where he is familiar with the legal system.

The number of places of jurisdiction wherein suits for claiming damages in the event of death or personal injuries have universally increased. However, the process to decide the extent of compensation to be granted in such cases has not been universalised. This is so because they depend on local laws. It is likely that the level of compensation for each lost life may vary according to the jurisdiction chosen by a victim/claimant and according to the facts concerning each victim/claimant. For instance, it is well known that the US courts are liberal in granting compensation in torts and liability cases. On the other hand, going by the jurisprudence in India relating to compensation in motor vehicle and air accidents, it is unlikely that the victims would get anywhere near 100000 SDR.[54]

Thus, it's possible that the difference in compensation granted to two victims of the same accident in the event of death be huge. The loss of life of one person is as much a loss as the loss of life of another person. The fact that the claimants are being compensated differently merely on the basis of the domicile of the deceased is not a fair means of compensating them. This creates a discriminatory effect. The aim of International Law is to unify laws. Thus, one of the means of solving this problem is to further unify laws of compensation across the states.

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