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LAWYERS

Asia Pacific Carriers' Liability Guide



1st edition

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NB: Due to the extensive nature of this publication and the pace of reforms and judicial consideration there may be an absence of reference to a recent case or some references to legislation and its provisions which are no longer current, yet proclaimed, amended or repealed. This publication attempts to draw out the most significant points in the relevant legislation. Whilst all care has been taken to ensure that the most up to date information has been included, not all cases or aspects of the legislation have been considered. The material contained in this publication is in the nature of general comment only, and neither purports nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering and, if necessary, taking appropriate professional advice upon his or her own particular circumstance.

Asia Pacific Carriers' Liability Guide

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PREFACE

Carriage by air in the South Pacific region can be best summed up as complicated and volatile, but also fundamentally necessary to both the regional and world economy. The very isolation of the many small communities that make air travel so important in this region, also makes efficient, cost effective and competitive carriage problematic. Limited island economies can sometimes find it difficult to fund the significant capital costs of an airline, let alone suitable airports. While there is often high demand for domestic and inter-island services, carriers can be controlled by external forces critical of opening routes to competitive market forces. Many enterprises have struggled and some failed as a result. Confluence between South Pacific nations remains a somewhat overwhelming task to establish common structures for the provision of air services, let alone a joint carrier. Yet in spite of these hurdles, and in spite of all the volatility in corporate, government and market forces, aviation remains a viable and essential industry for the region.

For Australians, the proximity of the South Pacific represents opportunities in business, tourism and in aviation regulation. CASA continues to support the Council of the Pacific Aviation Safety Office by providing technical advice and access to training courses, by attending working groups with specific member nations, and providing, operating and organising targeted programs aimed at enhancing safety standards through better safety inspectors and investigators¹. Tourism continues to drive much of the international inbound access to the South Pacific, with code-sharing and low cost airlines attractive options. While tourism is a major factor for aviation in this region, it too suffers from seasonal instability in pricing and travel patterns.

The upshot is an aviation market for which domestic and international services are essential, but the volatility and unpredictability present a risky financial equation. This balance of risk not only exists to financial stakeholders (such as Governments and investors), but also manifests as a liability risk with ageing aircraft and a limited emphasis on safety and security in an increasingly litigious and westernised society.

What links the South Pacific nations by their membership to instruments such as the Warsaw and Montreal Conventions, does not necessarily produce like-mindedness for carriage outside those regimes. Indeed, belonging to organisations such as ICAO,² the South Pacific Forum, the United Nations or PIASA³ does not guarantee uniformity in liability and compensation regimes across the region. And therein lies the complexity and legal diversity of the various South Pacific nations analysed in this *Guide*.

This inaugural edition of the Carter Newell *Asia Pacific Carriers' Liability Guide* details the civil aviation liability regime in a number of Asia Pacific nations. The *Guide* outlines the international conventions to which each nation is a member, and examines the key domestic carrier liability legislation and case law for death and injury, baggage and cargo, third party property damage and delay claims. The *Guide* then looks at the civil system of laws adopted and the judicial hierarchy in which they are enforced around the region, the key regulatory bodies empowered to oversee aviation and the impact of local customary laws in each country.

The *Asia Pacific Carriers' Liability Guide* we hope is a valuable tool to all with an interest in this area, with particular value to five key industries:

¹ Civil Aviation Safety Authority, Annual report, 2009–2010 (2010). The Pacific Aviation Safety Office is an organisation made up of member nations comprising the Cook Islands, Fiji, Kiribati, Niue, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, Australia and New Zealand.

² International Civil Aviation Organization.

³ Pacific Islands Air Services Agreement.

- Private charter or common commercial carriers operating out of or into the Asia Pacific region, or operating an aircraft for private or general business purposes within this region;
- Various business partners of Asia Pacific carriers and aircraft operators, such as brokers, auditors, accountants and loss adjusters;
- Aerospace and aviation underwriters, reinsurers and claims consultants, particularly those with major risks operating in this region;
- Businesses whose operations rely on the Asia Pacific region – from tourism and adventure operators, resorts, fishing, marine and the mining industry, to aircraft service companies, cargo and transshipment operations; and
- Corporate and private passengers who frequent some of Australia’s closest international neighbours, this *Guide* outlines how differently the Asia Pacific region deals with carriers’ liability.

While some of the nations outlined in this *Guide* may have only one national carrier which may be a signatory to an IATA Inter-carrier Agreement and/or promulgate its own more expansive conditions of carriage for liability, this *Guide* remains focused on the legislative regime for liability compensation for that respective nation. Care must always therefore be taken to ensure any express terms of carriage are considered in conjunction with the liability regimes in place as outlined in this *Guide*.

It is therefore with great pleasure that the Carter Newell aviation team provides the latest addition to the suite of Carter Newell legal guides; the *Asia Pacific Carriers’ Liability Guide*. As always, we encourage the use of the *Guide* where possible, as well as any feedback on its content and useability. We look forward to a strong ongoing partnership with Asia Pacific carriers, their corporate customers, insurers and brokers.

CARTER NEWELL

APPLICATION OF CUSTOMARY LAW

‘The fact that customary law is not part of the formal system of law does not mean that its importance will diminish in a practical sense. The enduring strength of customary law supports the view that formal recognition is not required to give it force. Customary law still operates, as it has always done, on a separate plane, at a village level. This is recognised and enforced independently and without the need for statutory endorsement.’⁴

Many of our readers will be well aware of the impact Asia Pacific customary laws have on the resolution of a property damage or personal injury carriers’ claim. But what is Customary Law, why is it relevant and how do we address this issue in this *Guide*?

To begin with, there is no universal definition of customary law. Confusion arises between a ‘custom’, compared to ‘customary law’; the former might refer to a person’s behaviour within a group, whereas the latter relates more to the rules governing that behaviour. Drawing a line between the two is difficult. Both are relevant to a carrier’s potential liability.

There is the related problem of deciding whether such rules qualify as law and whether they can be enforced within a formal system of law. Some countries do not deal with this. In the Cook Islands for example, where the definition of customary law dates back to the *Cook Islands Act 1915* (CK), custom is ‘*the ancient customs and usages of the Natives of Cook Islands*’.⁵ Often relevant definitions introduced at independence are more palatable. The Constitution of Papua New Guinea for instance defines a custom to include ‘*the customs and usages of the indigenous inhabitants of the country existing in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial*’. This elevates the status of custom and makes it clear that it will continue to develop and form part of the legal system. In countries where new customary rules may be recognised as law, a related question is how widespread they must be to warrant recognition as customary law? This question is particularly pertinent to this region where customs differ from island to island, and village to village.

Some guidance was given by Chief Magistrate Lunabeck in *Waiwo v Waiwo and Banga*.⁶ In that case, the petitioner sued for divorce on the grounds of adultery, under the *Marriage Act 1986* (VU). In accepting that adultery was a serious matter in custom (with customary law dictating the measure of punitive damages), the Magistrate referred to the words in the Preamble to the Constitution, which underlined that it was ‘*founded on traditional Melanesian values . . .*’. Chief Magistrate Lunabeck held that, when considering customary law, ‘*a Court should not be bound to observe strict legal procedures or apply technical rules of evidence, but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion) and the Court shall otherwise inform itself as it sees fit*’. This is a difficult and quite liberal approach that common law would struggle with. Indeed, this approach has since been rejected on appeal on the following basis:

⁴ G. Powles, ‘*The Status of Customary Law in Western Samoa*’ Masters Thesis, VUW, (1973), Part VI; Jennifer Corrin, ‘*The Status Of Customary Law In Fiji Islands After The Constitutional Amendment Act 1997*’ (2000) 4 *Journal of South Pacific Law*.

⁵ Section 2, whilst not defined in the Constitution, *Interpretation Act* (VU), Cap 132, provides that ‘Custom’ means the customs and traditional practices of the indigenous peoples of Vanuatu. The word ‘traditional’ could be interpreted as carrying with it a requirement that the custom is longstanding.

⁶ Unreported, Magistrates Court, Vanuatu, cc324/95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.

'It is essential to remember that Judges and magistrates are not custom chiefs and are not experts in custom of any area let alone of the whole of Vanuatu. Nor is there any such thing as THE custom of Vanuatu. Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless be obtained and a clear custom must be established.'

The corollary of the very nature of customary law is that it gives rise to fundamental questions of law and fact. Those nations (like Australia) whose constitutional systems approximate a Westminster concept of government and judicial law, would invariably seek to understand customary law by taking formal law and legal systems as a benchmark. But such concepts of proving facts by evidence and the rule of law may do little to underpin a customary law cause of action.

Ultimately, what makes customary law most perplexing and challenging, is that much of it is unwritten. For the purposes of this *Guide* therefore, it is impossible to provide, as a general explanation of laws, every nuance of a nation's injury, land and property customary laws. What we therefore seek to highlight in this *Guide* is whether the potential exists for customary laws to affect a carrier's liability by examining whether a plural legal system exists and how Judges in turn have resolved relevant liability cases. Certain Asia Pacific nations have sought to expressly exclude the import of custom and customary law by Constitutional amendment. While this does not necessarily mean the 'customs' of those nations will be extraneous to a carrier's liability, it does at least inform generally the minimal impact customary law will have in any given matter. By contrast, many of the Asia Pacific nations still formally seek to recognise and enforce customary law, even sometimes if only by recognising broad concepts rather than prescriptive rules. It is in these nations where our and our local agent's knowledge and experience of customary law throughout the region, is paramount to understanding carriers' liability.

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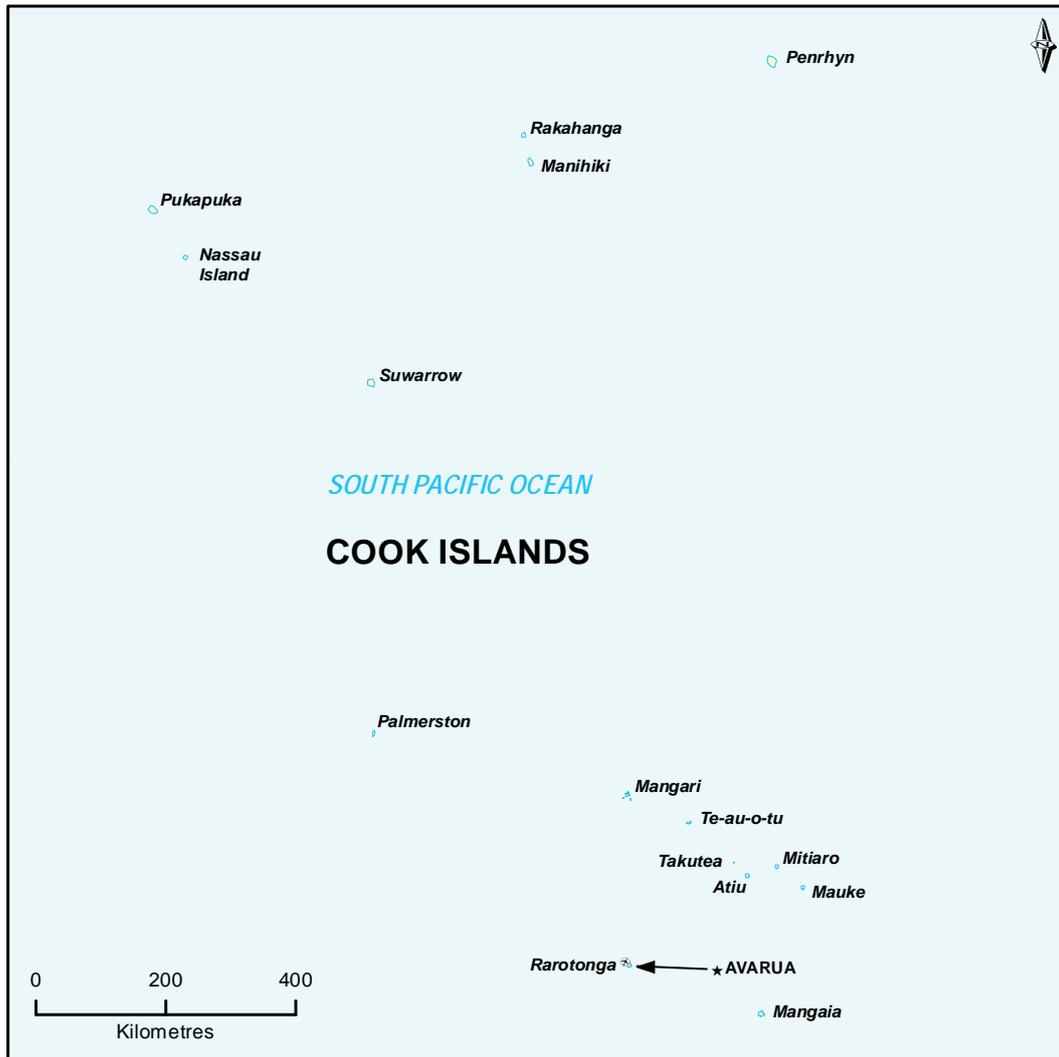
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COUNTRY CODES

CK	Cook Islands
FJ	Republic of the Fiji islands
FM	Federated States of Micronesia
ID	Republic of Indonesia (Including Bali and West Papua)
KI	Republic of Kiribati
MH	Republic of Marshall Islands
NR	Republic of Nauru
NZ	New Zealand
PG	Independent States of Papua New Guinea
PW	Republic of Palau
SB	Solomon Islands
TO	Kingdom of Tonga
TV	Tuvalu
VU	Republic of Vanuatu
WS	Independent States of Samoa

COOK ISLANDS



LOCATION

Oceania, a group of islands in the South Pacific Ocean about halfway between Hawaii and New Zealand.¹

Geographic Coordinates
21 14 S, 159 46 W.

Capital
Avarua.

Area
Total 236 sq km.

Independence
None.

Elevation
Highest point: Te Manga 652 m.

Population
10,777 (July 2012 est).

Boundaries
Coastline 120 km.

¹ Central Intelligence Agency, The World Factbook. <<https://www.cia.gov/library/publications/the-world-factbook/geoscw> at 9 August 2012.

INTRODUCTION

The Cook Islands is an independent parliamentary democracy in free association with New Zealand. The islands consist of 15 small islands scattered over 1.8 million square kilometres in the South Pacific Ocean. The Cook Islands are located west of Tahiti and east of the Kingdom of Tonga. The largest and most populous island is Rarotonga which holds the only international airport.

Tourism has grown significantly since 1971 when only a few hundred tourists visited the Cook Islands.² With over 100,000 arrivals annually over the last five years,³ tourism is now a leading economic sector in the Cook Islands and contributes to an average 80% of gross domestic product.⁴ Air Rarotonga, the only domestic air carrier in the Cook Islands and therefore its national carrier, reportedly carries approximately 70,000 passengers annually between nine island destinations including Rarotonga, Aitutaki, Atiu, Mitiaro, Mauke, Mangaia, Penrhyn, Manihiki and Pukapuka.⁵

Airports

The Cook Islands' primary international airport is Rarotonga International Airport, Avarua. The Cook Islands' two primary airports are the Rarotonga International Airport and Aitutaki Airport (also known as Avarua Airport). To ensure accessibility between its 15 islands, there are eight regional airstrips located throughout the islands, all of which have soft (unpaved) runways as shown by the table below.

Airports with hard (paved) runways – Primary

Total: 2

- There are two paved runways extending from 1,524 m to 2,437 m in length.⁶

Airports with soft (unpaved) runways – Secondary

Total: 7

- There are two unpaved airstrips extending from 1,524 m to 2,437 m in length;
- There are five unpaved airstrips extending from 914 m to 1,523 m in length.⁷

The following table outlines the Cook Islands' primary and secondary airports/airstrips:

Airport	Primary	Secondary
Aitutaki Airport	•	
Atiu Airport		•
Mangaia/Auau Airport		•
Manihiki Island Airport		•
Mauke Airport		•
Nitiaro/Nukuroa Airport		•

² Cook Islands Government Online (2008) <http://www.cook-islands.gov.ck/cook-islands.php> at 7 July 2012.

³ Cook Islands Statistics Office (2011). http://www.stats.gov.ck/Statistics/Tourism/tourism_total%20prov.htm at 31 July 2012.

⁴ Cook Islands Government Online (2008) <http://www.cook-islands.gov.ck/cook-islands.php> at 31 July 2012.

⁵ Air Rarotonga Ltd (2011) http://www.airraro.com/clientpages/raro/about_us.html at 31 July 2012.

⁶ Cook Islands Airports (2012) <http://www.cookislandsairports.com/home/> at 22 August 2012.

⁷ Ibid

Airport	Primary	Secondary
Penrhyn Island Airport		•
Pukapuka Island Airfield		•
Rarotonga International Airport	•	

Civil Aviation in the Cook Islands

Civil aviation in the Cook Islands operates within a system established and maintained in accordance with the *Civil Aviation Act 2002* (CK) (the CAA), which is closely modelled on the New Zealand *Civil Aviation Act 1990* (NZ). The purpose of the CAA is to ‘establish rules of operation and divisions of responsibility within the civil aviation system in order to promote aviation safety and security’,⁸ and to ensure the Cook Islands’ obligations under international aviation agreements are implemented.⁹

The CAA applies to every person, aircraft, aerodrome, aeronautical product, air service, and aviation related service, in the Cook Islands;¹⁰ every Cook Islands registered aircraft whether within or outside the Cook Islands;¹¹ every holder of an aviation document while outside the Cook Islands and exercising or purporting to exercise privileges accorded by that document;¹² and every foreign registered aircraft operating in the Cook Islands.¹³

The CAA provides little detail with respect to liability regulation, and merely details aerodromes and services, security and liability for damage (caused by an aircraft). Liability for claims stemming from injury, death, baggage and cargo are not detailed in the CAA.

The *Cook Islands Act 1915* (NZ) provides that the *Carriage by Air Act 1967* (NZ) is in force in the Cook Islands.¹⁴ The *Carriage by Air Act 1967* (NZ) provides that the Government of the Cook Islands has requested and consented to the application of the Act in the Cook Islands in accordance with Article 46 of the Constitution of the Cook Islands.¹⁵ Further, the sole domestic air carrier in the Cook Islands, Air Rarotonga, refers to the *Carriage by Air Act 1967* (NZ), in addition to the *Carriage of Goods Act 1998* (CK), in the provisions of its conditions of carriage concerning the liability of the airline. In relation to liability for death caused by accidents, the *Death by Accident Compensation Act 1952* (NZ) is applicable and enforceable in the Cook Islands.¹⁶ Therefore, Courts may turn to New Zealand legislation to resolve disputes concerning the liability of carriers in the Cook Islands.

Local Aviation Authorities

The Department of Civil Aviation, established by the *Department of Civil Aviation Act 1987* (CK), is the local aviation authority of the Cook Islands. The Department of Civil Aviation falls under the Ministry of Transport. The principal function of the authority is to undertake activities that promote safety and security in civil aviation at a reasonable cost.

⁸ *Civil Aviation Act 2002* (CK) s 2(a).

⁹ *Civil Aviation Act 2002* (CK) s 2(b).

¹⁰ *Civil Aviation Act 2002* (CK) s 5(1)(a).

¹¹ *Civil Aviation Act 2002* (CK) s 5(1)(b).

¹² *Civil Aviation Act 2002* (CK) s 5(1)(c).

¹³ *Civil Aviation Act 2002* (CK) s 5(1)(d).

¹⁴ *Cook Islands Act 1915* (NZ) s 618.

¹⁵ *Carriage by Air Act 1967* (NZ) s 3(1).

¹⁶ *Cook Islands Act 1915* (NZ) s 628.

Domestic Carriers Liability Legislation

Liability of a carrier for injury, death and delay is primarily regulated by the *Carriage by Air Act 1967* (NZ).¹⁷ Liability for death is also provided by the *Death by Accident Compensation Act 1952* (NZ),¹⁸ although it is unclear which Act would prevail in the event of death resulting from an aircraft incident.

The CAA regulates the liability of a carrier for surface damage caused to persons and property. In addition, the CAA confers the Minister power to make ordinary rules by reference to rules prescribed under law by any other contracting State of the International Civil Aviation Organisation.¹⁹ Under this authority, the Ministry of Transport adopted the New Zealand Civil Aviation Rules, which came into force on 1 April 2003.²⁰ Liability in relation to cargo is regulated by the *Carriage of Goods Act 1998* (CK).

Death & Injury

A carrier will be liable for damages arising from death or injuries suffered by a passenger resulting from an accident on board an aircraft or in the course of embarking and disembarking.²¹ Damages may be recovered for injury suffered as a result of shock.²² However, if a carrier can prove that all measures necessary to avoid the damage were taken or it was not possible to take such measures, the carrier will not be held liable.²³

The liability of a carrier for death or injury is limited to NZ\$42,000 or a higher sum if specified in the contract of carriage for each passenger.²⁴ This limitation will not apply if the damage results from the wilful or reckless misconduct of the carrier or its servants or agents.²⁵ Further, the *Carriage by Air Act 1967* (NZ) allows the limitations concerning damages to apply to proceedings brought by a tortfeasor to obtain contribution from a carrier or a servant or agent of the carrier.²⁶

Death

A carrier will be liable for damages for death caused by any wrongful act, neglect or default.²⁷ The family of the deceased is entitled to recover damages against the person deemed liable for the wrongful death.²⁸ The action must be brought by and in the name of the executor or administrator of the deceased person within six months of the death.²⁹ There is no cap on the amount of damages which can be awarded; rather the Court may award compensatory damages, pecuniary damages and damages in respect of medical and funeral expenses of the deceased person.³⁰

Contributory Negligence to Injury and Death

The amount of damages recoverable may be reduced when the damage is the result of the claimant's own fault.³¹

¹⁷ *Cook Islands Act 1915* (NZ) s 618.

¹⁸ *Cook Islands Act 1915* (NZ) s 628.

¹⁹ *Civil Aviation Act 2002* (CK) s 39.

²⁰ See *The Cook Islands Gazette* No. 7, 6 March 2003.

²¹ *Carriage By Air Act 1967* (NZ) s 22.

²² *Law Reform Act 1968* (CK) s 5.

²³ *Carriage by Air Act 1967* (NZ) s 26.

²⁴ *Carriage by Air Act 1967* (NZ) s 28(1).

²⁵ *Carriage by Air Act 1967* (NZ) s 31.

²⁶ *Carriage by Air Act 1967* (NZ) s 36.

²⁷ *Death by Accident Compensation Act 1952* (NZ) s4(1).

²⁸ *Death by Accident Compensation Act 1952* (NZ) ss 4 and 5.

²⁹ *Death by Accident Compensation Act 1952* (NZ) s6.

³⁰ *Death by Accident Compensation Act 1952* (NZ) s7.

³¹ *Law Reform Act 1968* (CK) s 7.

Delay

A carrier will be liable for damages or loss occasioned by delay in the carriage of passengers, baggage, or cargo.³² However, a carrier will not be held liable if it is proven the delay resulted from meteorological conditions, compliance with instructions by an air navigation service, obedience to orders given by a lawful authority, or the delay was made necessary by force majeure or the saving of life.³³

The liability of a carrier for damages arising from delay is limited to the smaller amount of either the amount of damage proven to have resulted from the delay or an amount representing ten times the sum paid for the carriage.³⁴

Baggage and Cargo³⁵

A contracting carrier will be liable for the loss of or damage to any goods occurring while the carrier is responsible for the goods, whether or not the loss or damage is caused wholly or partly by him or by any actual carrier.³⁶ The responsibility of the contracting carrier for goods begins when the goods are accepted for carriage in accordance with the contract of carriage.³⁷

A contracting carrier is not liable for baggage left in the custody of the carrier pending its acceptance for carriage or collection after completion of the carriage.³⁸ A carrier is liable for damage to hand baggage which occurs while the passenger is on board the aircraft or embarking or disembarking the aircraft.³⁹

The liability of the contracting carrier is limited in amount in each case to the sum of NZ\$1,500 for each unit of goods lost or damaged or, in the case of a contract 'at declared value risk', the amount specified in the contract.⁴⁰

Surface Damage

Damages are recoverable from the owner of an aircraft for material damage or loss caused to (amongst other things) persons and resulting from an aircraft in flight, taking off, landing or alighting or any person or thing in, falling from, or being released from the aircraft.⁴¹ The term material damage or loss includes death and personal injury.⁴² There is no statutory cap on damages recoverable.

Proof of negligence or intention is not required to recover damages, except where the person claiming the damages contributed to the damages.⁴³ Should a person other than the owner be liable to pay damages in respect of the damage or loss, the owner of the aircraft is entitled to be indemnified by that other person.⁴⁴

³² *Carriage by Air Act 1967* (NZ) s 25(1).

³³ *Carriage by Air Act 1967* (NZ) s 25(2).

³⁴ *Carriage by Air Act 1967* (NZ) s 28(4).

³⁵ *Carriage of Goods Act 1998* (CK) s 31(1), Sch 1. The *Carriage of Goods Act 1998* (CK) amends and repeals the provisions relating to the carriage of goods contained in the *Carriage by Air Act 1967* (NZ).

³⁶ *Carriage of Goods Act 1998* (CK) s 9(1).

³⁷ *Carriage of Goods Act 1998* (CK) s 9(2).

³⁸ *Carriage of Goods Act 1998* (CK) s 12(1).

³⁹ *Carriage of Goods Act 1998* (CK) s 12(4).

⁴⁰ *Carriage of Goods Act 1998* (CK) s 15.

⁴¹ *Civil Aviation Act 2002* (CK) s 105.

⁴² *Civil Aviation Act 2002* (CK) s 105(8)(b).

⁴³ *Civil Aviation Act 2002* (CK) s 105(3).

⁴⁴ *Civil Aviation Act 2002* (CK) s 105(4).

Where damages are caused by a person descending from an aircraft by parachute, damages are not recoverable against the owner of the aircraft.⁴⁵ Rather the person descending is liable for the damage or loss,⁴⁶ unless the descent is required to avoid injury or death.⁴⁷

System of Law

The Cook Islands is a common law country with a system of law influenced by both New Zealand and England. The Cook Islands became a '*British protectorate*'⁴⁸ in 1888, which resulted in the Cook Islands being annexed to New Zealand and its Parliament.⁴⁹ It must be noted that '*only specific statutes and subsidiary legislation*'⁵⁰ from New Zealand are applicable to the Cook Islands.⁵¹ The following New Zealand statutes are relevant to carriers in the Cook Islands:

- *Cook Islands Act 1915* (NZ);
- *Carriage by Air Act 1967* (NZ);
- *Civil Aviation Act 1990* (NZ); and
- *Death by Accident Compensation Act 1952* (NZ).

On 4 August 1965, the free association of the Cook Islands from New Zealand took place,⁵² following which the New Zealand Parliament enacted the Cook Islands' Constitution, enabling its laws to be created by its Legislative Assembly.⁵³ If the '*specific statutes and subsidiary legislation*'⁵⁴ from New Zealand were consistent with the Constitution, then they remained enforceable in the Cook Islands.⁵⁵ In 1981, an amendment in the Constitution abolished the New Zealand Parliament's power to enact and enforce legislation in the Cook Islands.⁵⁶

Application of Customary Laws

The preamble of the Cook Islands' Constitution states the customs of the Cook Islands are recognised. The Constitution enables '*Parliament [to] make laws recognising or giving effect to custom and usage*'.⁵⁷ Custom will be considered an element of Cook Island's law on the proviso it is consistent with the Constitution and its provisions.⁵⁸

The '*ancient custom and usage of the Natives of the Cook Islands*'⁵⁹ determines how an interest in or title to customary land is established.

⁴⁵ *Civil Aviation Act 2002* (CK) s 105(5)(a).

⁴⁶ *Civil Aviation Act 2002* (CK) s 105(5)(b).

⁴⁷ *Civil Aviation Act 2002* (CK) s 105(6).

⁴⁸ Patterson, Prof D (1999) *Cook Islands – Introduction* <<http://www.paclii.org/ck/sources.html>> at 26 May 2011.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Constitution of Cook Islands 1965* (CK) s 66A.

⁵⁸ *Constitution of Cook Islands 1965* (CK) s 66A(3).

⁵⁹ *Cook Islands Act 1915* (NZ) s 422.

Court System

The Cook Islands' judicial system consists of the High Court, the Court of Appeal, and the United Kingdom's Privy Council.⁶⁰

The High Court is comprised of a High Court Judge and one to three Justices of the Peace. When Justices preside the High Court, the jurisdiction is limited, whereas the jurisdiction is unlimited when a High Court Judge presides on the High Court bench. If one Justice presides the High Court, the jurisdiction is limited to hearing actions that have a maximum amount of NZ\$1,500 in damages claimed. If three Justices preside the High Court, the jurisdiction is limited to hearing actions where damages claimed range between NZ\$1,500 and NZ\$3,000. Decisions of the Justices can be appealed and will be heard by the High Court Judge.⁶¹

Appeals from the High Court are then heard by the Court of Appeal. Such appeals must involve a '*High Court certifying] that a substantive question of law is involved*';⁶² and if the High Court grants leave for the case to be heard in the Court of Appeal.

The Privy Council is the final court of appeal. If there is a '*substantive question of law*'⁶³ or '*a question of great general or public importance*'⁶⁴ to be answered, the Privy Council will hear the case.

Status of International Law Instruments

The provisions of the Montreal Convention were acceded to on 22 May 2007 and came into force on 21 July 2007.⁶⁵

The Cook Islands is not a signatory to the Warsaw Convention, Hague Protocol, Rome Convention, or the Guadalajara Convention.

⁶⁰ Paclii (2001) 'Cook Islands Court System Information' <<http://www.paclii.org/ck/courts.html>> at 26 May 2011.

⁶¹ Ibid.

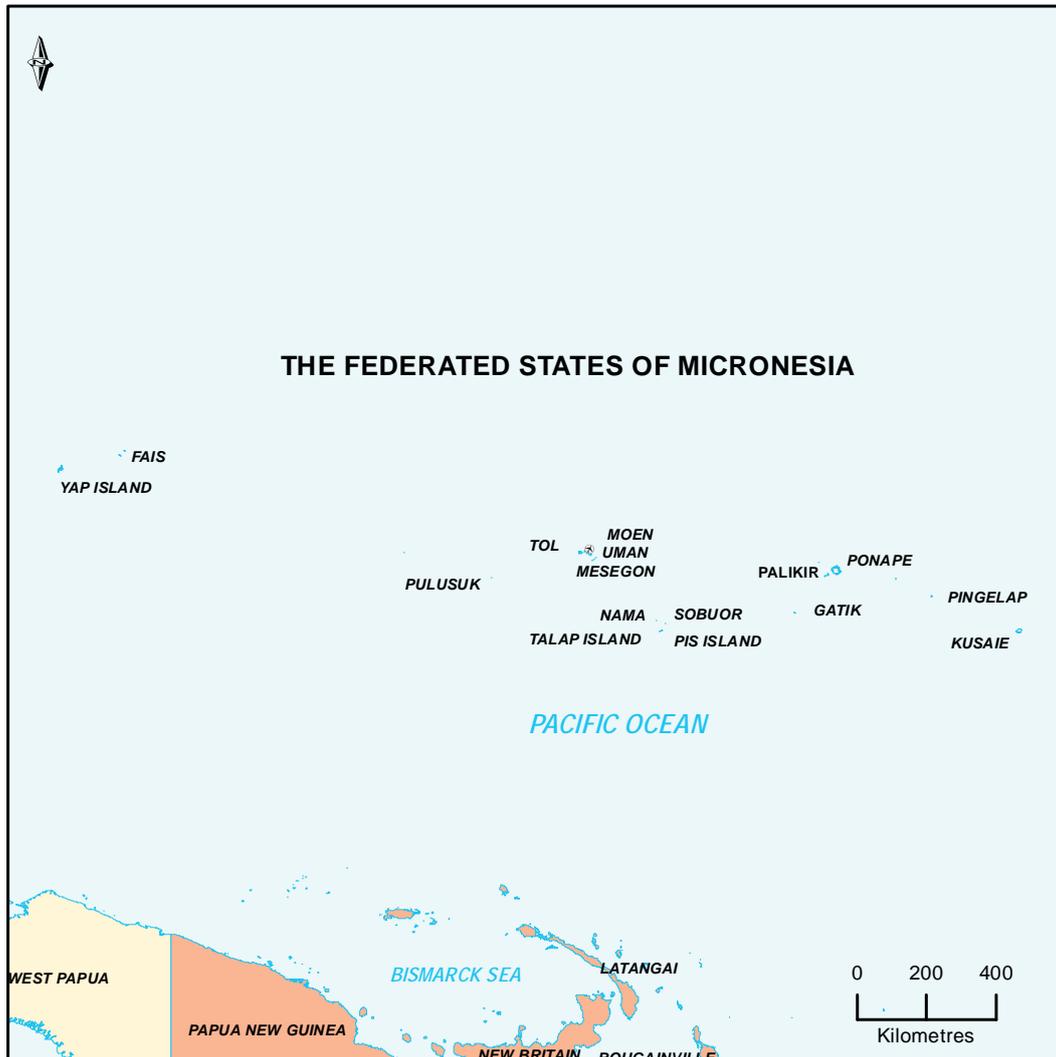
⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ International Civil Aviation Organisation, *Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999* (n.d.) International Civil Aviation Organisation <<http://www.icao.int/icao/en/leb/mtl99.pdf>> at 26 May 2011.

FEDERATED STATES OF MICRONESIA



LOCATION

Oceania, archipelagos in the Western Central Pacific Ocean about three-quarters of the way from Hawaii to Indonesia and just north of the equator.¹

Geographic Coordinates
6 55 N, 158 15 E.

Capital
Palikir.

Area
Total 702 sq km.

Independence
3 November 1986 (from the US-administered UN trusteeship).

Elevation
Highest point: Dolohmwar (Totolom) 791 m.

Population
106,487 (July 2012 est).

Boundaries
Coastline 6,112 km.

¹ Central Intelligence Agency, The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/fm.html>> at 9 August 2012.

INTRODUCTION

The Federated States of Micronesia (the FSM) is a group of 607 islands (of which only 65 are inhabited)² spanning approximately 1,800 miles across the archipelago of the Caroline Islands in the Western Central Pacific Ocean. It lies southwest of Hawaii, northeast of New Guinea, west of Nauru and east of Palau. The four states are the island groups of Yap, Chuuk, Pohnpei and the island of Kosrae.

In such a geographically disbursed region, local carriers including helicopter operations originating principally from Yap and Pohnpei play an important role in servicing the outer islands within the FSM archipelagos.³

Airports

The four states in the FSM each have their own international airport;

Airports with hard (paved) runways – Primary

Total: 5

- There are four paved runways extending from 1,524 m to 2,437 m in length;
- There is one paved runway with less than 914 m length.

The following table outlines the Federated States of Micronesia’s primary airports/airstrips:

Airport	Primary	Secondary
Kosrae International Airport	•	
Pohnpei International Airport	•	
Ulithi Airport	•	
Chuuk International Airport	•	
Yap International Airport	•	

Civil Aviation in the Federated States of Micronesia

Civil aviation in the FSM is regulated by Title 20 of the *Code of the Federated States of Micronesia* (FM) (the Code).

Local Aviation Authorities

The Code empowers the Secretary of the Department of Transportation, Communication and Infrastructure to (amongst other things):

- ‘organise the Civil Aviation Authority of the FSM consistent with other national legislation and in such manner as to promote efficiently and effectively, the safety and economic development of civil aviation’;⁴
- ‘encourage and foster the development of civil aeronautics and air commerce in the FSM and abroad’;⁵

² <http://www.visit-fsm.org> at 31 July 2012.

³ Ibid.

⁴ *Code of the Federated States of Micronesia* 1999 (FM), Title 20, §301.

⁵ *Code of the Federated States of Micronesia* 1999 (FM), Title 20, §302.

- conduct investigations, issue and amend orders and make general or special rules, regulations and proceedings necessary to carry out provisions of Title 20 of the Code;⁶ and
- the Secretary is further responsible for regulating use of airspace, air navigation facilities and air traffic rules⁷ and may prescribe rules and regulations in relation to air transportation security.⁸

Domestic Carriers Liability Legislation

Death, Injury, Delay, Surface Damage and Cargo

The Code does not prescribe rules in relation to domestic carriers' liability for death, injury, delay, or damage to baggage or cargo or surface damage.

That said, it does appear to contemplate a situation in which a domestic carrier may become legally liable for such losses. For example, the Code requires all air carriers to hold insurance or plans for self-insurance sufficient to meet any amount for which the air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others as a result of the operation or maintenance of an aircraft.⁹

In circumstances where the legislation does not prescribe rules for the assessment of carriers' liability (consistent with the principles laid out in the international conventions in relation to carriers liability), it may be relevant to consider the application of alternative domestic legislation in the FSM before looking to take guidance from international jurisdictions and case law.

Injury

It is understood that responsibility for the law of torts in the FSM rests with the individual states and not the national government, notwithstanding the national government may have an implied power to regulate tort law as part of its exercise of other powers.¹⁰

In at least two of the four states, Pohnpei and Chuuk, the definition of 'negligence' as is used in common law countries is applicable or similar in understanding.¹¹ That is to say that consideration of issues such as duty of care, breach and proximity are all relevant factors used to assess liability for injuries inflicted on another.¹²

In the FSM, the general principle is that '*one person may be liable in tort to another only if the first intentionally or negligently violates a duty owed to the other, and the other is injured as a result*'.¹³

The object of the importation of the common law concept of tort law into the FSM is to '*afford compensation for injuries sustained by one person as the result of the unreasonable or socially harmful conduct of another*'.¹⁴ However, in order to do this, where custom and tradition are not determinative, the Supreme Court of the FSM, will '*look to its earlier holdings and decisions of the United States Courts for guidance as to relevant common law tort principles, and will evaluate the persuasiveness of the reasoning in those decisions against the background of pertinent aspects of Micronesian society and culture*'.¹⁵

⁶ Code of the Federated States of Micronesia 1999 (FM), Title 20, §201.

⁷ Code of the Federated States of Micronesia 1999 (FM), Title 20, §304.

⁸ Code of the Federated States of Micronesia 1999 (FM), Title 20, §306.

⁹ Code of the Federated States of Micronesia 1999 (FM), Title 20, §401(6).

¹⁰ *Edwards v Pohnpei*, 3 FSM Intrm. 350, 359 (Pon. 1986).

¹¹ *Pohnpei v M/V Miyo Maru No. 11*, 8 FSM Intrm. 281.

¹² *Fabian v Ting Hong Oceanic Enterprises*, 8 FSM Intrm. 63, 65 (Chk. 1997).

¹³ *Semens v Continental Airlines, Inc (1)*, 2 FSM Intrm. 131, 142 (Pon. 1985).

¹⁴ *Primo v Refalopei*, 7 FSM Intrm. 423, 430 n.13 (Pon. 1996).

¹⁵ *Mauricio v Phoenix of Micronesia, Inc.* 8 FSM Intrm. 248, 253 (Pon. 1998).

In considering the appropriate level of compensation in a personal injury case, the Courts of the FSM will consider those traditional heads of damage covered by a personal injury action such as general damages, economic loss, care and assistance and special damages in addition to non-traditional items such as the inability of an injured person to *'provide family support through fishing and farming'*.¹⁶

General Damages

While the FSM Court recognises general damages by reference to compensation for pain and suffering, there is no prescribed method for the calculation of same. As such, the Court will use its discretion in awarding same.¹⁷

Economic Loss

In the case of *Mathebei v Ting Hong Oceanic Enterprises*¹⁸ it was noted the measure of damages for impairment of earning capacity is the *'difference between the amount which the plaintiff was capable of earning before the injury and the amount which he or she is capable of earning thereafter'*.

In order to sustain a claim for economic loss, a plaintiff must introduce sufficient evidence to support the extent of their earning capacity prior to the subject incident causing the injury and impairment.¹⁹ It is the approach in the FSM that *'where there is evidence of prior earnings this in itself will warrant recovery for the impairment of any possible future earning capacity which the injury would generally cause'*.²⁰

Finally, the Courts will assess all future economic losses on the basis that the individual would have continued to earn an income until age 60, noting this is the mandatory age for retirement for government employees, although not for private employees.²¹

Special Damages

Allowances for the recovery of medical expenses in the FSM will generally be lower than would be expected in a country like Australia because the government typically absorbs the medical bills.²² That said, a court in the FSM is *'entitled to presume that some medical expenditures were made, even absent any proof of purchase'*.²³

Given the close legal history shared by the FSM and the United States, it is somewhat surprising to find that in the FSM punitive damages are not recoverable for ordinary negligence.²⁴ The only exception to this rule is where the plaintiff can establish the defendant acted with *'actual malice or deliberate violence'*.²⁵ With this in mind, we are of the view that in the majority of aviation cases there is little to no reason to expect the imposition of punitive damages in claims for compensation for personal injuries arising from aviation risks.

Death

In the FSM, where the death of a person is caused by the *'wrongful act, neglect, or default'* of a person or corporation, that party can be liable to an action for damages to the estate.²⁶

¹⁶ *Koike v Ponape Rock Products, Inc.* FSM Intrm. 57, 73 (Pon. S. Ct. Tr. 1986).

¹⁷ *Ibid.*

¹⁸ 9 FSM Intrm. 23, 26 (Yap 1999).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Koike v Ponape Rock Products, Inc.* FSM Intrm. 57, 73 (Pon. S. Ct. Tr. 1986).

²² *Suka v Truk*, 4 FSM Intrm. 123, 131 (Truk S. Ct. Tr. 1989).

²³ *Meitou v Uwera*, 5 FSM Intrm. 139, 145 (Chk. S. Ct. Tr. 1991).

²⁴ *Elwise v Bonneville Construction Co.*, 6 FSM Intrm. 570, 572 (Pon.1994).

²⁵ *Davis v Kutta*, 7 FSM Intrm. 536, 546 (Chk.1996).

²⁶ *Code of the Federated States of Micronesia 1999* (FM), Title 6, §501.

The entitlement to pursue an action for wrongful death has been imported into the Code of the FSM from legislation²⁷ which was put in place when the FSM was a Trust Territory of the United States of America. Any actions for wrongful death must be:

- brought in the name of the personal representative of the deceased, but will ultimately be for the 'exclusive benefit' of the surviving spouse, children and any other next of kin of the decedent as the Court may direct²⁸; and
- commenced within two years of the date of the death of the person (although it is subject to the 'Tolling Provisions' of the Code of the FSM²⁹ which allow minors a period of time in which to commence any claim for wrongful death following the end of their legal disability (i.e. reaching adulthood)).³⁰

In awarding damages for the wrongful death of a person, the damages awarded by the Court must not exceed the sum of US\$100,000. However, the award of damages up to this limit may reflect the Court's views on the pecuniary injury resulting from the death.³¹

Where the decedent was a child, and where the claim for wrongful death is brought by the parent of the child, or one who stands in the place of a parent pursuant to customary law, such damages are to also include mental pain and suffering for the loss of the child without regard to provable pecuniary damages.³²

The decision of the Supreme Court of the FSM in the case of *Luda v Maeda Road Construction Co.*,³³ was the first time the Supreme Court considered the application of the wrongful death provisions of the Code of the FSM. It provides a good analysis of the FSM wrongful death legislation particularly with respect to the influence of the laws of other nations such as the USA and the United Kingdom.

The Court observed that the wrongful death laws in the FSM Code are '*similar to those which appear in most jurisdictions which trace their origins to common law traditions*'.³⁴ To that end, the wrongful death provisions in the FSM Code are based upon the founding principles of the Lord Campbell's Act.³⁵ However, the Court noted that during the course of the case, '*no party suggested or demonstrated that the FSM wrongful death statute was drawn directly from any specific statute*'.³⁶

The Court expressly indicated that it would not simply adopt previous interpretations of other jurisdictions without careful analysis and that the Court's interpretation of the FSM wrongful death laws is to be controlled by the earlier decisions of the Courts of other jurisdictions.³⁷

In view of this, the Court elected to approach the application of the FSM wrongful death legislation with a presumption that it '*will yield a result comparable to that which would obtain for other similar tort actions*'³⁸ and the Court proceeded to interpret and apply the FSM legislation in accordance with its own judicial approach.

²⁷ Trust Territory Code 6 TTC 203.

²⁸ *Code of the Federated States of Micronesia 1999* (FM), Title 6, §502.

²⁹ 6 FSM 806; see further *Luda v Maeda Road Construction Co.*, 2 FSM Intrm. 107.

³⁰ *Code of the Federated States of Micronesia 1999* (FM), Title 6, §503(2).

³¹ *Code of the Federated States of Micronesia 1999* (FM), Title 6, §503(1).

³² *Code of the Federated States of Micronesia 1999* (FM), Title 6, §503(1).

³³ 2 FSM Intrm. 107 110 (Pon. 1985).

³⁴ *Ibid.*

³⁵ 2 FSM Intrm. 107 111 (Pon. 1985).

³⁶ 2 FSM Intrm. 107 112 (Pon. 1985).

³⁷ *Ibid.*

³⁸ 2 FSM Intrm, 107 113 (Pon. 1985).

However, following this decision the Supreme Court of the FSM found that the wrongful death statutes actually form a part of the law of each state of the FSM and should not be considered national law except in limited circumstances.³⁹ The effect of this was that each state in turn enacted wrongful death legislation imposing the following limits of liability:

- Pohnpei

In accordance with the Pohnpei State Code, a trial court may award damages for wrongful death, not exceeding the sum of US\$100,000, to be apportioned on the basis of the pecuniary injury suffered by the surviving relatives as a result of the death.⁴⁰

The only exception to this limit arises where the decedent was a child, and the plaintiff is a parent of the child (or one who stands in the shoes of a parent pursuant to customary law). In that situation, the damages shall include the parents' mental pain and suffering for the loss of the child without regard to provable pecuniary damages.

- Kosrae

Adopts the same position as Pohnpei in relation to the limit on damages (i.e., US\$100,000) and in relation to damages for mental pain and suffering for the loss of a child.⁴¹

- Chuuk

In a draft version of the Chuuk State Code (2001), it was proposed the limit on damages for wrongful death be set at US\$100,000 with an allowance for the mental pain and suffering of parents upon the loss of a child.⁴² The status of the draft Code could not be confirmed in terms of it having been formalised into law.

With this in mind, we note that case law on point (as discussed below) indicates that prior to preparation of the draft code, the limit on damages for wrongful death in this state was US\$50,000 subject to the exception for mental pain and suffering of a parent.

- Yap

The Yap State Code makes no reference to wrongful death actions or the limits which may or may not apply in respect of same. That said, in the decision of *Leeruw v FSM*⁴³ the Court made reference to, and applied, the general limit of US\$100,000 as provided for in the FSM Code. We would suggest that guidance on this issue may therefore be taken from the FSM Code absent of any state based legislation available on point.

The following case examples, while not specific to aviation, illustrate the FSM Courts' attitude toward wrongful death claims and the assessment of damages in respect of same:

- In a wrongful death claim in Truk State, the total pecuniary estimated loss of an infant child who had lost its mother was calculated to be US\$15,288, however the Court found the plaintiff was entitled to the maximum amount allowed by law, in the State of Truk being US\$50,000,⁴⁴ and

³⁹ *Edwards v Pohnpei*, 3 FSM Intrm. 350, 360 (Pon. 1988).

⁴⁰ Digital Code of the State of Pohnpei, div VIII, Title 58, 6-112/see further: [http://www.vanuatu.usp.ac.fj/library/Paclaw/FSM/Code of the State of Pohnpei](http://www.vanuatu.usp.ac.fj/library/Paclaw/FSM/Code%20of%20the%20State%20of%20Pohnpei) at 7 July 2012.

⁴¹ Kosrae State Code, Title 6, s 6.2903. See further: <http://www.fsmlaw.org/kosrae/code/title06/to6p03c29/> htm at 7 July 2012.

⁴² Chuuk State Code (Draft Version), Title 5, ch 14, §1433.

⁴³ *Leeruw v FSM*, 4 FSM Intrm. 350 (Yap 1990).

⁴⁴ *Asan v Truk*, 4 FSM Intrm. 51, 56-57 (Truk S. Ct. Tr. 1989).

- In a wrongful death claim by the parents of a four year old child killed as a result of a motor vehicle accident, the Court made a total award of damages of US\$30,800, comprising US\$15,000 to each parent for the mental pain and suffering which ensued following the death of their son and an additional award of US\$800 for pecuniary losses incurred by the parents in this case.⁴⁵

In the matter of *Leeruw v FSM* the Court observed the term ‘pecuniary injury’ as used in the wrongful death statutes is traditionally interpreted to comprise ‘*probable support, services and other contributions that reasonably could have been expected by the beneficiaries had the decedent lived out his/her full life expectancy, all reduced to present worth*’.⁴⁶

Contributory Negligence

Given the Courts of the FSM approach to the imposition of common law tort concepts, the concept of ‘contributory negligence’ is also imported in the law of the FSM. Indeed the Courts have indicated the concept of contributory negligence is in keeping with the tradition and customs of the various states of the FSM.⁴⁷

It should be expected of course that in the majority of aviation related claims, the passengers themselves are unlikely to have contributed in any way to an aviation incident. However, it is useful to bear this in mind nonetheless when assessing both liability and quantum in respect of any claim which may arise within the FSM.

Baggage and Cargo/Surface Damage

As with injury and death, there is no specific legislation in the FSM which governs the liability of a carrier for damage sustained in the event of the destruction or loss of the baggage of a passenger or damage arising from aircraft (i.e. surface damage).

Absent such legislation, it seems appropriate to look to the common law of the FSM, and in particular the law on negligence to address the absence of specific aviation legislation.

Negligence

In an action for damage caused to personal property, the Courts of the FSM have held that plaintiff’s are entitled to recover the cost of the repairs to their damaged property.⁴⁸

In addition, plaintiffs are also entitled to recover compensation for loss of use of the property.⁴⁹ The period of time for which loss of use allowances are made is the ‘*reasonable time that it would take to repair the damaged property*’.⁵⁰ The Courts of the FSM have held that customary rental charges are an adequate measure of damage for loss of use and are awardable even when the plaintiff has not rented a substitute.⁵¹ Importantly though, any claim for damages for loss of use of property ‘*may not exceed the value of the property*’.⁵²

Finally, where a plaintiff does make a claim for damage to his/her property, the Courts in the FSM have imposed a duty on the plaintiff to mitigate their damages. Thus a plaintiff who has not taken reasonable steps to minimise his/her damages may well not recover the amount of the damages alleged.⁵³

⁴⁵ *Suka v Truk*, 4 FSM Intrm. 123, 130 (Truk S. Ct. Tr. 1989).

⁴⁶ 4 FSM Intrm. 350.

⁴⁷ *Leeruw v Yap State Gov’t*, (Yap, 97).

⁴⁸ *Elymore v Walter*, 9 FSM Intrm. 450,456 (pon. 2000).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

System of Law

The Federated States of Micronesia is a federal republic and its Constitution recognises state constitutions, legislation, customary law and common law.⁵⁴ Courts interpret laws of the Federated States of Micronesia to ensure they conform to the Constitution itself, *'to the customs and traditions of Micronesia and to the social and geographical configuration of the Federated States of Micronesia and its legal sources'*.⁵⁵

The Free Association Compact with the United States⁵⁶ is said to have a major impact on the Federated States of Micronesia and on its laws. Accordingly, while Courts are tasked to develop a uniquely Micronesian common law, when doing so, it does give special regard to American law – albeit with no binding effect.

Judges determining contract disputes in the Federated States of Micronesia apply predominately common law principles although again, customary law can impact on an outcome of a case, particularly at the State Supreme Court level. It is said that the common law provides the general framework in which customary law principles will operate.⁵⁷ Similar common law concepts applicable to contract disputes in Australia have been upheld as consistent with Micronesia's values. For instance, the *contra preferentum* rule that sees an ambiguous contract interpreted against the party relying on its benefit has been applied.⁵⁸

National and state courts recognise negligence as a tortious action and the concomitant duties to ensure reasonably safe premises, the duty to warn and an employer's duties of care.⁵⁹ Joint and several liability is not recognised and proportionate liability is consistent with Micronesian custom.

Application of Customary Laws

While traditional rights are recognised,⁶⁰ and while it is said that Micronesia's customary norms and dispute settlement processes are the earliest and most enduring sources of law, the common law is now quite pervasive.

As above, *Semens v Continental Airlines, Inc.*⁶¹ involved a dispute in Pohnpei where customary law was recognised by the federated and state Constitution. To decide the claim, interpretation of a clause of the contract was required. The court held the Constitution was the supreme law. As it had no application to the facts, the next source of law was customary law. However, the Chief Justice held he would only be under an obligation to search for an applicable custom or tradition if the nature of the dispute and surrounding facts indicated that this was likely. His Lordship felt this was not such a case, as the business activities which gave rise to the suit were not of a local or traditional nature. Although goods handling and moving might take place in a traditional setting, baggage and freight handling at an airport was of an international, non-local nature.

Accordingly, the common law of the United States was applied; the Supreme Court of the FSM held that customary law cannot be applicable in disputes between people from different customary groups or between indigenous and non-indigenous people.

⁵⁴ *Constitution of the Federated States of Micronesia 1978* (FM) s 2 art V.

⁵⁵ *Constitution of the Federated States of Micronesia 1978* (FM) Judicial Guidance Clause, s 11 art XI.

⁵⁶ United States Code (US), *Title 48 Territories and Insular Possessions*, §1902.

⁵⁷ Michael Ntuny (1993) *South Pacific Islands Legal Systems* 510.

⁵⁸ *Semens v Continental Airlines, Inc.* 2 FSM Intrm 131.

⁵⁹ *Koike v Ponape Rock Products Inc.* 3 FSM Intrm 157 (Pon. S. Ct. Tr. 1986)

⁶⁰ *Constitution of the Federated States of Micronesia 1978* (FM) art V.

⁶¹ [1985] FMSC 3; 2 FSM Intrm. 131 (Pon. 1985) (10 December 1985).

We have sighted a number of cases throughout this chapter which provide guidance and commentary on the effect and application of customary law in the FSM. The following are some additional brief examples of how local custom is considered for the purpose of assessing damages in wrongful death claims (although we note the principles will likely translate to personal injury compensation actions as well):

- A 19-year-old daughter is considered a child under Yapese custom. The decedent was a 19-year-old daughter who up to the time of her death continued to live with her parents in Yap and was therefore required to perform various household chores expected under custom of young female persons within families in Yap. The parents were accompanying their daughter en route to obtain medical services when she died, the daughter was therefore found to be a child within the meaning of wrongful death provisions of the Code of the FSM;⁶²
- Under Yapese custom a daughter in her adult years may be expected to provide certain services for her mother, therefore the loss of such customary services should be considered in calculating the mother's pecuniary injury resulting from her daughter's death;⁶³
- Since the judicial system and customary settlement in Chuuk are fundamentally different and serve different goals, the primary concern of customary settlement is therefore community harmony rather than compensation for loss, the use of one should not prevent the use of the other;⁶⁴ and
- Offers or acceptances of customary settlement should neither be used in court to prove liability on the part of the wrongdoer, nor be deemed the same as a legal release on the part of the plaintiff.⁶⁵

Court System

The judicial power of the national government is vested in the Supreme Court.⁶⁶

The Supreme Court is a court of record and the highest court in the FSM. It has original and exclusive jurisdiction in cases involving disputes on national laws or treaties and other domestic laws. The Supreme Court has both a Trial and an Appellate Division.

Each state in turn has their own Courts, which are also divided into a Trial and Appellate Division which are capable of hearing civil trials.

Status of International Law Instruments

Micronesia is not a party to the Warsaw Convention, Hague Protocol, Rome Convention, Guadalajara Convention, or the Montreal Convention.

Case Law

In *Semens v Continental Airlines Inc.*,⁶⁷ Benter Semens, a resident of Pohnpei and a citizen of the Federated States of Micronesia, sought compensation for injuries allegedly suffered on 28 July 1982 at the Pohnpei airport while, as a member of a ground handling crew, he was attempting to assist in unloading cargo from a Continental Air and Air Micronesia aircraft.

⁶² *Leeruw v FSM*, 4 FSM Intrm. 350, 366 (Yap 1990).

⁶³ *Ibid.*

⁶⁴ *Suka v Truk*, 4 FSM Intrm. 123, 128 (Truk S. Ct. Tr. 1989).

⁶⁵ *Ibid.*

⁶⁶ *Constitution of the Federated States of Micronesia* 1978 (FM) art XI s 1.

⁶⁷ [1985] FMSC 3; 2 FSM Intrm. 131.

The minutia of events leading to Siemens' alleged accident are not entirely relevant to the case at hand because the matter was not a trial, but rather a summary judgment hearing by Siemens' employer, Martin Enterprises, Inc (Martin), and the United Micronesia Development Association (UMDA) which was the entity with whom the ground handling contracts were made with the relevant carriers.

Two issues were relevant to the Supreme Court of the Federated States of Micronesia on the determination of this hearing: firstly, whether Martin and/or UMDA were liable for the plaintiff's injuries, and secondly, whether they could be exposed to the carriers' collective demands under the ground handling contracts for indemnity. Suffice to say – given the purview of this *Guide* to consider a carrier's liability – the first issue is not worthy of detailed synopsis but the result is directly relevant to how the Court dealt with the second issue. The plaintiff's case against Martin and UMDA was thrown out. Chief Justice King held (quite against what we feel it would have held in Australia) that because both Martin and UMDA exercised no control over the plaintiff, and because any alleged failure to act would not have prevented this incident in any event, that neither the employer, nor UMDA were liable. The Court also rejected the carriers' argument that Martin ought to be liable for engaging an incompetent employee in the plaintiff.

The second issue though as to the carriers' pursuit of protection under the ground handling contracts, and the manner in which the Court dealt with such contractual issues, is relevant here.

There were three ground handling agreements, running in a chain from Continental Air to Air Micronesia to UMDA to Martin. They all have similar language. There is a nearly identical clause in each, under the heading 'indemnification' whereby the party assuming ground handling obligations makes certain agreements concerning liability to its own employees; the clause read:

'[Martin] and its employees engaged in performing the services furnished hereunder shall under no circumstances be deemed to be the employees of Carriers or UMDA. [Martin] assumes full responsibility for any and all liability to its employees on account of injury or death sustained in the performance of this Agreement. Each party with respect to its own employees, accept (sic) full and exclusive liability for maintaining workmen's compensation or employer's liability insurance.'

The carriers claimed protection as third party beneficiaries of the indemnification clause in the ground handling agreements.

Chief Justice King made comments about the Judicial Guidance Clause which is discussed earlier in this Chapter; the Judicial Guidance Clause was

'intended to have pervasive effect on the decision making of the Court. This clause was the effort by the drafters to assure that judges would recognize that the Constitution represents the aspirations of the People of Micronesia to exercise "our inherent sovereignty" to "affirm our common wish to live together in peace and harmony, to preserve the heritage of the past" and "to protect the promise of the future" by becoming "the proud guardian of our own islands" now and forever.

'In the context of the disputes here concerning the meaning of a contractual provision and possible liability for negligence, I consider the Judicial Guidance Clause to impose the following requirements on the Court's analytic method. First, in the unlikely event that a constitutional provision bears upon the case, that provision would prevail over any other source of law. Second, any applicable Micronesian custom or tradition would be considered and the Court's decision must be consistent therewith. If there is no directly applicable constitutional provision, custom or tradition, or if those sources are insufficient to resolve all issues in the case, then the Court may look to the law of other nations. Any approach drawn from those other sources, however, must be consistent with the letter and spirit of the Constitution as well as principles of, and values inherent in, Micronesian custom and tradition.'

Chief Justice King found no relevant provision of the Constitution. While not asserted by the parties, Chief Justice King had an obligation to consider Micronesian custom and tradition of which it also found none. *'The business activities which gave rise to this lawsuit are not of a local or traditional nature. While there may have been traditional arrangements whereby one party agreed to handle or move goods for another, the setting and items handled by the parties to this arrangement are of a markedly nonlocal, international character. The work is done at the Pohnpei airport. The goods handled are baggage and freight typically engaged in international travel. Three of the four defendants have their principal place of business outside the Federated States of Micronesia. And finally, the contract reveals no intention that Micronesian custom or tradition was to serve as the guide for interpretation.'*

Accordingly, Chief Justice King was free to refer to the common law, with all parties referring his Honour to decisions of courts in the United States which fell on two sides of the fence:

- cases where agreements purporting to exculpate a party against the consequences of that party's own negligence are, while disfavoured, nonetheless not so contrary to the public interest that Courts refuse to enforce them;⁶⁸ or
- where Courts are *'traditionally skeptical of a claim that two parties agreed that one should protect the other against the other's negligence, and are reluctant to construe a contract to have that meaning, thereby casting the burden of negligent actions upon one not actually at fault, unless that meaning is very clearly expressed in the contract'*.⁶⁹

The Court held there was ambiguity in the clause such that various reasonable and practical alternative constructions were available to it. It therefore took it upon itself to construe the clause narrowly.

Chief Justice King felt the focus of the clause is on Martin's responsibility while performing services under the contract such that it made no reference to saving the carriers from their own negligence. Nor is there mention of the possibility that Martin might have no control over the actions of the person injured or the performance of the work. Chief Justice King was persuaded against the carrier's arguments because there was no clear statement that it was to be protected against its own negligence in the indemnity clause. *'Without such a clear and direct statement, a reasonably intelligent Micronesian citizen aware of the general circumstances of the parties would not have perceived the words used to require indemnification under the circumstances of this case.'* Accordingly, Martin and UMDA were successful in their summary judgment applications with the obvious corollary being the carriers were left to defend the plaintiff's claim.

⁶⁸ *Southern Pacific Co. v Morrison-Knudsen Co.*, 338 P2d 665; *Indemnity Ins. Co. v Koontz-Wagner Electric Co.*, 233 F2d 380.

⁶⁹ *Siemens v Continental Airlines, Inc.*, 2FSM Intrm 131.

PAPUA NEW GUINEA



LOCATION

Oceania, islands in the South-Western Pacific Ocean, between the Coral Sea and Indonesia.¹

Geographic Coordinates

6 00 S, 147 00 E.

Area

Total 462,840 sq km.

Elevation

Highest point: Mount Wilhelm 4,509 m.

Boundaries

Coastline 5,152 km.

Land Boundaries 820 km.

Capital

Port Moresby.

Independence

16 September 1975 (from the Australian-administered UN trusteeship).

Population

6,310,129 (July 2012 est).

¹ Central Intelligence Agency, The World Factbook

< <https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html> > at 9 August 2012.

INTRODUCTION

The Independent State of Papua New Guinea is located in the south-western Pacific Ocean, occupying the eastern half of the island of New Guinea and numerous offshore islands between the Coral Sea and Indonesia.

Papua New Guinea has a highly diverse ethnic population numbering some six million people, with over 850 indigenous languages and at least as many traditional societies. Its population is largely rural, with only 18% of its people living in urban centres.

Papua New Guinea is a constitutional hereditary monarchy and member of the Commonwealth of Nations.

Airports

Papua New Guinea’s primary international airport is Jacksons International Airport, Port Moresby. However, due to the country’s mountainous terrain and in order to access and service Papua New Guinea’s largely rural population, there are some 560 regional airstrips located throughout the country; the majority of these airstrips have soft (unpaved) runways as will be seen in the table below.

Airports with hard (paved) runways – Primary

Total: 17

- There are two paved runways extending from 2,438 m to 3,047 m in length;
- There are 14 paved runways extending from 1,524 m to 2,437 m in length;
- There are four paved runways extending from 914 m to 1,523 m in length; and
- There is one paved runway with less than 914 m length.

Airports with soft (unpaved) runways – Secondary

Total: 539

- There are nine unpaved airstrips extending from 1,524 m to 2,437 m in length;
- There are 63 unpaved airstrips extending from 914 m to 1,523 m in length; and
- There are 467 unpaved airstrips with less than 914 m length.

The following table outlines Papua New Guinea’s primary airports and a selection of secondary airports/airstrips:

Airport	Primary	Secondary
Alotau Airport – Gurney	•	
Awaba Airport		•
Baimuru Airport		•
Balimo Airport		•
Bosset Airport		•
Buka Airport		•
Daru Airport	•	
Efogi Airport		•
Fane Airport		•
Goroka Airport	•	
Hoskins Airport	•	
Itokama Airport		•

Airport	Primary	Secondary
Kagi Airport		•
Kamusu Airport		•
Kavieng Airport	•	
Kerema Airport	•	
Kikori Airport		•
Kiunga Airport		•
Kokoda Airport		•
Lihir Island Airport		•
Chimbu Airport	•	
Lae Nadzab Airport	•	
Lake Murray Airport		•
Momote Airport	•	
Losuia Airport		•
Madang Airport	•	
Manari Airport		•
Mendi Airport		•
Milei Airport		•
Misima Airport		•
Moro Airport		•
Mount Hagen Airport	•	
Nomad River Airport		•
Obo Airport		•
Ononge Airport		•
Girua Airport	•	
Jacksons International Airport – Port Moresby	•	
Tokua Airport – Rabaul	•	
Sasereme Airport		•
Suki Airport		•
Tabubil Airport		•
Tapini Airport		•
Tari Airport		•
Tufi Airport		•
Vanimo Airport	•	
Vivigani Airport	•	
Wabo Airport		•
Wanigela Airport		•
Wapenamanda Airport		•
Boram Airport – Wewak	•	
Wipim Airport		•
Woitape Airport		•

Civil Aviation in the Independent State of Papua New Guinea

Civil aviation in Papua New Guinea operates within a system established and maintained in accordance with the *Civil Aviation Act 2000* (PG) (the CAA). The primary object of the CAA is the enhancement of safety, security, efficiency and service quality in the aviation system so as to facilitate access to a sustainable air transport network that can contribute to the economic and social development of Papua New Guinea.² The CAA also establishes rules of operation for Papua New Guinea's civil aviation system and ensures compliance with Papua New Guinea's obligations under the various international aviation and meteorological agreements implemented by the Papua New Guinea government.³

Local Aviation Authorities

The Civil Aviation Authority of Papua New Guinea was established pursuant to s 18 of the CAA. The principal function of the Authority is to undertake activities that promote safety in civil aviation at a reasonable cost; to ensure the provision of air traffic services, aeronautical communications services and aeronautical navigation services; to ensure the provision of meteorological services and science; and, to own, operate, manage and maintain airports.

Domestic Carriers Liability Legislation

The *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG)⁴ regulates the liability of a carrier for death or injury to a passenger(s) and applies to *'the carriage of a passenger who is, or is to be, carried in an aircraft:*

- *being operated by the holder of an airline licence or charter licence in the course of commercial transport operations; or*
- *in an aircraft being operated between Papua New Guinea and another country, not being carriage to which the Warsaw Convention, Hague Protocol or the Guadalajara Convention applies*.⁵

Death & Injury

Where the carriage of a passenger falls within the scope of the Act,⁶ the carrier will be held liable for the death of a passenger or any personal injury suffered by that passenger if it resulted from an accident that took place on board the aircraft or in the course of any operations of embarking or disembarking.⁷

The liability of the carrier is limited for injury or death to K30,000 or such higher sum as specified in the contract of carriage;⁸ this limitation is subject to the regulations relating to passenger tickets.⁹

However, the liability limit does not operate so as to exclude the liability of a carrier to: (a) indemnifying an employer of a passenger or any other person in respect of any liability or payments made by the employer or another person by way of workers' compensation; or (b) to pay contribution to a tortfeasor who is liable in respect of the death of, or injury to, the passenger.¹⁰ While the Act makes provision to ensure certain liabilities are not excluded, it does

² *Civil Aviation Act 2000* (PG) s 2(a).

³ *Civil Aviation Act 2000* (PG) s 2(b), 2(c).

⁴ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt III.

⁵ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 23.

⁶ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt III.

⁷ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 24.

⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 27.

⁹ At this time, there are no Regulations in force which pertain to passenger tickets under pt III of the Act.

¹⁰ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 33 (a) and (b).

not operate to increase the limit of liability of a carrier in respect of the injury or death of a passenger beyond the fixed amount (i.e. K30,000),¹¹ although costs and interest are in addition to the amount fixed. Examples of how costs are determined follow at the end of this chapter.

The right of a person to bring a claim for death, injury or destruction, damage or loss of baggage is extinguished if the claim is not brought within two years after the date of arrival of the aircraft at the destination or in the event the aircraft did not arrive at its destination: (a) 'the date on which the aircraft ought to have arrived at the destination';¹² or (2) 'the date on which the carriage stopped'.¹³

Injury

The liability of the carrier for personal injury¹⁴ is in substitution for any civil liability of the carrier under any other law in respect of the injury.¹⁵ The case of *Susanna Undapmaina by the next friend Eriwiye Daena v Talair Pty Limited*¹⁶ illustrates this point in a claim for personal injury arising from an aviation accident.

Susanna Undapmaina, (the plaintiff) brought a claim for damages against Talair Pty Limited (the defendant) for personal injuries sustained in an aircraft accident on 23 December 1978. The plaintiff was a passenger on an aircraft, owned and operated by the defendant which was on a flight from Goroka to Marawaka. The aircraft crashed in the Highlands area killing the pilot and seven passengers, including the plaintiff's father and sister. The plaintiff was the sole survivor and was nine years old at the time of the accident.

The plaintiff sustained injuries to her head and leg, including a three inch transverse scalp laceration and fractures of the left femur and right tibia. Further, the plaintiff suffered continuing mental distress, psychological instability and anxiety. The plaintiff's mother, Eriwiye Daena, filed a claim in the Papua New Guinea National Court of Justice on the plaintiff's behalf.

The plaintiff's counsel submitted that the plaintiff should receive separate awards in relation to each physical injury. However, the Court rejected counsel's submission as the injuries occurred at the same time and were treated over the same period of time. In relation to the psychological injuries sustained by the plaintiff, the defendant's counsel submitted the injury was not pleaded in the plaintiff's claim and should therefore be discounted. However, the Court found that '*nervous shock, if it accompanies physical injuries, qualifies for damages as part of the pain and suffering*'. The Court recognised the whole circumstances of the crash, in particular the death of her father and sister had resulted in the plaintiff suffering psychological injuries beyond the normal state of grieving. Accordingly, the Court awarded the plaintiff the sum of K10,000 for general damages including pain, suffering and loss of amenities.

The Court rejected the plaintiff's claim for future medical and associated expenses to be incurred with a view to alleviating the plaintiff's neurosis anxiety state and her fear of air travel. In this regard, the Court found in favour of the defendant on the basis that firstly, the plaintiff's condition could not be described as neurosis and secondly, the plaintiff had flown since the crash.

The Court recognised that in relation to special damages, the cost of medical treatment was free. However, the Court awarded the plaintiff K34 for the cost of a fare from Goroka to Marawaka, and awarded the plaintiff's mother K246 for the expenses incurred to attend to the plaintiff while in hospital. Accordingly, the Court ordered the defendant pay a total of K10,834 into the Court to be invested on the plaintiff's behalf until she turned 21 years of age.

¹¹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 33.

¹² *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 30(a).

¹³ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 30(b).

¹⁴ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt III.

¹⁵ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 32.

¹⁶ [1981] PNGLR 559.

Death

The liability of the carrier for the death of a passenger (including the injury that resulted in the death) is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.¹⁷

Damages recoverable for the death of a passenger include (a) loss of earnings or profits up to the date of death; and (b) funeral, medical or hospital expenses paid or incurred by the passenger before their death or by their personal representative.¹⁸ However, in awarding damages a court is not limited to the financial loss resulting from the death of the passenger.¹⁹

The liability is enforceable for the benefit of those members of the passenger's family who have sustained damage as result of the death of the passenger.²⁰ The action to enforce the liability may only be brought by the personal representative of the passenger or the person for whose benefit the liability is enforceable, i.e. the family member.²¹

Importantly, only one claim can be pursued in respect of the death of any one passenger and that claim is to be for the benefit of all persons who have sustained damage as a result of the death of the passenger.²² In the event of a dispute as to the distribution of the liability, the court may make any order it directs regarding the proportionate division of the liability.²³

Finally, the following people will be deemed 'family' for the purpose of recovering damages for a liability in respect of the death of a passenger: a wife or husband; parents; step-parents; grandparents; brothers and/or sisters; half-brothers and or half-sisters; children; step children; grandchildren; an illegitimate child will be treated as the legitimate child of his mother or reputed father and an adopted person will be treated as the legitimate child of his adopters.²⁴

Contributory Negligence

A reduction on account of contribution is allowed in circumstances where the carrier proves the damage was '*caused or contributed to by the negligence of the passenger*'.²⁵

In assessing the damages recoverable, the Court must first determine the damages that would have been recoverable if there was no limit on the amount of the damages fixed by or in accordance with the Act,²⁶ and if there had been no negligence on the part of the passenger.²⁷ Once this process has been completed, the Court must then reduce those damages to such extent as the Court thinks '*just and equitable having regard to the share of the passenger in responsibility for the damage*'.²⁸

In the event the damages, as reduced, exceed the maximum allowable liability of the carrier, the Court shall further reduce the damages to that maximum amount.²⁹

¹⁷ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(2).

¹⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(4).

¹⁹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(6).

²⁰ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(3).

²¹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(5).

²² *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(5).

²³ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(8).

²⁴ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 31(3).

²⁵ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 35(1).

²⁶ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt IV.

²⁷ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 35(2).

²⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 35(3).

²⁹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 35(4).

Baggage and Cargo

Where the Act applies to the carriage of a passenger,³⁰ the carrier will also be liable for damage sustained in the event of the destruction or loss of the baggage of the passenger. However, the liability of the carrier for destruction or loss of baggage³¹ is limited as follows:

- Baggage of any one passenger, that is or includes registered baggage, is limited to the sum of K300 or such higher sum as specified in the contract of carriage,³² subject to the regulations relating to baggage checks.³³
- Baggage of any one passenger, other than registered baggage, is limited to the sum of K30³⁴ or such higher sum as specified in the contract of carriage. This provision is not subject to any regulations relating to baggage checks.

Baggage

For the Act to apply, the occurrence that causes the destruction or loss of baggage must take place during the period of the carriage by air unless the carrier proves that: (a) *'it and/or its agents took all necessary measures to avoid the destruction or loss'*;³⁵ or (b) *'it was impossible to take such measures'*.³⁶

Except where the carrier has been fraudulent, a passenger is precluded from pursuing a claim against a carrier in respect of destroyed or lost baggage, unless the passenger or a person acting on behalf of the passenger has made a written complaint, delivered to the carrier by post or in person within the following time periods:

- For loss or destruction of registered baggage, or loss or destruction of part of an item of registered baggage, within three days after the date of receipt of the baggage or the remainder of the item of baggage;³⁷ or
- For loss or destruction of the registered baggage as a whole, within 21 days after the date on which the baggage should have been placed at the disposal of the passenger;³⁸ or
- For loss or destruction of baggage other than registered baggage, within three days after the date on which the carriage of the passenger ended.³⁹

However, if the carrier can provide evidence of receipt of registered baggage, without complaint from the person entitled to receive delivery, it will be accepted that the baggage was delivered in good condition and in accordance with the contract of carriage.

'The period of the carriage by air' in the case of baggage is *'the period during which the passenger is on board the aircraft or is in the course of any of the operations of embarking or disembarking'*⁴⁰ and in relation to *'registered baggage'* is the *'period during which the baggage is in the charge of the carrier whether on board the aircraft or elsewhere'*.⁴¹

³⁰ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt IV.

³¹ Baggage is defined in s 22 as *'baggage, personal effects or other articles, not being registered baggage, in the possession of the passenger, or in the possession of another person (being a person accompanying the passenger, or a servant or agent of the carrier) on behalf of the passenger, while the passenger is on board the aircraft for the purpose of carriage to which this Part applies or during the course of any of the operations of embarking or disembarking'*.

³² *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 27(2).

³³ At this time, there are no Regulations in force which pertain to baggage checks under pt III of the Act.

³⁴ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 27(3).

³⁵ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 25(1)(a).

³⁶ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 25(1)(b).

³⁷ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 26(2)(a).

³⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 26(2)(b).

³⁹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 26(2)(c).

⁴⁰ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 25(2)(a).

⁴¹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 25(2)(b).

In the case of ‘registered baggage’, if the carrier proves the baggage was available for collection by the passenger within a period of 12 hours after the arrival of the aircraft, the period of the ‘carriage by air’ will not extend beyond that preliminary 12 hour period.

The case of *Robsonson Urai v Air Niugini & Guard Dog Security Services Ltd*⁴² illustrates how the PNG Courts have applied the Act in respect of baggage and cargo claims.

Robsonson Urai (the plaintiff) brought a claim against Air Niugini (the first defendant) and Guard Dog Security Services Ltd (the second defendant) for damages arising from a loss of goods. The plaintiff contracted with the first defendant for the consignment of three boxes on 29 January 2008 destined for Wewak from Port Moresby. Two of the boxes, which contained computer sets, were under the custody of the first defendant in its cargo shed at Boram Airport when they were stolen. The second defendant had been contracted by the first defendant to provide security at this cargo shed. However, at the time of the theft, one of the two security guards assigned to the building was not at his post.

The plaintiff filed a claim in the District Court of Justice alleging both defendants were negligent in not providing better security to prevent his computer sets being stolen. The first defendant’s counsel submitted that under the terms of contract of carriage, the first defendant cannot be held liable for the loss of the plaintiff’s goods: ‘*the conditions of carriage on the consignment note and in particular clauses 2 and 4 exempt Air Niugini from any liability for the loss of or damage to goods by any acts of negligence by Air Niugini’s employees and agents*’. Counsel further submitted that even if the first defendant was liable, its liability was limited to K300. Counsel for the first defendant also argued that the first defendant is entitled to be indemnified by the second defendant because of the guard’s failure to be at his assigned post.

The Court examined the contract of carriage and determined that ‘*as long as the cargo is under the custody of Air Niugini, Air Niugini, including the Guard Dog Security firm, owes a duty of care to safeguard cargo under the contract of carriage until the owner signs and collects them*’. Accordingly, the Court held the duty had been breached and the first defendant was guilty of the negligence committed by the second defendant’s failure to provide adequate security.

The Court then considered whether the exemption clauses would relieve the defendants of liability. The Court recognised that ‘*notwithstanding clauses 2 and 4, the consignment note also provided a clause limiting Air Niugini’s liability for loss of cargo that was consigned*’. This was found in clause 5 which provided that each package was insured free of charge against theft for its actual value or K70, whichever is less. The Court found the plaintiff was entitled to enforce clause 5 against the first defendant for the loss, or he may resort to section 27 of the Act. In relation to whether the second defendant could find protection under the terms of carriage from liability, the Court held that as the second defendant was not privy to the contract, it could not rely on the limitation on liability. However, ultimately the Court found that ‘*even though the second defendant committed the negligent act, the first defendant . . . would be responsible to make good the loss*’. The Court held the first defendant liable to pay damages for the loss of the plaintiff’s goods.

Cargo

The PNG Act⁴³ briefly deals with the claims in respect of cargo by noting the regulations may provide for applying the provisions of the Warsaw Convention, the Hague Protocol and the Guadalajara Convention and any of the provisions of the Act to the carriage of cargo, being carriage in relation to which, if it were the carriage of passengers, pt III of the Act would apply.⁴⁴

⁴² [2008] PGDC 131.

⁴³ *Civil Aviation (Aircraft Operators’ Liability) Act 1975* (PG) pt IV.

⁴⁴ *Civil Aviation (Aircraft Operators’ Liability) Act 1975* (PG) s 37(1).

However, no adaption or modification under sub-s (1), of the provisions of art 22 of the Warsaw Convention (as replaced), has the effect of limiting the liability of the carrier to a sum less than the sum to which its liability would have been limited if those provisions were applied without adaption or modification.⁴⁵

Surface Damage

The Act⁴⁶ also applies to all claims for surface damage arising from damage by aircraft which has occurred in circumstances where the provisions of the Rome Convention are not met.

The Act applies to an aircraft registered in PNG that, while being moved between PNG and another country, is in flight in PNG:

- in the course of a journey between a place in PNG and a place outside PNG;⁴⁷ or
- in the course of a journey between two places in PNG, if passengers or goods are being carried in the aircraft in part performance of a contract for their carriage by a single carrier between a place in PNG and a place outside PNG.⁴⁸

The Act also applies to an aircraft, not being an aircraft registered in PNG or in a contracting State,⁴⁹ which is being moved between PNG and another country and is in flight in PNG.⁵⁰

An aircraft will be 'in flight' *'from the moment when power is applied for the purposes of take-off until the moment when the landing run ends'*.⁵¹

In addition to the above, the CAA also provides that where material damage or loss to property on land or water is caused by an aircraft *'in flight, taking off, landing or alighting or by any person or article in or falling from any such aircraft, damages shall be recoverable from the owner of the aircraft'*.⁵²

Where the alleged damage or loss is caused in circumstances in which:

- damages are recoverable from the owner of the aircraft in respect of the damage or loss by virtue only of the forgoing provisions of this subsection; and
- some person other than the owner is liable to pay damages in respect of the damage or loss;

the owner shall be entitled to be indemnified by that other person against any claim in respect of the damage or loss.⁵³ Proof of negligence, intention or another cause of action is not required to establish liability against the aircraft's owner or some other person as outlined above.⁵⁴

⁴⁵ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 37(2).

⁴⁶ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) pt IV, div 3.

⁴⁷ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 46(1)(a).

⁴⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 46(1)(b).

⁴⁹ A contracting state as defined by the international conventions.

⁵⁰ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 46(2).

⁵¹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 46(3).

⁵² *Civil Aviation Act 2000* (PG) s 320(3).

⁵³ *Civil Aviation Act 2000* (PG) s 320(4).

⁵⁴ *Civil Aviation Act 2000* (PG) s 320(3).

The only exception is where the damage or loss alleged was caused by or contributed to by the fault of the person by whom the damage was suffered.⁵⁵ In that situation, an apportionment of liability shall be applied⁵⁶ and any damages recoverable in respect of the contributory negligence shall be reduced to such extent as the Court thinks *'just and equitable, having regard to the claimant's share in the responsibility for the damage'*.⁵⁷

In circumstances where an aircraft has been hired by its owner to another person for a period of greater than 28 days, the provisions outlined above will apply as though every reference to the owner is a reference to the person to whom the aircraft has been hired.⁵⁸ In this situation, it is however necessary that no pilot, pilot-in-command, or operative member of the crew of the aircraft be in the employment of the aircraft owner if liability for any alleged damage or loss is to be transferred to the hirer.⁵⁹

System of Law

Papua New Guinea is a common law country.

Application of Customary Laws

Customary law is formally recognised by the Constitution as a source of law.⁶⁰

Assessing Damages for Plaintiffs Living a Part-Subsistence Lifestyle

Damages for Injury

Due to political, social and geographical demographics many Papua New Guineans continue to live in a traditional village situation which may comprise a part subsistence lifestyle. This presents a significant challenge for the PNG Courts in awarding damages for death and personal injury caused by a civil wrong against a person/s living in traditional village situations.

A part subsistence lifestyle has been held by the PNG Courts to apply to *'a person who produces his or her own food and collects firewood and other items to live a basic lifestyle. Over and above this, there is the cash income gained from the sale of vegetables and coffee, which are surplus to the subsistence needs of the family'*.⁶¹

In view of this, it can be seen that the Papua New Guinean common law has developed a system which recognises and compensates people living part subsistence lifestyles in accordance with the impact their injuries/death would have for a person in a like situation.

⁵⁵ *Civil Aviation Act 2000* (PG) s 320(3); 'Fault' includes *'negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from the Wrongs (Miscellaneous Provisions) Act 1975 give rise to the defence of contributory negligence'*; *Wrongs (Miscellaneous Provisions) Act 1975* (PG) s 320(9).

⁵⁶ *Civil Aviation Act 2000* (PG) s 320(5) – see further Ch 297, s 40 of the *Wrongs (Miscellaneous Provisions) Act 1975* (PG).

⁵⁷ *Wrongs (Miscellaneous Provisions) Act 1975* (PG) s 40(1).

⁵⁸ *Wrongs (Miscellaneous Provisions) Act 1975* (PG) s 320(8).

⁵⁹ *Wrongs (Miscellaneous Provisions) Act 1975* (PG) s 320(8).

⁶⁰ *Constitution of Papua New Guinea 1975*, sch 2.1(1).

⁶¹ *Miles J, Kaka Kopun v State of Papua New Guinea* [1980] PNGLR 557, 560.

To be able to effectively participate in village life in PNG, a person must have a high degree of fitness and be fully able to use all of their limbs so that they may actively participate in the manual labour aspects of village life.⁶² In addition to the manual labour components of village life, there are also a number of traditional obligations imposed on villagers such as contributions to bride price payments, compensation and other exchanges (such as pigs and other valued commodities to build and establish good relationships between villagers/clans).⁶³

The importance of these items has been noted by the PNG Courts in the decisions of *Kaka Kopun*⁶⁴ and *Raquel v Smerdon*⁶⁵ where an injury or death which impacts on a person's ability to fully participate in all aspects of village life may have serious consequences for that person or the family of the deceased.

In *Kaka Kopun*, as a result of an injury to his left arm and wrist, the plaintiff was unable to grip the handle of a spade or hold an axe. His situation was exacerbated by a childhood injury to the other hand which deprived his full use of same. This made manual work in the village virtually impossible for the plaintiff.⁶⁶ Judge Miles noted in this case that the effect of the plaintiff's injury was devastating.⁶⁷ In the case of *Raquel v Smerdon*, Judge Prentice noted that '*a person who is used to a full range of village activities including hunting, gardening, fishing, carrying of timber, house construction and the like would find that the loss of the use of the arm or a leg could cause a more serious invasion of his or her life than a similar loss to an urban dweller*'.⁶⁸

The PNG Courts have also acknowledged the effect that a personal injury or the death of a family member may have on a person's social status and standing in their village community. In *Kaka Kopun*, Judge Miles stated that '*the injury to the plaintiff's hand, aggravated by a pre-existing disability to his other hand, meant that the plaintiff could not work in the gardens, do any work on his house or even be able to cook for himself. This reduced the plaintiff to a person of no standing in the community*'.⁶⁹

In addition to the issue of compensation for the items identified above, the PNG Courts have also considered the impact, and assessment, of economic loss to a village person living a part-subsistence lifestyle. In a number of PNG cases, the Courts have heard witness evidence from coffee experts called by plaintiffs' Counsel at trial and, in view of that evidence, damages have been awarded to local village people for economic loss. The following are examples of case law on point:

- Judge Miles held in the *Kaka Kopun* case that the plaintiff's combined loss of income (including food production) amounted to K30 per week at the time of the loss. In making this decision, the Judge accounted for the '*full impact of the loss of income resulting from the plaintiff being unable to work in his garden*'⁷⁰ and hence his ability to earn an income from which he could obtain the means to procure food or to support himself.⁷¹
- In the case of *Seke Opa*⁷² the court heard evidence from a coffee expert who assessed how much of the plaintiff's coffee derived income had been reduced as a result of the plaintiff's injuries and the subsequent inability by the plaintiff to tend his crops.⁷³

⁶² Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 3.

⁶³ Ibid.

⁶⁴ [1980] PNGLR 557.

⁶⁵ Unreported Supreme Court Judgment, No 706, 1972.

⁶⁶ Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 3.

⁶⁷ [1980] PNGLR 557.

⁶⁸ Unreported Supreme Court Judgment, No 706, 1972.

⁶⁹ [1980] PNGLR 557, 561.

⁷⁰ Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 4.

⁷¹ [1980] PNGLR 557, 563.

⁷² *Seke Ope v State of Papua New Guinea* [1987] PNGLR 469.

⁷³ [1987] PNGLR 469, 471.

- In *Pangis Toea*,⁷⁴ the Judge fully assessed the plaintiff's economic situation including consideration of evidence that prior to her injuries, the plaintiff had assisted her husband in their coffee gardens and that after her husband had made a sale, he would give the plaintiff K20 by way of contribution for her efforts. The Judge confirmed that this should have been accounted for in assessing the plaintiff's economic loss and the court made an allowance of K80 per year loss.⁷⁵

These examples demonstrate the propensity of the PNG Courts to ensure that any given plaintiff is extended the opportunity to obtain compensation for economic loss, irrespective of whether those losses are not of the kind typically seen in Australian claims and case law. The cases outlined above demonstrate that the PNG Courts will, where possible, rely on local expert knowledge and custom as evidence of things such as the market prices, land fertility and lifespan in relation to the growing and harvesting of crops such as coffee and wage rates for income derived from part-subsistence enterprises such as coffee growing and market garden produce.

Following on from the issue of economic loss, the case law also demonstrates the PNG Courts preparedness to make awards of damage for items such as paid manual labour in circumstances where an injury sustained by a plaintiff precludes that person from tending to their source of income, for example coffee plants or market gardens. In *Kupil* the Judge found that due to the plaintiff's injuries he was unable to contribute to the manual tasks in the village and as such, awarded the plaintiff K15 per week (based on labour hire rates current at the time of the case) to employ a labourer to do the manual work, which the plaintiff could no longer do.⁷⁶

Damages for Death/Dependency

For people living a part-subsistence lifestyle, the death of a family member, can severely impact the surviving family members, together with the village community as a whole. For the spouse, children or parents of a deceased person, quantifying damages for the loss of the deceased family member can be difficult in the absence of traditional quantum indicators typically seen in Australian case law. In the PNG context, it is further complicated by gender.

The following case law provides examples of the PNG Court's approach to quantification of claims for death/dependency in respect of the death of fathers, mothers and deceased children:

- In *Koko v Motor Vehicles Insurance (PNG) Trust*⁷⁷ the Court held that in a dependency claim for the loss of a mother, no damages were payable to the children dependents for the loss of their mother's love and affection nor for the grief they suffered.⁷⁸ The Court did however award damages for the pecuniary benefit that the children might have expected to enjoy had their mother not been killed.⁷⁹
- In *Nolnga v Motor Vehicles Insurance (PNG) Trust*⁸⁰ the husband and father of three children brought a claim for dependency arising from the death of his wife in a motor vehicle accident. Prior to her death the wife had contributed to the family by generating income from pigs, coffee and operating a beer tavern. After the death of the wife, the plaintiff was required to employ labourers to tend to the deceased wife's gardens and tavern in addition to paying his mother for extra help with the children.⁸¹

⁷⁴ *Pangis Toea v Motor Vehicles Insurance (PNG) Trust and the Independent State of Papua New Guinea* [1986] PNGLR 294.

⁷⁵ [1987] PNGLR 469, 479.

⁷⁶ *Aundak Kupil v State of Papua New Guinea* [1983] PNGLR 350.

⁷⁷ [1988] PNGLR 167.

⁷⁸ Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 9.

⁷⁹ Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 10.

⁸⁰ [1991] PNGLR 436.

⁸¹ *Ibid.*

The Court accepted the plaintiff's wife was a very industrious person and for past economic loss awarded the plaintiff K2,000 per year (total of K9,800 at time of trial).⁸² However, for future economic loss, the Court took account of the fact that in the 'social context of Papua New Guinea, it was more than likely the plaintiff would take another wife and so would suffer less financial loss'. On that basis the Court allowed K5,000 for future economic loss.⁸³

In relation to the children of the deceased, the Court found the youngest child in the family (aged 11) was entitled to K1,000 for the increased risk of orphanhood and that the plaintiff was entitled to K2,512 for loss of his wife's share of support and care of the children.⁸⁴

- The case of *Pike Dambe v Peri and the State of Papua New Guinea*⁸⁵ pertains to the unjustified death of the plaintiff's husband when he was shot by a police officer during a police operation in the area where the plaintiff's family lived. The plaintiff claimed damages for the wrongful death of her husband including general damages and economic loss.⁸⁶ Prior to his death, the plaintiff's husband had planted coffee and vegetable gardens providing his family with an income of K800 per year.⁸⁷

The Court found that the plaintiff's husband had performed all of the duties expected of him including physical work in the family's gardens and that his death would significantly reduce the production of the gardens and the resulting income for the plaintiff. In view of this, the Court awarded the plaintiff K300 per year for economic loss.⁸⁸

An additional allowance of K3 per week to each of the plaintiff's three children and K5 per week to the plaintiff was provided for the loss of the contribution of their father in undertaking all heavy manual activities for the benefit of the family, which was deemed to include items such as breaking the ground for gardening, construction of drains around the home, overseeing the interests of the family in fulfilling community and family obligations, collecting and breaking firewood etc.⁸⁹

Finally, payment of the 'usual sum of K1,500 as customary personal representative for the estate of the deceased for the loss of expectation of life' was also provided by the Court.⁹⁰

- In *Seni Ela v State of Papua New Guinea*⁹¹ the plaintiff claimed damages on behalf of herself and one child for the death of her husband in a motor vehicle accident. The plaintiff's husband was a village farmer cultivating coffee and cash crops and the sole supporter of his wife and child.⁹² The Court found the income which the family derived from the coffee and vegetable gardens amounted to K400 per year.⁹³ The Court specifically indicated the non-pecuniary contributions made by the plaintiff's husband, including things such as the construction of gardens, fences and home maintenance, should not be forgotten.⁹⁴

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ [1993] PNGLR 4.

⁸⁶ Tennent, D 'The Awarding of Damages to People Living a Part Subsistence Lifestyle in the Highlands of Papua New Guinea' (1998) *Melanesian Law Journal* 10.

⁸⁷ [1993] PNGLR 4.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ [1988–89] PNGLR 653.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

The Court allowed for a figure of K5.50 per week for the plaintiff for a period of 33 years (K5,445) and K5.50 per week for the plaintiff's child for a period of 11 years until 18 years of age (K2,695).⁹⁵

- In the case of *Mina Uokare v The Independent State of Papua New Guinea*⁹⁶ the parents of an 18-year-old subsistence village farmer brought a claim for loss of dependency arising from the death of their son in a motor vehicle accident. The deceased son was not the only child of the family, but the Court noted the deceased did assist with the support of his parents.⁹⁷

While acknowledging that it was difficult to quantify the claim and the period of time for which the claim should run, the Court did conclude that while the parent plaintiffs were receiving support at the time of their son's death, that support would increase as they got older.⁹⁸

In a somewhat arbitrary manner the Court calculated the plaintiff's loss on the basis of K4 per week for ten years with a deduction of 10% for early payment of the funds. This amounted to a total judgment of K3,256 in favour of the plaintiffs.⁹⁹

- In the case of *Simin Dingi v Motor Vehicles Insurance (PNG) Trust*¹⁰⁰ the plaintiff's teenage daughter was killed in a motor vehicle accident. In assessing the plaintiff's losses arising from the death of his daughter, the Court made an allowance for the loss of potential bride price payments for his daughter. In making an assessment as to the appropriate sum, the Court was guided by evidence as to the average bride price paid in the Gumine area of Simbu.¹⁰¹
- Finally, in the case of *Inabari v Sapat and State of Papua New Guinea*¹⁰² the Court considered the issue of reasonable funeral costs, noting that Papua New Guinea custom dictates a funeral is regarded as a major occasion.

The Court commented that according to Papua New Guinean culture, the standing of the person in the community is relevant and many more people will come from far and near to pay their respects at the funeral if the person was of note in the community. The Court further noted the length of the period of mourning may also be determined by the status of the dead person in the community.

In determining what reasonable funeral costs are, the Court heard evidence from an elder in the plaintiff's village as to the customs in his area in relation to funeral arrangements, obligations and ceremonies. The elder confirmed the deceased's parents were required to provide for (including catering) all mourners that come to pay their respects and the mourning period is up to approximately two weeks long.¹⁰³

The Court ultimately made allowances for the purchase of the coffin; funeral clothes; labour for grave digging and associated labour and supply costs; food for 14 days after the burial on the basis of customary obligation; telephone costs; vehicle hire. The total amount allowed by the Court for funeral expenses was K2,406.¹⁰⁴

⁹⁵ Ibid.

⁹⁶ [1988–89] PNGLR 655.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ [1994] PNGLR 385.

¹⁰¹ Ibid.

¹⁰² [1991] PNGLR 427.

¹⁰³ Ibid.

¹⁰⁴ [1991] PNGLR 427.

The cases outlined above, while not specific to carriers liability, give an indication of the items which the Papua New Guinean Courts consider relevant in assessing a plaintiff's claim for loss of dependency (including funeral expenses). Such items could easily be imported into a situation where there is a death arising from an aviation incident and as such, consideration of these items should be had when assessing the potential quantum of a demand and/or claim on a carrier following an aviation incident in Papua New Guinea.

Assessment of Costs and Interest

*David Kapi v Pacific Helicopters*¹⁰⁵

In *David Kapi v Pacific Helicopters*, Judge Davani provided reasons for the ruling he held on 27 August 2002.

The defendant's and plaintiff's applications both proposed the Court make a judgment in favour of the plaintiff with the judgment amounting to the statutory maximum of K30,000. Disputes arose as the defendant's application proposed the plaintiff's Statement of Claim be struck out, with interest and costs being awarded to the defendant. The plaintiff on the other hand proposed the defendant's application be dismissed, and damages be awarded to the plaintiff because the defendant was negligent, or in accordance with the *Civil Aviation (Aircraft Operators' Liability) Act*.

The defendant relied on ch 292, s 27(1) of the Act which stated that, if a passenger sustains injuries or dies, a carrier is liable and must pay a sum of no more than K30,000 to each injured or dead passenger. The defendant did not dispute whether it should have paid the plaintiff the statutory maximum of K30,000. However, the defendant did dispute the amount of interest and costs that should be awarded to the plaintiff.

The Court stated that, *'[i]f the defendant is prepared to settle, the plaintiff should accept that'*. The defendant acted in good faith and this was demonstrated by K30,000 being paid into the Court. As such a payment illustrates an official settlement offer being recorded, the Court stated that if the *'plaintiff who refuses to accept the money and, at trial, recovers no more than the amount paid in, must bear both his and the defendants costs from the date of payment'*.

The Court ordered that K30,000 be awarded to the plaintiff. The Court stated that costs would be determined when an 'open offer' had been made. Therefore, any offers made between the parties that were 'without prejudice' were not considered 'open' offers as they were inadmissible in court.

The Court held the plaintiff be awarded K30,000; that interest be calculated from the judgment date to the payment date, with it being calculated at 8%;¹⁰⁶ and the defendant pay costs from the filing date of the application (23 March 2000) to when the defendant made an 'open offer', which occurred when the defendant paid K30,000 into the court (27 May 2002).

*Costello v Talair Pty Ltd*¹⁰⁷

In *Costello v Talair Pty Ltd* the plaintiff, Costello was a passenger on an aircraft that was involved in an accident on 20 March 1980. The plaintiff sustained multiple injuries from the aircraft accident and the plaintiff's rescue took place twenty-four hours after the aircraft accident had occurred. The defendant, Talair Pty Ltd, was the aircraft's carrier.

The plaintiff's injuries included shock; injuries to the ear, eye, shoulder, ribs and sternum; as well as burns and cuts to his body and face. The plaintiff had also sustained a 'fear of flying'. The plaintiff's injuries inhibited the amount of hours he could work and the amount of sport he could play.

¹⁰⁵ [2002] PGNC 53.

¹⁰⁶ *Judicial Proceedings (Interest on Debts and Damages) Act 1962* (PG).

¹⁰⁷ *Costello v Talair Pty Ltd* [1985] PNGLR 61 N503.

In order for him to return to Australia, the plaintiff (who was considered a 'stretcher patient') had to travel on multiple planes and be accompanied by a nurse or doctor at all times. The plaintiff was treated at the Royal North Shore Hospital in Sydney, and was required to return to the hospital on multiple occasions to undergo surgeries.

The defendant admitted liability which was capped at K30,000.¹⁰⁸

The Court awarded the plaintiff general damages which amounted to the sum of K18,000. Approximately half of the awarded amount consisted of 'out-of-pocket medical expenses' which included payment for the charter flight to Port Moresby; the flight to Sydney; the doctor's return flight from Sydney to Port Moresby (economy class, not first class); replacement pair of glasses; medical treatment by doctors; lost suitcase; economic loss; and monies as reimbursement to the Plaintiff's workers compensation insurer. The Court stated '*the defendant only [had] to pay expenses reasonably incurred*'.

The Court admitted that awarding interest to the plaintiff would result in the total amount being awarded to the plaintiff exceeding the statutory maximum of K30,000. The court considered ss 24 and 27 of the *Civil Aviation (Aircraft Operators' Liability) Act 1975* noting a carrier which '*is liable for damage sustained*'¹⁰⁹ results in the carrier being '*liable in damages for injury or loss sustained by the passenger*'. Therefore, as interest and costs are incurred as compensation for the plaintiff '*being kept out of his money*' and for '*pursuing his claim in the Court*', and are not incurred by the aircraft accident causing 'injury or loss' to the plaintiff, the Court awarded interest and costs in favour of the plaintiff.

The Court held:

- The plaintiff be awarded general damages and special damages which amounted to the sum of K31,411.44 (inclusive of interest); and
- The plaintiff be awarded special damages which amounted to the sum of AU\$4,596.48 (inclusive of interest).

Court System

Papua New Guinea's independent judicial system consists of the Supreme Court of Justice, the National Court of Justice, and local and village courts. The Supreme and National Courts are comprised of the Chief Justice, the Deputy Chief Justice and other judges. The National Court has unlimited jurisdiction, which is exercised by a single judge. It deals with the majority of civil and criminal cases and also hears appeals from lower courts. The Supreme Court is the final court of appeal and has original jurisdiction on constitutional matters. It sits as a bench of three or five judges.

Other courts may be established under section 172 of the Constitution. This may include courts intended to deal with matters primarily by reference to custom or in accordance with customary procedures.

Status of International Law Instruments

On 6 November 1975, the Government of Papua New Guinea informed that it considered itself to be bound by the Warsaw Convention of 1929. Before it became independent (on 16 September 1975), acceptance of the Convention was effected on behalf of its territory by Australia.

¹⁰⁸ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 27.

¹⁰⁹ *Civil Aviation (Aircraft Operators' Liability) Act 1975* (PG) s 24.

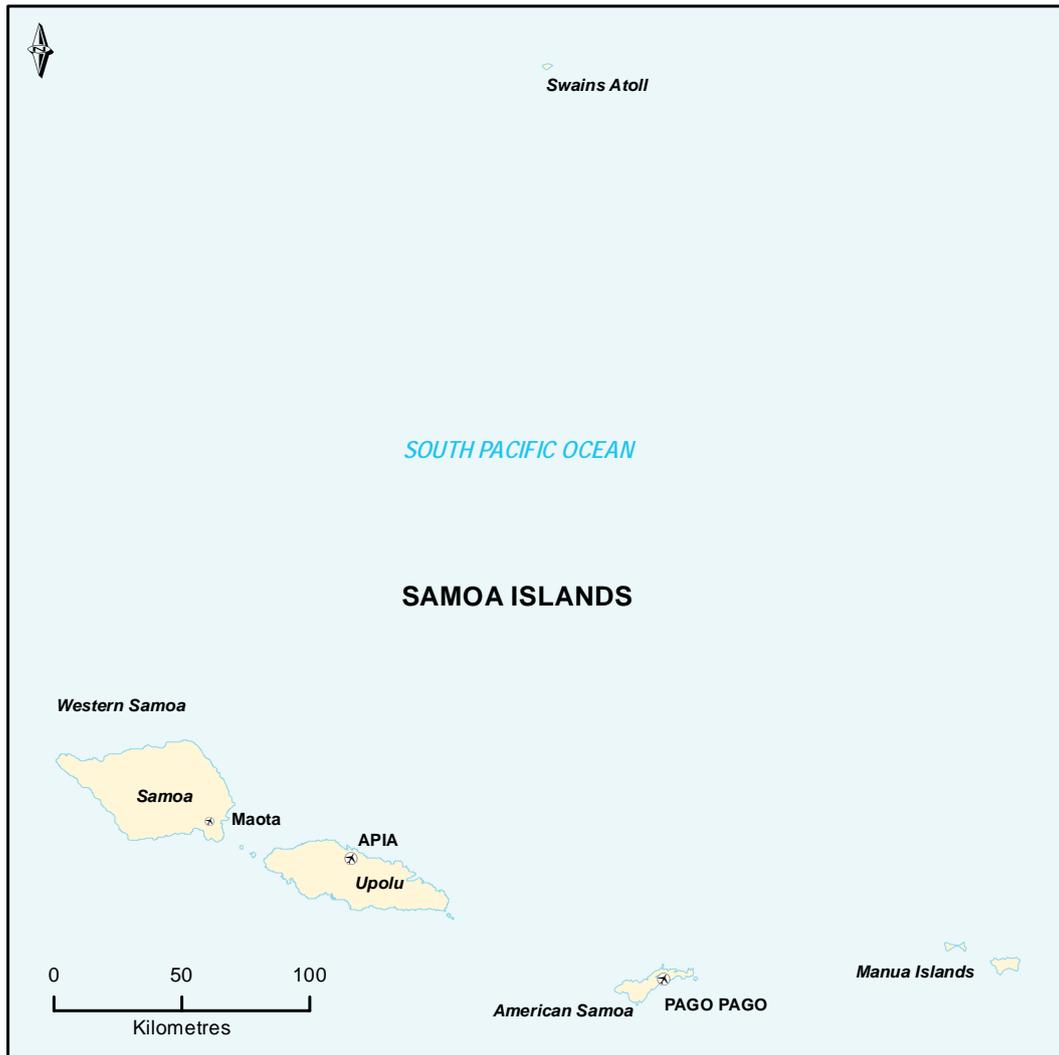
On 6 November 1975, the Government of Papua New Guinea informed that it considered itself to be bound by the Hague Protocol of 1955. Before it became independent (on 16 September 1975), acceptance of the Hague Protocol was effected on behalf of its territory by Australia.

On 15 December 1975, a declaration dated 6 November 1975 was deposited with the International Civil Aviation Organization by the Government of Papua New Guinea indicating that Papua New Guinea desired to be treated as a party in its own right to the Rome Convention, which had entered into force for Australia on 8 February 1959 and had applied to the Territory of Papua and Trust Territory of New Guinea. Papua New Guinea attained independence on 16 September 1975.

On 2 March 1976, the Guadalajara Convention came into force.

Papua New Guinea is not a party to the Montreal Convention.

INDEPENDENT STATE OF SAMOA



LOCATION

Oceania, group of islands in the South Pacific Ocean, about halfway between Hawaii and New Zealand.¹

Geographic Coordinates
13 35 S, 172 20 W.

Area
Total 2,831 sq km.

Elevation
Highest point: Mount Silisili 1,857 m.

Boundaries
Coastline 403 km.

Capital
Apia.

Independence
1 January 1962 (from New Zealand-administered UN trusteeship).

Population
194,320 (July 2012 est).

¹ Central Intelligence Agency, The World Factbook
<<https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html>> at 9 August 2012.

INTRODUCTION

The Independent State of Samoa, formerly known as Western Samoa and German Samoa, became the first independent state of the South Pacific region in 1962. It was previously ruled by Germany from 1900–1914, then by Britain under a mandate from the League of Nations until 1919, and then under the colonial rule of New Zealand.

Samoa became independent from New Zealand in 1962. It consists of a group of volcanic islands located on the westerly end of the Samoa Archipelago in the South Pacific Ocean and is located approximately halfway between Hawaii and New Zealand.

Samoa comprises two main islands (Upolu and Savaii), several smaller islands and uninhabited islets. It has a narrow coastal plain with rugged mountainous terrain.

Airports

There are five airports in Samoa, with only one international airport, being Faleolo International Airport. Its runway was upgraded by the New Zealand Government and is now capable of handling aircraft as large as a Boeing 747.

The remaining four airports, Fagaili'i, Maota, Asau and Lalomalava only manage a small number of daily domestic flights.

Airports with hard (paved) runways – Primary

Total: 3

- There are two paved runways extending from 2,438 m to 3,047 m in length;
- There is one paved runway with less than 914 m length.

Airports with soft (unpaved) runways – Secondary

Total: 2

- There are two unpaved airstrips with less than 914 m length.

The following table outlines the Independent State of Samoa's primary and secondary airports/ airstrips:

Airport	Primary/Paved	Secondary
Faleolo International Airport	•	
Asau Airport		•
Lalomalava Airport		•
Maota Airport (Saleologa Airport)	•	
Fagaili'i Airport	•	

Civil Aviation in the Independent State of Samoa

The primary legislation governing civil aviation in Samoa is the *Civil Aviation Act 1998* (WS) (CAA), which is modelled on New Zealand's *Civil Aviation Act 1990* (NZ). The CAA consolidates and amends the law relating to civil aviation in Samoa. It also seeks to promote aviation safety and enable Samoa to comply with its international legal obligations.²

² *Civil Aviation Act 1998* (WS) s 1.

Local Aviation Authorities

The Ministry of Transport is designated as the Civil Aviation Authority for Samoa.³ However, in practice, it is the Civil Aviation Division of the Ministry of Works, Transport and Infrastructure that is tasked with enforcing the relevant Acts and Regulations and continually reviewing safety procedures and recommending appropriate changes where necessary.

Domestic Carriers Liability Legislation

The *Carriers Act 1975* (WS) (the CA) governs and limits the liabilities of carriers of passengers and goods within Samoa. The *Carriage by Air Act 1964* (WS) (CBAA) adopts the provisions of the Warsaw Convention as domestic law in Samoa but not for domestic travel. Although s 12 allows the provisions detailed in the Convention to be applied to domestic carriage, this can only be done by way of an Order from the Head of State, which does not appear to have occurred.

The CAA and CA do not address key liability areas relating to injury, death, baggage, and cargo.

Although the *Accident Compensation Act 1989* (WS) initially regulated claims arising from personal injuries caused while aboard an aircraft during domestic travel, it has since been amended and does not apply to such claims.⁴

In 2005, Samoa adopted the Civil Aviation Rules of New Zealand as amended from time to time,⁵ however this relates primarily to carrier licensing and regulator issues.

As such, having regard to Samoa's aviation legislation, its regulation of relevant liability issues is somewhat minimal.

According to the Samoan Constitution,⁶ existing laws (which were essentially English and New Zealand Laws) continued to have effect post-independence. However, all English and New Zealand legislation in force (bar four New Zealand Acts) were subsequently abolished by the *Reprint of Statutes Act 1972* (WS)⁷ and the *Revision and Publication of Laws Act 2008* (WS) (which itself repealed the former Act).

As such, English and New Zealand legislation cannot be applied to supplement the CAA and CA. However, the Samoan Constitution recognises English common law as having force except so far as inconsistent with Samoan laws or inappropriate to the circumstances of Samoa.⁸ In this regard, as English common law principles are guided by relevant English legislation, it is arguable the Samoan law can be supplemented by the English *Carriage by Air Act 1961* (UK).⁹ Further, given the aforementioned Act is essentially the same as Samoa's *Carriage by Air Act 1964* (WS), we do not consider applying same at odds with the intention of the relevant repealed Acts.

As such, there may be a combined legal effect in which the aforementioned English legislation will be relied upon to supplement regulation not covered by the Samoan legislation.

³ *Civil Aviation Act 1998* (WS) s 5.

⁴ *Accident Compensation Amendment Act 2003* (WS) s 2(3).

⁵ By way of the *Civil Aviation Regulations 2000* (WS).

⁶ *Constitution of Samoa 1960* s 114.

⁷ Section 8(2): 'All United Kingdom or New Zealand statutes heretofore in force in Samoa, other than those specified in the Schedule hereto, shall cease to be part of the law of Samoa on the coming into force of this Act.'

⁸ *Constitution of Samoa 1960* ss 111 and 114.

⁹ As the applicable English Act in force at the time of independence (1 January 1962).

Death and Injury

A carrier will be liable for damages for the death of a passenger or any personal injuries sustained by a passenger while on board, or in the course of embarking or disembarking, the aircraft.¹⁰

A carrier is defined as ‘any common carrier of passengers or goods by land, sea or water, or any person engaged in the business of the carriage of passengers or goods by air for hire or reward who would, if that business were the carriage of passengers or goods by land, be a common carrier’.¹¹

Liability will be imposed on a carrier notwithstanding any express term or condition in a contract purporting to limit liability for damages in this regard.¹² In this sense, it can be said that a strict liability regime is applicable.

The only exceptions to the strict liability regime are as follows:

- a carrier will not be held liable if it is shown the carrier, its servants and/or agents had taken all necessary measures to avoid the damage; and
- a carrier will also escape liability if it is deemed impossible to have taken such measures.¹³

Liability for death or injury of a passenger is limited to the sum of 250,000 francs.¹⁴ While the sum of 250,000 francs is an unbreakable minimum limit, the amount may be increased by special contract where a carrier and passenger agree to a higher limit.¹⁵

Damages may be reduced partly or wholly if it is found the injured person negligently caused or contributed to their damage.¹⁶

Delay

A carrier will be liable for damage or loss occasioned by delay in the carriage of passengers, baggage or cargo.¹⁷

Absent any special contract, the liability of a carrier for a passenger’s delay is limited to 250,000 francs.¹⁸

In regard to delay in the carriage of baggage or cargo, the liability of a carrier is limited to the sum of 250 francs per kilogram. However, if the passenger or consignor makes a special declaration of interest in delivery, and has paid an additional fee, a carrier will be liable to pay that declared sum, unless it is proved the sum is greater than the passenger’s actual loss.¹⁹ Proof of the actual value of the goods shall in all cases rest with the person claiming compensation for the loss or damage.²⁰

¹⁰ *Carriers Act 1975* (WS) s 3; *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 17.

¹¹ *Carriers Act 1975* (WS) s 2.

¹² *Carriers Act 1975* (WS) s 3.

¹³ *Carriage by Air Act 1964* (WS) art 20.

¹⁴ One franc is deemed to refer to a currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. Sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.

¹⁵ *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 22.

¹⁶ *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 21.

¹⁷ *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 19.

¹⁸ *Ibid* art 22, ch III.

¹⁹ *Carriage by Air Act 1961* (UK) s 2(a), sch 1, pt 1, art 22.

²⁰ *Carriers Act 1975* (WS) s 6.

In the case of delay of *part* of the registered baggage or cargo (or an object contained therein), the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be the total weight of the relevant part of the baggage or object. Although, if the object or part of the baggage affects the value of the entire baggage, the total weight of that baggage will be determinative of the liability limit.²¹

A carrier's liability for delay of baggage or objects which a passenger takes charge themselves is limited to 5,000 francs per passenger.²²

Baggage and Cargo

A carrier will be liable for damage sustained in the event of loss, damage or destruction of registered baggage or cargo, if it is shown the occurrence which caused the damage took place during the carriage by air or in the performance of the contract for carriage by air.²³ Again, this is notwithstanding any contractual provision purporting to limit liability in this regard.²⁴

Neither the CBAA, CA nor the CAA contain any definition or requirements for baggage to be regarded as 'registered'.

The CA limits damage to baggage at '\$100', also subject to special contract.²⁵ The applicable currency, however, is not noted in the Act. Given this ambiguity, guidance may be taken from the English *Carriage by Air Act 1961* (UK) which states the liability for damage sustained to baggage is limited to the sum of 250,000 francs, a carrier and passenger may agree to a higher limit by special contract.²⁶

Surface Damage

Where damage is caused to property on land or water by an aircraft in flight, taking off, landing, or alighting, or by person or article falling from any such aircraft, damages shall be recoverable from the owner of the aircraft.²⁷

There is no need to prove negligence, intention or other cause of action as against the owner, except where the damage or loss was caused or contributed to by the fault of the person by whom the damage was suffered.²⁸

The ability however to claim for such damages is predicated on the loss or damage not being caused or contributed to by the claimant's negligence.²⁹ Moreover, where a legal liability is created in some other tortfeasor to pay damages in respect of the said loss or damage, the owner shall be entitled to be indemnified by that tortfeasor against any claims in respect of the said loss or damage.³⁰

The final key point to note in respect to surface damage liability in Samoa is that where an aircraft has been leased to an operator for any period exceeding 28 days, and no pilot, commander, navigator or other flight crew member of the operator is in the employment of the owner, the regime above will apply such that the operator has the same strict liability as the owner in such a situation.³¹

²¹ *Carriage by Air Act 1961* (UK) s 2(b), sch 1, pt 1, art 22.

²² *Carriage by Air Act 1961* (UK) s 3.

²³ *Carriers Act 1975* (WS) s 4; *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 18.

²⁴ *Carriers Act 1975* (WS) s 4.

²⁵ *Carriers Act 1975* (WS) s 6.

²⁶ *Carriage by Air Act 1961* (UK) sch 1, pt 1, art 22.

²⁷ *Civil Aviation Act 1998* (WS) s 122(3).

²⁸ *Civil Aviation Act 1998* (WS) s 122.

²⁹ *Civil Aviation Act 1998* (WS) s122(5).

³⁰ *Civil Aviation Act 1998* (WS) s122(4).

³¹ *Civil Aviation Act 1998* (WS) s122(7).

System of Law

Samoa's Constitution provides that 'law' includes '*English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa.*'³² The period '*for the time being*' has not been afforded an expiration date in either the Constitution or any other piece of legislation.

The term 'English' has been held to be '*descriptive of a system and body of law which originated in England*'³³ and is not necessarily limited to the law as applied in England. As such, Samoan courts can apply common law principles as developed throughout the Commonwealth.

Application of Customary Laws

The Constitution of Samoa recognises customary law as a source of law, stating that 'Law' includes '*any custom or usage which has acquired the force of the law in Samoa . . . under the provision of any Act or under a judgement of a court of competent jurisdiction.*'³⁴

Although customary law is formally recognised in Samoa, there are judgments of the superior courts which suggest that common law notions prevail over customs if inconsistencies arise.³⁵

Court System

The Samoan Court hierarchy follows a three-tier model of inferior courts, Supreme Court and Court of Appeal.

The inferior Magistrates Courts retain varying degrees of authority and jurisdiction, while the Supreme Court has unlimited jurisdiction and can hear any matter.

Appeals can be made from the Supreme Court to the Court of Appeal, which is the final appellate court in civil matters.

There also exists a Land and Titles Court that deals with matters relating to Samoan land and succession to Samoan titles.

Some civil matters are also handled by traditional courts known as '*village fonos*'. Village fonos deal with village affairs and matters relating to customary land. They apply a considerably different procedure than that used in the common law court system. Matters relating to disputes over customary land can be appealed from village fonos to the Land and Titles Court. A final appeal can be made from the Land and Titles Court to a court comprising the Land and Titles Court president and two Samoan judges.

Status of International Law Instruments

The provisions of the Warsaw Convention were ratified on 20 January 1964 and came into force on 1 January 1962.

The provisions of the Hague protocol were ratified on 16 October 1972 and came into force on 14 January 1973.

Samoa is not a party to the Rome Convention, Guadalajara Convention or the Montreal Convention.

³² *Constitution of Samoa 1960* s 111(1).

³³ *Opeloge Ole v Police*, unreported, Supreme Court, Samoa, m5092/80.

³⁴ *Constitution of Samoa 1960* s111.

³⁵ *Alii and Fapule of Siumu District v Attorney General* [2010] WSSC 9.

Case Law

In *Agnew v Polynesian Airlines Holdings Ltd*³⁶, the plaintiff boarded a flight in New Zealand that was bound for Hawaii, transiting connecting flights in Tonga and Samoa en route. While the aircraft was positioning for take off in Tonga for its onward flight to Samoa, a heavy bag fell out of one of the compartments and struck the plaintiff, causing severe injuries for which she brought a claim for damages.

The defendant sought a motion to strike out the plaintiff's statement of claim on the grounds that it disclosed no cause of action and the proceedings were time-barred. The plaintiff, in reliance on the *Limitation Act 1975*, sought an extension of time for filing her proceedings.

The plaintiff's action was purportedly founded on common law. The defendant submitted the applicable law was that provided for under the Warsaw Convention³⁷ (the Convention) which is given the force of law in Samoa by the CBAA.

In considering whether the Convention applied to the action at hand, Sapolu CJ referenced art 1(1) of the Convention, which provides:

'This Convention applies to all international carriage of persons, baggage or cargo by aircraft for reward.' (emphasis added)

Having accepted the carriage in the relevant action was for reward, Sapolu CJ was then required to determine whether it was 'international carriage'. Reference was made to the exhaustive definition of 'international carriage' provided under art 1(2) of the Convention. Essentially, the Convention provides that international carriage is any carriage in which the place of departure and the place of destination are situated within the territories of two High Contracting Parties³⁸ or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State.

Having determined that New Zealand and the United States of America (Hawaii) were both High Contracting Parties, it was held the plaintiff's journey was by way of international carriage to which the Convention applied.

It was therefore held that, as the CBAA and the Convention both applied to the action, the time limits provided in the Act and Convention governed the case and, consequently, the *Limitation Act 1975* did not apply.³⁹

As both the CBAA and the Convention provided a two year limitation period, and the action had been commenced outside this time, the plaintiff's action was held to be time-barred.

As the case was one to which the CBAA and the Convention applied, the plaintiff should not have framed her action pursuant to common law, which had no application. Given the action had already been held to have been time-barred, Sapolu CJ found no purpose in allowing the statement of claim to be amended to plead the appropriate cause of action.

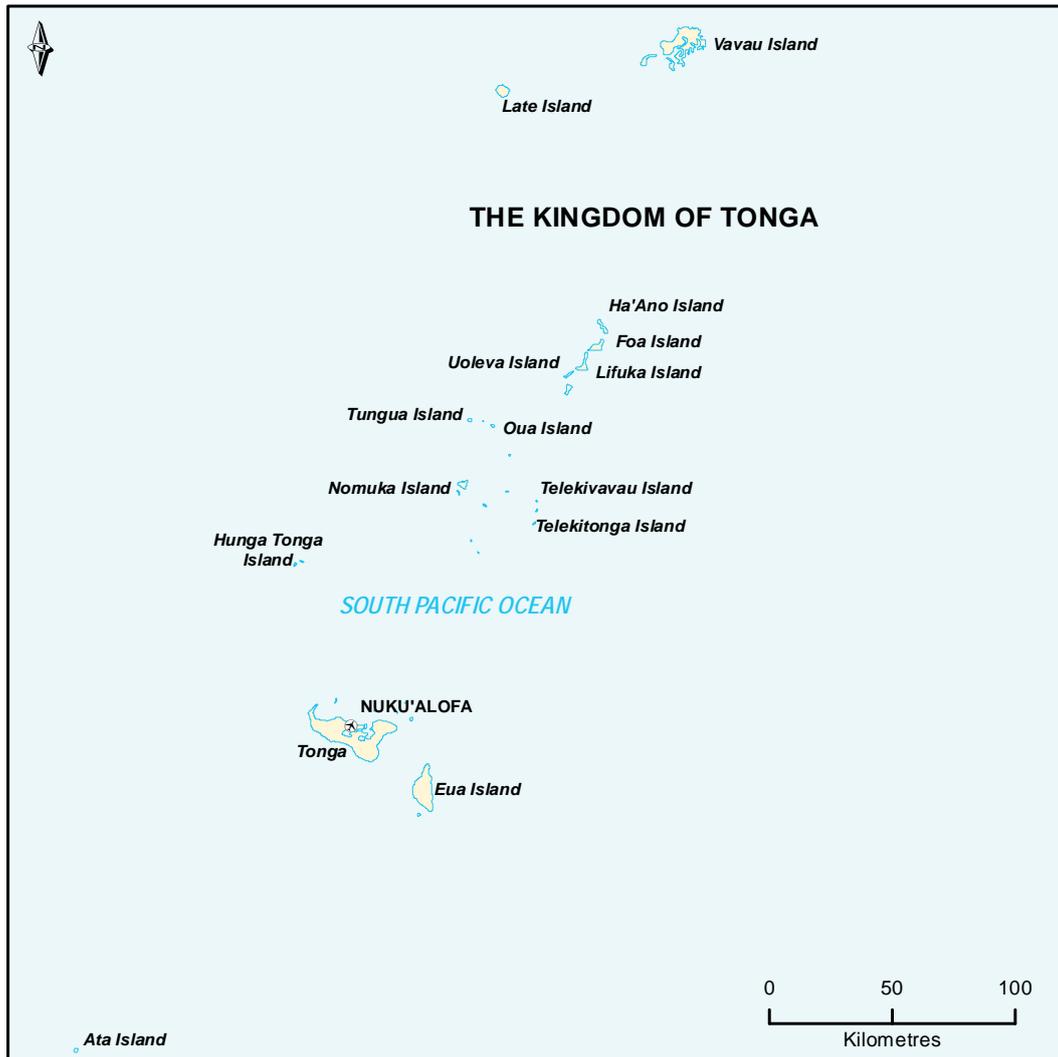
³⁶ [1997] WSSC 29 (8 December 1997).

³⁷ 1929 as amended by the Hague Protocol 1955.

³⁸ A 'High Contracting Party' is a state which has ratified or adhered to the Convention and has not denounced the Convention.

³⁹ Section 30 of the *Limitation Act 1975* (WS) states the Act shall not apply to any action for which a period of limitation is prescribed by any other enactment.

KINGDOM OF TONGA



LOCATION

Oceania, archipelago in the South Pacific Ocean, about two-thirds of the way from Hawaii to New Zealand.¹

Geographic Coordinates
20 00 S, 175 00 W.

Area
Total 747 sq km.

Elevation
Highest point: unnamed elevation on Kao Island 1,033 m.

Boundaries
Coastline 419 km.

Capital
Nuku'alofa.

Independence
4 June 1970 (from the UK protectorate).

Population
106,146 (July 2012 est).

¹ Central Intelligence Agency, The World Factbook
<<https://www.cia.gov/library/publications/the-world-factbook/geos/tn.html>> at 9 August 2012.

INTRODUCTION

The Kingdom of Tonga is an archipelago in the South Pacific Ocean comprising more than 170 islands stretched over a distance of approximately 800 km. The Kingdom of Tonga lies south of Samoa and east of Fiji.

A former British protectorate, Tonga became fully independent in 1970. Tonga is unique among Pacific nations in that it is the only Polynesian country to avoid formal colonisation. It is also the only sovereign monarchy among the island nations of the Pacific Ocean.

The Kingdom of Tonga is endowed with tropical beaches, rainforest and active volcanoes. This diverse terrain means there is a need for differing and varied airstrips and importantly a need to be aware of volcanic activity on the islands.

Airports

Tonga's primary airport is Fua'amotu International Airport. In total there are seven airports throughout Tonga, with the other six providing a means of access to the main islands that make up Tonga. Fua'amotu International Airport exists as the only airport with a paved runway. The others are unpaved, with some using unsealed coral or grass.²

Airports with hard (paved) runways – Primary

Total: 1

- There is one paved runway extending from 2,438 m to 3,047 m.³

Airports with soft (unpaved) runways – Secondary

Total: 5

- There is one unpaved airstrip extending from 1,524 m to 2,437 m in length;
- There are three unpaved airstrips extending from 914 m to 1,523 m in length;
- There is one unpaved airstrip with less than 914 m in length.⁴

The following table outlines the Kingdom of Tonga's primary and secondary airports/airstrips:

Airport	Primary	Secondary
Eua Airport		•
Lifuka Island Airport		•
Nioafo'ou Airport		•
Niuatoputapu Airport (Kuini Lavenia Airport)		•
Fua'amotu International Airport	•	
Vava'u International Airport (Lupepau'u Airport)		•

² Airports in Tonga

<<http://www.aircraft-charter-world.com/airports/oceania/tonga.htm>> at 16 June 2011.

³ Central Intelligence Agency, The World Factbook

<<https://www.cia.gov/library/publications/the-world-factbook/geos/tn.html>> at 16 June 2011.

⁴ Central Intelligence Agency, The World Factbook

<<https://www.cia.gov/library/publications/the-world-factbook/geos/tn.html>> at 16 June 2011.

Civil Aviation in the Kingdom of Tonga

Civil aviation in Tonga operates within a system established and maintained by the *Civil Aviation Act 1990* (TO) (the CAA). The primary object of the CAA is to administer and regulate civil aviation, aerodrome and air navigation services, and aviation security. The CAA also ensures Tonga's obligations under international aviation agreements are implemented.⁵

The CAA provides little detail with respect to liability regulation, and merely details aerodromes and services, security and liability for damage caused by an aircraft. Liability for claims stemming from injury, death, baggage and cargo are not detailed in the CAA.

As such, laws regulating these areas fall back to the English *Carriage by Air Act (Application of Provisions) Order 2004* (UK). The *Civil Law Act 1966* (TO) makes it clear that in the absence of Tongan law in a particular area, current English statutes may be drawn upon.⁶ Although the CAA is 'lacking' in some liability areas, the liability areas that are provided for still have effect, and the English law is relied upon only to dovetail the existing Tongan legislation.

As such, the *Carriage by Air Act (Application of Provisions) Order 2004* (UK) applies to claims arising from injury, death, delay or those which are related to baggage or cargo. The CAA regulates liability for nuisance, trespass and surface damage.

The *Carriage by Air Act (Application of Provisions) Order 2004* (UK) was introduced to apply the provisions of the Warsaw Convention to domestic flights and therefore largely mirrors the Warsaw Convention.

Local Aviation Authorities

The Minister of Civil Aviation

The Minister of Civil Aviation is empowered to exercise control over all matters relating to civil aviation in Tonga.⁷ The Minister of Civil Aviation's functions include controlling the use of the airspace over Tonga,⁸ administering the CAA and supporting regulations,⁹ exercising the appropriate powers to ensure the proper implementation of any International Convention or agreement to which Tonga is a party,¹⁰ and having regard to the rules of customary international law and any treaty or convention to which Tonga is a party affecting the use of airspace.

The Minister is required to exercise his powers in accordance with the provisions of the *Civil Aviation Act 1990* (TO) and any International Convention or agreement to which Tonga is or becomes a party.

Domestic Carriers Liability Legislation

Death and Injury

A carrier in Tonga is liable for damage sustained in the event of the death or for any personal injury suffered by a passenger, if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking.¹¹

⁵ *Civil Aviation Act 1990* (TO) s 3(2).

⁶ *Civil Law Act 1966* (TO) s 3.

⁷ <https://www.cia.gov/library/publications/the-world-factbook/geos/tn.html> at 16 June 2011.

⁸ Central Intelligence Agency, The World Factbook

⁹ <https://www.cia.gov/library/publications/the-world-factbook/geos/tn.html> at 16 June 2011.

¹⁰ *Civil Aviation Act 1990* (TO) s 3(1)(b).

¹¹ *Civil Aviation Act 1990* (TO) s 3(1)(c).

¹⁰ *Civil Aviation Act 1990* (TO) s 2.

¹¹ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 17.

Strict liability is imposed on a carrier for such damages, notwithstanding any express term or condition in a contract for carriage purporting to limit liability for damages.¹²

However, a carrier will escape liability if it proves it or its agents had taken all necessary measures to avoid the damage or that it was impossible to undertake such measures.¹³

Liability for each passenger is limited to the sum of 100,000 special drawing rights.¹⁴ Although this amount is an unbreakable minimum limit, the amount may be increased by special contract where the carrier and passenger agree to a higher limit.¹⁵

If the carrier proves the damage was caused by or contributed to by the negligence of the person claiming compensation, the carrier shall be wholly or partly exonerated from its liability to the claimant.¹⁶

Baggage and Cargo

A carrier will be liable for damage to baggage and cargo sustained in the event of loss, damage or destruction to checked baggage or cargo, if it is shown the occurrence which caused the damage took place during the carriage by air.¹⁷

In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.¹⁸

The carrier, however, is not liable if the damage to baggage results from an inherent defect, quality or vice of the baggage.¹⁹ In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.²⁰

In circumstances where cargo is damaged, the carrier is not liable where the destruction, or loss of, or damage to the cargo resulted from an inherent defect, quality or vice of that cargo, the defective packing of that cargo performed by a third party or in circumstances of an act of war or an armed conflict.²¹

Receipt by the person entitled to delivery of baggage or cargo without complaint is *prima facie* evidence that same was delivered in good condition and in accordance with the document of carriage.²²

¹² *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 21.

¹³ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 21.

¹⁴ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 21. While there seems some conjecture over its application (refer later in this chapter to the case of *Cauchi v Air Fiji & Air Pacific Ltd* [2005] TOSC 7; CV 440 2001 (1 February 2005)), on 22 January 2003, the Tongan Minister of Finance enacted the *Carriage by Air Currency Equivalent Order 2003*, the Notice for which was published in the Tonga Government Gazette on 21 February 2003. Consideration should therefore be given to this 2003 Order, or later Order in force, for conversion to Tongan pa'anga (TOP).

¹⁵ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 25.

¹⁶ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 20.

¹⁷ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 17(2) and art 18(1). 'Carriage by air' is defined by this article to comprise the period during which the baggage or cargo is under the control of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

¹⁸ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 17(2).

¹⁹ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 17(2).

²⁰ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 17(2).

²¹ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 18(2).

²² *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(1).

In regard to damage to baggage or cargo, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage, and 14 days from the date of receipt in the case of cargo.²³ The complaint must be made in writing.²⁴

The liability for damage, loss or delay sustained to baggage is limited to 1,000 special drawing rights for each passenger unless the passenger has made, at the time of checking in the baggage, a special declaration of interest in delivery at the destination and has paid a supplementary sum. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves the sum is greater than the passenger's actual interest in delivery at destination.²⁵

The liability for damage, loss or delay to carriage of cargo is limited to 17 special drawing rights per kilogram. As above, where a special arrangement has been entered, the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves the sum is greater than the consignor's actual interest in delivery at destination.²⁶

In the case of destruction, loss and damage the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is the total weight of the relevant object concerned.²⁷ However, if the object or part of the baggage affects the value of the entire baggage, the total weight of that baggage will be determinative of the liability limit.²⁸

Delay

A carrier operating in Tonga is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.²⁹ However, a carrier will not be liable for damage occasioned by delay if it proves it had taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures.³⁰

With respect to passenger delay involving a multi carriage journey, action can only be taken against the carrier who performed the carriage during which the delay occurred, except where, by express agreement, the first carrier has assumed liability for the whole journey.³¹ In regards to baggage or cargo, the passenger (or consignor) will have a right of action against the first carrier and the passenger who is entitled to delivery will have a right of action against the last carrier. Each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger.³²

²³ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(2).

²⁴ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(3).

²⁵ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(2). Consideration should be given to the *Carriage by Air Currency Equivalent Order 2003* (or later Order in force), for conversion to Tongan pa'anga (TOP).

²⁶ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(3). Consideration should be given to the *Carriage by Air Currency Equivalent Order 2003* (or later Order in force), for conversion to Tongan pa'anga (TOP).

²⁷ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(4).

²⁸ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(4).

²⁹ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 19.

³⁰ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 19.

³¹ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 36(2).

³² *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 36(3).

The liability of a carrier for delay to baggage or cargo is limited to 4,150 special drawing rights for each passenger.³³ In the case of destruction, loss, damage or delay of part of the cargo the weight to be taken into consideration in determining the amount to which the carrier's liability is limited, is the total weight of the relevant object concerned.³⁴ However, if the object or part of the baggage affects the value of the entire baggage, the total weight of that baggage will be determinative of the liability limit.³⁵

In the case of delay of baggage, the passenger must make a complaint within 21 days from the date on which the passenger first retains the baggage or cargo,³⁶ failing which no action shall lie against the carrier, save in the case of fraud on its part.³⁷ Such a complaint must be made in writing upon the document of carriage or by separate notice in writing given within the aforementioned period.³⁸

Surface Damage

Where damage is caused on land or water by an aircraft while in flight, taking off or landing, unless the loss or damage was caused or contributed to by the negligence of the injured party, damages in respect of the loss or damage shall be recoverable.³⁹

There is no need to prove negligence, intention or other cause of action as against the owner, except where the damage or loss was caused or contributed to by the fault of the person by whom the damage was suffered.⁴⁰

Where a legal liability is created in some other person other than the owner, the owner can seek an indemnity from someone else who is liable for the damage,⁴¹ and may also achieve a discount to any damages as a result of the injured party's contributory negligence.⁴²

Whilst liability is strict, the legislation makes no provision for a limit on damages.

System of Law

There is no provision that officially ceases the force of law of the English common law and equity in Tonga.⁴³ Tongan Courts apply the common law of England and rules of equity, together with statutes of general application in force in England.⁴⁴

Application of Customary Laws

The Tongan Constitution of 1875 makes no express statement on customary law as a source of law in Tonga. While Tonga is unique in that it does not have express provision in written law for the application of customs or customary law,⁴⁵ there are circumstances, however, where the courts turn to custom or customary law, specifically with regard to those issues relating to family law and land disputes.

³³ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(1). Consideration should be given to the *Carriage by Air Currency Equivalent Order 2003* (or later Order in force), for conversion to Tongan pa'anga (TOP).

³⁴ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(4).

³⁵ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 22(4).

³⁶ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(2).

³⁷ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(4).

³⁸ *Carriage by Air Act (Application of Provisions) Order 2004* (UK), sch 1, pt 1, art 31(3).

³⁹ *Civil Aviation Act 1990* (TO) s 28(2).

⁴⁰ *Civil Aviation Act 1990* (TO) s 28(2).

⁴¹ *Civil Aviation Act 1990* (TO) s 28(2).

⁴² *Civil Aviation Act 1990* (TO) s 28(2).

⁴³ *Civil Law Act 1966* (TO) s 3.

⁴⁴ *Civil Law Act 1966* (TO).

⁴⁵ <http://www.southpacificbars.org/member/kingdom-tonga> at 31 July 2012.

Court System

The Tongan Court structure includes an inferior (Magistrates Court), superior (Supreme Court) and Court of Appeal model with the addition of a Privy Council and the Land Court.⁴⁶

The Magistrates Court has general powers in civil cases such as to issue subpoenas for witnesses, enforce payments and to deal with claims for ownership or possession of goods up to the value of TOP1,000. It also has specific jurisdiction in civil actions where the plaintiff or defendant resides in its district, provided the amount claimed does not exceed TOP1,000, or, in the case of the chief police Magistrate, TOP2,000. Magistrates Court matters are heard before a Chief Police Magistrate or District Magistrate.⁴⁷

The Supreme Court has all the powers of the Magistrates Court and appellate jurisdiction in relation to decisions of the Magistrates Court. It has civil jurisdiction in cases where the amount claimed exceeds TOP500. The Supreme Court consists of a chief judge and judges as appointed by the King with Privy Council consent. Whilst a single judge will usually hear a civil matter, a party has the right to a trial by jury in circumstances where there is an issue of fact raised.⁴⁸

The Court of Appeal has all the powers of the Supreme Court and exclusive jurisdiction to determine civil appeals from the Supreme Court. The Court of Appeal consists of the Chief Justice and other judges appointed by the monarch. At any one time there must be at least three members sitting on the bench.⁴⁹

Status of International Law Instruments

The provisions of the Warsaw Convention were ratified on 31 January 1977 and signed on 4 June 1970.

The provisions of the Hague Protocol were ratified on 31 January 1977 and signed four months later on 22 May 1977.

The provisions of the Montreal Convention were ratified on 20 November 2003 and signed on 19 January 2004.

The Kingdom of Tonga is not a party to the Rome Convention or the Guadalajara Convention.

Case Law

In *Cauchi v Air Fiji & Air Pacific Ltd*,⁵⁰ the plaintiff's wife, Clare Bleakley (herein, 'the deceased'), boarded an Air Fiji flight from Nausori airport in Suva to Nadi early on the morning of Saturday, 24 July 1999. Approximately 10 minutes into the flight the Embraer Bandeirante aircraft impacted into the side of a rugged and steep ridge with the loss of 17 passengers and two crew with no survivors.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ [2005] TOSC 7; CV 440 2001 (1 February 2005); it should be noted that this case and case synopsis is also relevant to Fiji noting the carrier, the location of the incident and the Accident Investigation Report coming out of Fiji.

The plaintiff and his wife were both Australian citizens, and were living and working in Tonga. The 44 year old deceased was employed by AusAid as a Programme Manager. She had travelled from Tonga to Fiji on 17 July 1999 on AusAid related work. She purchased her tickets from a travel agency in Tonga. Her return booking from Tonga to Nadi had been made with the second defendant, Air Pacific. Her return booking from Nadi to Suva was with the first defendant, Air Fiji. The deceased's original return flight had been booked for Friday 23 July but whilst she was in Suva she changed that booking to an Air Fiji flight that was scheduled to depart for Nadi at 5:25 a.m. on Saturday, 24 July 1999.

It was common ground that the deceased was travelling on international carriage by air, which was to be performed by successive carriers. As such, the plaintiff's claim was governed by the provisions of the Warsaw Convention 1929, as amended by the Hague Protocol of 1955. Both the Convention and the Protocol were incorporated into the law of Tonga by virtue of the provisions of the *Carriage by Air Act 1991* (TO). The plaintiff pleaded the defendant was not entitled to rely upon the limitation prescribed in art 22 of the Warsaw Convention because he was unable to prove 'recklessness' in terms of art 25. It is assumed this matter did not proceed to trial (or at least not yet by the date of this *Guide*) as this matter only pertains to interlocutory issues.

The parties' interlocutory matters were dealt with in the following order.

1. Strike out of the plaintiff's claim against the second defendant (Air Pacific);
2. The admissibility or otherwise of the accident investigation report;
3. The treatment of the 2003 Currency Equivalent Order; and,
4. Strike out of the plaintiff's nervous shock claim.

Defendants Application to Strike Out Claim Against Second Defendant

The second defendant argued that whenever there are successive carriers, in terms of art 30(2) of the Warsaw Convention, a plaintiff can bring his action only against the carrier who performed the carriage during which the accident occurred. In this case, the performing carrier was the first defendant, Air Fiji.

The plaintiff relied upon the saving provision and claims that by express agreement the first carrier, Air Pacific, assumed liability for the whole journey. The plaintiff was anxious to retain Air Pacific as a defendant because Air Pacific (as opposed to Air Fiji) purportedly took steps to waive the compensatory limits payable under the Warsaw Convention such that the plaintiff would be entitled to significantly higher damages than otherwise allowed under the Convention.

In his original statement of claim, the plaintiff made the allegation that the second defendant had by express agreement assumed liability for the whole journey. His allegation at that stage was one of agency. It was alleged that Air Fiji was the interline carrier for Air Pacific and that, at all material times, Air Pacific was acting as an agent for Air Fiji. Those allegations were denied.

The problem for the plaintiff though was that he did not have evidence of the existence of any such express agreement with Air Pacific and it was on that basis the plaintiff was found to have no prospect of proving the second defendant assumed a liability for the whole journey. This resulted in Air Pacific being let out of the claim.

Admissibility of Accident Investigation Report

The 32 page Accident Investigation Report dated 16 December 1999 was released by the Government of Fiji *'in a spirit of openness'*. The report was prepared by the Australian Transport Safety Bureau (ATSB) at the request of the Fiji Ministry of Tourism and Transport because the Ministry did not have the resources to undertake such a large-scale investigation. A feature of the report is that it is unsigned and its author, as well as the investigators and witnesses it refers to, are all undisclosed. An affidavit from Alan Stray, Deputy Director of Air Safety Investigations at the ATSB, shows the omissions were deliberate because of the perceived need to be able to demonstrate to industry sources, in particular, that frank disclosure of information to the Bureau in accident investigations will be kept confidential.

The plaintiff sought to have the report admitted into evidence either because it was a public document in terms of the *Evidence Act* (FJ)⁵¹ or because it fell within one or more of the exceptions to the hearsay rule set out in the *Evidence Act*.⁵²

The first defendant argued the report was inadmissible because it was:

- hearsay and none of the exceptions applied;
- opinion evidence which did not qualify for admission; and,
- subject to public interest immunity.

While the Court was satisfied the report was brought into existence for air safety, it held the mere fact it is now in the public arena was an incidental result rather than a purpose. The Court held the definition of ‘public documents’ in the *Evidence Act* relates to documents such as birth/death certificates, registers of marriage, business records, court orders, legislation and the like. The Court said such a definition was not broad enough to encompass a document such as the investigation report.

The Court also found the report was ‘*riddled with hearsay – in some cases double hearsay*’ which the *Evidence Act* prohibits. It therefore found the report, which did not fall within any of the exclusions to the hearsay rule, was inadmissible.

Orders relating to the Currency Equivalent Order 2003

This issue revolved around the plaintiff’s application for a declaration that the Currency Equivalent Order be deemed, for the purposes of these proceedings, not to have been made. On 22 January 2003, the Minister of Finance in Tonga made what is described as the *Carriage by Air Currency Equivalent Order 2003*. Notice of the Order was published in the *Tonga Government Gazette* dated 21 February 2003. In the Order, which was made pursuant to s 3(5) of the *Carriage by Air Act 1991* (TO), the Minister of Finance specified the amounts in Tongan pa’anga which were equivalent to the sums expressed in francs in art 22 of the Warsaw Convention. The sum of 250,000 francs was expressed as being equivalent to TOP40,663.85.

The defendant argued the figure of TOP40,663.85 is, thus, the maximum amount of its liability under the Convention and sought a declaration accordingly.

The plaintiff on the other hand argued the Equivalency Order did not apply noting the date of the incident which predated the Order. The plaintiff said the 2003 Order could not be given retrospective effect. Accordingly, while the validity of the Order itself was not in dispute (and the Court accepted it had no power to find to this effect absent a successful application for judicial review), the parties were contesting its application to the plaintiff’s entitlement to damages in this specific case.

The Court refused to make such an order, but did express two basic concerns about the Court being invited to adopt the Tongan pa’anga figure stated in the Currency Equivalent Order. Firstly, the Court said that there is a fundamental abhorrence shared by most Courts and embodied in cl 20 of the Constitution, against any form of retrospective legislation. Second, the Court had reference to the final sentence in art 22(5) of the Warsaw Convention: ‘*Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment*’ (our emphasis). Noting the words in emphasis, the Court indicated that whenever in the future a judgment would be made in this case, it does not sit easily alongside a Currency Equivalent Order prescribing a figure which was the outcome of a particular conversion exercise carried out on 1 August 2002.

⁵¹ (CAP. 15).

⁵² Section 89.

Nervous Shock Claim

The plaintiff's claim was based on two alleged causes of action. First, a next of kin claim under Chapter III of the Warsaw Convention and secondly, in the alternative, a common law cause of action in negligence for damages resulting from nervous shock.

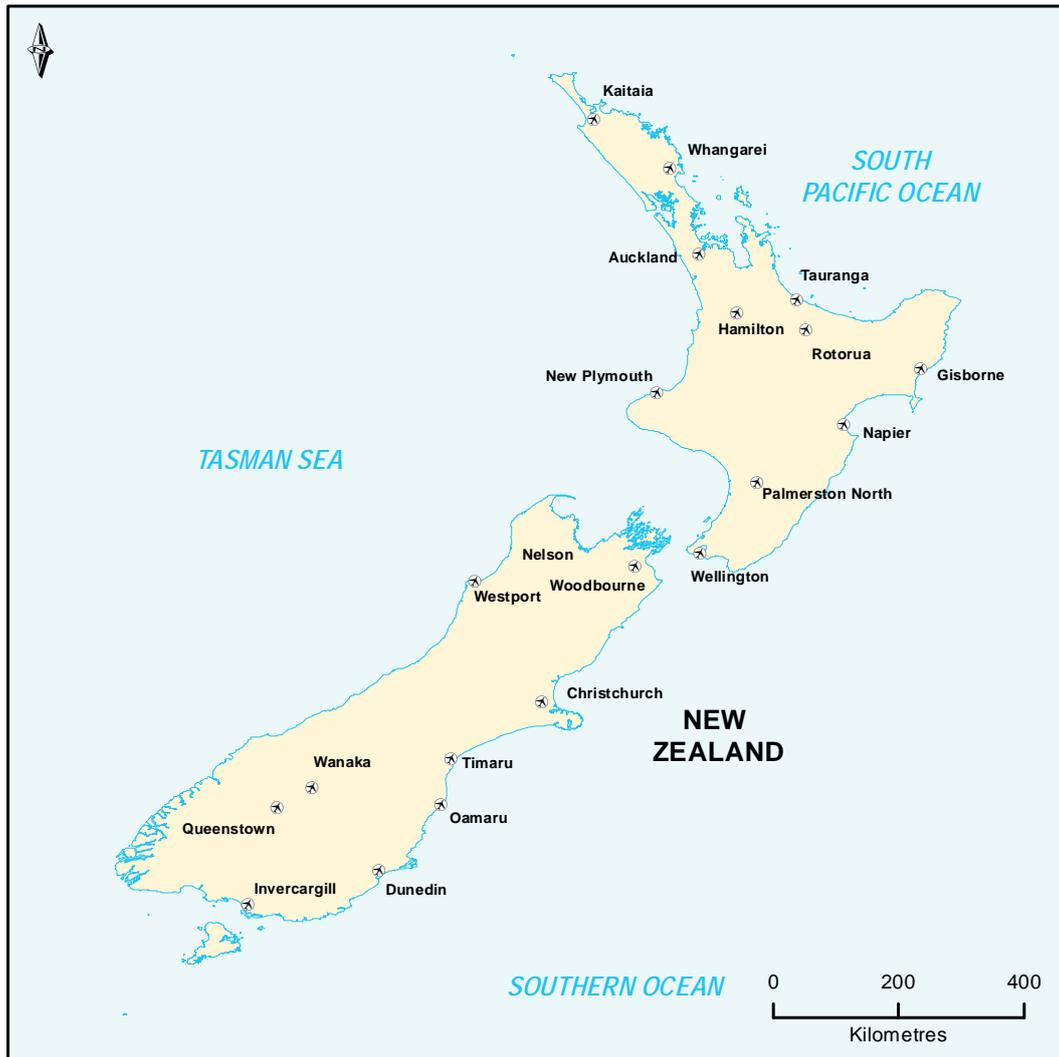
The defendant argued that under the scheme of the Warsaw Convention, a plaintiff cannot bring a concurrent common law action in negligence, stating, *'It is well settled law that the Convention is an exclusive cause of action and if a remedy cannot be claimed under the Convention, it cannot be claimed at all'*.

The Court held that the purposive construction given to the Convention makes it clear that it should be regarded as an exclusive cause of action so that if a remedy cannot be claimed under the Convention then no remedy is available. Judge Ford said:

'If air carriers were to be exposed to damages claims falling outside the Convention by non-passengers based on causes of action such as nervous shock and psychological injuries, the floodgates would surely tumble and the Convention rules relating to international carriage by air would soon be subverted. It seems to me that, wherever the boundary lines are finally drawn for the still emerging nervous shock cause of action, they will be unable to make any inroads into the now entrenched principle of construction that the Warsaw Convention is a comprehensive code which excludes any other form of domestic remedy by passengers or non-passengers alike.'

The plaintiff's tortious cause of action for nervous shock was therefore struck out.

NEW ZEALAND



LOCATION

Oceania, islands in the South Pacific Ocean, southeast of Australia.¹

Geographic Coordinates

41 00 S, 174 00 E.

Capital

Wellington.

Area

Total 267,710 sq km.

Independence

26 September 1907 (from the UK).

Elevation

Highest point: Aoraki-Mount Cook
3,754 m.

Population

4,325,944 (July 2012 est).

Boundaries

Coastline 15,134 km.

¹ National Geographic, <http://travel.nationalgeographic.com/travel/countries/new-zealand-facts/> at 7 July 2012.

INTRODUCTION

New Zealand is a Pacific nation situated 2,012 kilometres south-east of Australia in the south-western Pacific Ocean. New Zealand is unique in that it has two main landmasses (the North Island and the South Island) that are vastly different, and a number of smaller islands which cover an area of 267,710 square kilometres. The North Island (115,777 square kilometres) is 829 km long and volcanic in its south-central part. The South Island (151,215 square kilometres) has the Southern Alps along its west coast, with Mount Cook (3,754 metres) the highest point.

New Zealand is an independent nation and member of the Commonwealth of Nations. The country's diverse multi-cultural population is dominated by two cultural groups: New Zealanders of European descent, and the indigenous Maori (whose ancestors arrived from the legendary Hawaiki approximately 1,000 years ago).

New Zealand, a parliamentary democracy modelled on the United Kingdom, has been a self-governing British dominion since 1907. It became a founding member of the British Commonwealth in 1926.

New Zealand has maintained a close relationship with Australia over the years, fuelled by a passion for sport and a unified position on many political issues.

Airports

There are 120 airports in New Zealand, with the largest of these being Auckland Airport. Airports in New Zealand can be described as having two types of runways:

Airports with hard (paved) runways – Primary

Total: 41

- Two paved runways with more than 3,047 m in length;
- One paved runway extending from 2,438 m to 3,047 m in length;
- Twelve paved runways extending from 1,524 m to 2,437 m in length;
- Twenty-five paved runways extending from 914 m to 1,523 m in length;
- One paved runway less than 914 m in length.

Airports with soft (unpaved) runways – Secondary

Total: 79

- Three unpaved airstrips extending from 1,524 m to 2,437 m in length;
- Thirty-one unpaved airstrips extending from 914 m to 1,523 m in length;
- Forty-five unpaved airstrips less than 914 m in length.

The following table outlines New Zealand's major primary and secondary airports/airstrips:

Airport	Primary	Secondary
Alexandra Airport	•	
Ashburton Airport		•
Ardmore Airport	•	
Auckland Airport	•	
Chatham Islands/ Tuuta Airport	•	
Christchurch International Airport	•	

Airport	Primary	Secondary
Coromandel Airport		•
Dannevirke Airport		•
Dargaville Airport		•
Dunedin International Airport	•	
Feilding Airport	•	
Gisborne Airport	•	
Glenorchy Airport		•
Glentanner Airport	•	
Gore Airport		•
Great Barrier Airport		•
Greymouth Airport	•	
Hamilton International Airport	•	
Hastings Airport	•	
Hawera Airport		•
Hobsonville Aero		•
Hokitika Airport	•	
Invercargill Airport	•	
Kaikohe Airport		•
Kaikoura Aerodrome	•	
Kaipara Flats Airport		•
Kaitaia Airport	•	
Karamea Airport		•
Kerikeri Airport	•	
Manapouri Airport	•	
Masterton Airport	•	
Matamata Airport		•
Matarangi Airport		•
Mercer Airport		•
Milford Sound Airport	•	
Motueka Airport	•	
Mount Cook Aiport	•	
Napier Airport	•	
Nelson Airport	•	
New Plymouth Airport	•	
North Shore Airport	•	
Oamaru Airport	•	
Ohakea Airport (Military)	•	
Okiwi Station Airport		•
Omaka Airport		•
Omarama Airport		•
Opotiki Airport		•
Palmerston North International Airport	•	
Paraparaumu Airport	•	
Pauanui Beach Airport		•
Pukaki Airport	•	

Airport	Primary	Secondary
Queenstown Airport	•	
Raglan Airport		•
Rangiora Airport		•
Reeve Airport		•
Rotorua Airport	•	
Stratford Airport		•
Taumarunui Airport		•
Taupo Airport	•	
Tauranga Airport	•	
Te Anau Airport		•
Te Aroha Airport		•
Te Kuiti Airport		•
Thames Airport		•
Timaru Airport	•	
Tokoroa Airport	•	
Turandi Airport		•
Waihi Beach Airport		•
Waimate Airport		•
Waiouru Airport	•	
Waipukurau Airport		•
Wairoa Airport	•	
Wanaka Airport	•	
Wanganui Airport	•	
Wellington International Airport	•	
Wesport Airport	•	
Whakatane Airport	•	
Whangarei Airport	•	
Whenuapai (Military)	•	
Whitianga Airport		•
Woodbourne (Military) (in Blenheim)	•	

Civil Aviation in New Zealand

Civil aviation in New Zealand operates within a system established and maintained by the *Civil Aviation Act 1990* (NZ) (the CAA). The primary object of the CAA is to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety.² The CAA also establishes rules that ensure New Zealand’s obligations under international aviation agreements are implemented.³

² *Civil Aviation Act 1990* (NZ).

³ *Civil Aviation Act 1990* (NZ).

The CAA applies to every person, aircraft, aerodrome, aeronautical product, air service, and aviation-related service in New Zealand.⁴ It also regulates every New Zealand registered aircraft whether within or outside New Zealand,⁵ every holder of an aviation document while outside New Zealand and exercising, or purporting to exercise, privileges accorded by that document,⁶ and every foreign registered aircraft operating in New Zealand.⁷

Local Aviation Authorities

The Civil Aviation Authority of New Zealand (the Authority) was established in 1992. In New Zealand there are about 9,000 active pilots and 3,830 aircraft. More than 8.4 million passengers travel on New Zealand's main domestic services and 3.7 million arrive via international air carriers each year. It is the principal function of the Authority to oversee the safety of each of these passengers.⁸

The Authority regulates the safety and security of the New Zealand civil aviation community through the implementation of regulatory and promotional action. The Authority establishes civil aviation safety and security standards, and monitors adherence to those standards, carries out accident and incident investigations and collates this material to establish an industry-wide safety picture.⁹

Domestic Carriers Liability Legislation

The *Accident Compensation Act 2001* (NZ) regulates the liability of a carrier for death or injury to passengers. Where passengers are injured domestically they are entitled to compensation under New Zealand's no-fault cover. This comprehensive cover is unique to New Zealand.

Cover does not apply to any damage to personal property¹⁰ or to those incidents not relating to personal injuries. In this regard, the CAA will have application. The CAA adopts as a law of New Zealand, the Warsaw Convention by regulating the liability of a carrier for domestic carriage by air. The legislation applies to *'any carriage by air (other than international carriage) in which:*

- *the place of departure and the place of destination are both in New Zealand; and,*¹¹
- *there is no agreed stopping place outside New Zealand.*¹²

This also applies if *'the aeroplane in which the carriage takes place is at the same time engaged in international carriage'*¹³ or *'the contract for the carriage of any passenger is made without consideration'*.¹⁴

⁴ *Civil Aviation Act 1990* (NZ) s 4(a).

⁵ *Civil Aviation Act 1990* (NZ) s 4(b).

⁶ *Civil Aviation Act 1990* (NZ) s 4(c).

⁷ *Civil Aviation Act 1990* (NZ) s 4(d).

⁸ Civil Aviation Authority of New Zealand, *About the CAA* (2011) CAA <http://www.caa.govt.nz/about_caa/about_the_CAA.htm> as at 31 March 2011.

⁹ Civil Aviation Authority of New Zealand, *About the CAA* (2011) CAA <http://www.caa.govt.nz/about_caa/about_the_CAA.htm> as at 31 March 2011.

¹⁰ *Accident Compensation Act 2001* s 317(2).

¹¹ *Civil Aviation Act 1990* (NZ) s 91V(1)(a).

¹² *Civil Aviation Act 1990* (NZ) s 91V(1)(b).

¹³ *Civil Aviation Act 1990* (NZ) s 91V(2)(a).

¹⁴ *Civil Aviation Act 1990* (NZ) s 91V(2)(b).

Death & Injury

The *Accident Compensation Act 2001* (NZ) provides compensation to those persons injured under New Zealand's no-fault cover. This compensation is administered by the Accident Compensation Corporation (ACC) whose aims are to promote safety by preventing accidents, promoting the rehabilitation of injured persons and provide compensation for the injured and for the dependants of certain people whose death resulted from injury.¹⁵ Cover for personal injury applies if:

- the person suffers personal injury in New Zealand¹⁶ when he or she embarks in New Zealand on an aircraft to travel from one place in New Zealand to another place in New Zealand, or returns to his or her place of embarkation without disembarking at any other place and does not go beyond a limit of 300 nautical miles from any point in New Zealand;¹⁷ and
- the person has:
 - died;¹⁸
 - sustained physical¹⁹ or mental injuries;²⁰
 - sustained damage (other than wear and tear) to dentures or prostheses that replace a part of the human body;²¹ and
- the personal injury has arisen as a result of an accident to the person,²² which must involve either:
 - the application of force;²³
 - a sudden movement or resistance, external to the human body;²⁴
 - a twisting movement of the body;²⁵
 - the inhalation²⁶ or oral ingestion²⁷ of any solid, liquid, gas, fungus or foreign object;
 - a burn or exposure to radiation of rays;²⁸
 - the absorption of any chemical;²⁹ or
 - exposure to the elements or to the extremes of temperature or environment.³⁰

Benefits are payable by the ACC and include the following entitlements:

- treatment, social rehabilitation, and vocational rehabilitation;³¹
- weekly compensation for economic loss;³²
- a lump sum compensation for any permanent impairment sustained;³³ and
- funeral grants, survivors' grants, weekly compensation for the spouse or partner, children and other dependants of a deceased injured person, and child care payments.³⁴

¹⁵ *Accident Compensation Act 2001* (NZ) s 3.

¹⁶ *Accident Compensation Act 2001* (NZ) s 20.

¹⁷ *Accident Compensation Act 2001* (NZ) s 16(3).

¹⁸ *Accident Compensation Act 2001* (NZ) s 26(1)(a).

¹⁹ *Accident Compensation Act 2001* (NZ) s 26(1)(b).

²⁰ *Accident Compensation Act 2001* (NZ) s 26(1)(c).

²¹ *Accident Compensation Act 2001* (NZ) s 26(1)(e).

²² *Accident Compensation Act 2001* (NZ) s 20(2)(a).

²³ *Accident Compensation Act 2001* (NZ) s 25(1)(a)(i).

²⁴ *Accident Compensation Act 2001* (NZ) s 25(1)(a)(ii).

²⁵ *Accident Compensation Act 2001* (NZ) s 25(1)(a)(iii).

²⁶ *Accident Compensation Act 2001* (NZ) s 25(b).

²⁷ *Accident Compensation Act 2001* (NZ) s 25(ba).

²⁸ *Accident Compensation Act 2001* (NZ) s 25(c).

²⁹ *Accident Compensation Act 2001* (NZ) s 25(d).

³⁰ *Accident Compensation Act 2001* (NZ) s 25(e).

³¹ *Accident Compensation Act 2001* (NZ) s 69(1)(a).

³² *Accident Compensation Act 2001* (NZ) s 69(1)(b).

³³ *Accident Compensation Act 2001* (NZ) s 69(1)(c).

³⁴ *Accident Compensation Act 2001* (NZ) s 69(1)(d).

Persons injured who wish to make a claim must lodge a claim with the ACC³⁵ within 12 months from the date on which he or she suffers injury³⁶ or (in the case of a claim for an entitlement³⁷), within 12 months from the date on which the entitlement arose.³⁸ The injured person is required to see a doctor, nurse or other appropriate health professional, who will then make the claim on behalf of the injured person.³⁹ On receiving a claim lodgement, the ACC is required to investigate the claim and advise whether or not they will extend cover to the injured person.

Whilst the *Accident Compensation Act 2001* (NZ) bars persons from bringing litigation for personal injuries which are covered by the Act,⁴⁰ a specific exception is allowed where the liability arises under the law of New Zealand under any international convention relating to the carriage of a person.⁴¹

The international conventions to which New Zealand is a signatory⁴² will be applicable where the incident occurs within the definition of international carriage. That is, '*carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States 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 State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.*'⁴³

In short, where a person is injured during a flight which is deemed to be international carriage then litigation can be pursued. In the alternative, domestic carriage will be regulated by the ACC (as noted above).

In addition, as there is no way to claim for exemplary damages under New Zealand's no fault compensation scheme, an injured party can pursue litigation for these damages against the carrier.

In *McGrory v Ansett New Zealand Ltd*,⁴⁴ the Court of Appeal upheld the High Court's finding that claims for compensatory damages under the *Carriage by Air Act 1967* (NZ) for injury or death resulting from a domestic flight accident are statute barred by the New Zealand Accident Compensation scheme.

The High Court case concerned an Application made by Ansett New Zealand Ltd (the respondent) to strike out two causes of action in a claim for damages brought by 12 seriously injured passengers and the estates of three people who were killed (the applicants) as a result of an aircraft accident which occurred in 1995 near Palmerston North, New Zealand.

The applicants pleaded three causes of action, claiming the respondent was liable for:

- (1) reckless conduct in accordance with s 31 of the *Carriage by Air Act 1967* (NZ);
- (2) damages of up to NZ\$42,000 under s 28 of the *Carriage by Air Act 1967* (NZ); and
- (3) flagrant disregard of the applicants' rights and safety.

³⁵ *Accident Compensation Act 2001* (NZ) s 48.

³⁶ *Accident Compensation Act 2001* (NZ) s 53(3)(a).

³⁷ *Accident Compensation Act 2001* (NZ) s 69.

³⁸ *Accident Compensation Act 2001* (NZ) s 53(3)(b).

³⁹ Accident Compensation Corporation www.acc.co.nz.

⁴⁰ That is not covered by the *Accident Compensation Act 2001* (NZ).

⁴¹ *Accident Compensation Act 2001* (NZ) s 317(5).

⁴² Refer to status of New Zealand with regard to International Law Instruments.

⁴³ Warsaw Convention art 1 (2).

⁴⁴ [1999] 2 NZLR 328.

The applicants claimed compensatory damages for the first two causes of action and exemplary damages for the third.

The respondent accepted (while firmly denying liability) that the third cause of action could not be struck out on the Application as the *Accident Rehabilitation and Compensation Insurance Act 1992* does not preclude common law claims for exemplary damages. However, the respondent succeeded in its Application to the High Court on the grounds the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ) removed the right to sue under the *Carriage by Air Act 1967* (NZ) for damages for the first and second causes of action 'save to the extent that any individual plaintiffs are able to advance common law claims for compensatory damages for mental injury, which is not in consequence of physical injury'.

Delay

A carrier will be liable for damages caused by delay⁴⁵ unless a carrier can prove the delay arose by reason of meteorological conditions,⁴⁶ compliance with instructions, advice or information given by an air traffic control service,⁴⁷ obedience to orders or directions given by a lawful authority,⁴⁸ by force majeure,⁴⁹ or was necessary for the purpose of saving or attempting to save a life.⁵⁰

A carrier will not be found liable if the carrier demonstrates it, or its servants or agents, had taken all necessary measures to avoid the delay, or that it was not possible for the carrier, or the carrier's servants or agents, to have taken those measures.⁵¹

The liability of the carrier in respect of damage caused by delay is limited to the amount of damage proved to have been sustained as a result of the delay, or an amount representing ten times the sum paid for the carriage, whichever is the lesser amount.⁵² In circumstances however, where the carrier has suffered damage caused by delay, and that carrier has in place a special contract, the terms of that contract will not be affected by any limits imposed by legislation.⁵³

Similarly, the limits of liability do not apply if it is proved the delay resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.⁵⁴

An action brought for damages caused by delay is to be brought within two years of the date of the arrival of the aircraft at the destination or where the aircraft does not arrive at the destination, the date on which the aircraft ought to have arrived at the destination or the date on which the carriage stopped.⁵⁵ Leave can be sought to bring an action at any time within six years after the date on which the cause of action accrued where the delay in bringing the action was caused by a mistake of fact, mistake of law or any other reasonable cause.⁵⁶

⁴⁵ *Civil Aviation Act 1990* (NZ) s 91Z.

⁴⁶ *Civil Aviation Act 1990* (NZ) s 91Z (a) (i).

⁴⁷ *Civil Aviation Act 1990* (NZ) s 91Z (a) (ii).

⁴⁸ *Civil Aviation Act 1990* (NZ) s 91Z (a) (iii).

⁴⁹ *Civil Aviation Act 1990* (NZ) s 91Z (b).

⁵⁰ *Civil Aviation Act 1990* (NZ) s 91Z (c).

⁵¹ *Civil Aviation Act 1990* (NZ) s 91ZA.

⁵² *Civil Aviation Act 1990* (NZ) s 91ZC.

⁵³ *Civil Aviation Act 1990* (NZ) s 91ZC.

⁵⁴ *Civil Aviation Act 1990* (NZ) s 91ZE.

⁵⁵ *Civil Aviation Act 1990* (NZ) s 91ZL.

⁵⁶ *Civil Aviation Act 1990* (NZ) s 91ZL.

Contributory Negligence

If the carrier proves the delay was caused, or contributed to by the negligence of the passenger, the Court may exonerate the carrier wholly or partly from liability.⁵⁷

In *Eastern & Global (NZ) Limited v Air New Zealand Limited*,⁵⁸ the plaintiff brought a claim under art 19 of the Warsaw Convention for delay of a cargo shipment. The consignment was not transported pursuant to its original air waybill due to a flight delay, and was shipped the following day under separate air waybills. The Court held that if the carriage was treated as one single transaction and not two separate contracts evidenced by two separate air waybills, the carrier was not bound to perform the carriage by any particular time. The Court also found that, under the circumstances, delivery 22 hours after the original estimated time of arrival in Japan was within a reasonable period of time and there had been no delay.

Baggage & Cargo

A contracting carrier will be found liable to the contracting party for the loss or damage to any goods occurring while he or she is responsible for the goods, whether or not the loss or damage is caused wholly or partly by him or by any actual carrier.⁵⁹

A carrier is not liable for the loss of or damage to goods occurring while under a contract of carriage to the extent the loss or damage resulted directly and without fault from an inherent defect, quality or vice of the baggage, or any breach of either of the terms implied in the contract, or seizure under legal process, or saving or attempting to save life or property in peril.⁶⁰

A carrier is also liable for the loss of or damage to any carry-on baggage occurring during the period in which the passenger is on board the aircraft or in the course of any of the operations of embarking or disembarking, if the loss or damage is caused wholly or partly by the negligence or wilful default of the carrier.⁶¹

The liability of the carrier is limited in amount in each case to the sum of NZ\$1,500 per unit of goods lost or damaged or, in the case of a contract at declared value risk, the amount specified in the contract.⁶² This limitation of liability does not apply to any liability for the loss of or damage to any goods intentionally caused by the carrier; or any liability arising out of the terms of the contract for damages other than for the loss of or damage to the goods; or any liability arising out of the terms of the contract for damages consequential upon the loss of or damage to the goods.⁶³

Contributory Negligence for Baggage

If the carrier proves the loss or damage to any hand baggage was contributed to by the negligence or wilful default of the passenger, the Court may, in accordance with the provisions of the *Contributory Negligence Act 1947* (NZ), exonerate the carrier from any part of its liability.

⁵⁷ *Civil Aviation Act 1990* (NZ) s 91ZB/*Contributory Negligence Act 1947* (NZ).

⁵⁸ District Court Auckland (unreported), Judge Gittos, 23 December 2004 (Civ 2002-004-2759).

⁵⁹ *Carriage of Goods Act 1979* (NZ) s 9.

⁶⁰ *Carriage of Goods Act 1979* (NZ) s 14.

⁶¹ *Carriage of Goods Act 1979* (NZ) s 12(4).

⁶² *Carriage of Goods Act 1979* (NZ) s 15(1).

⁶³ *Carriage of Goods Act 1979* (NZ) s 15(2).

Surface Damage

Where material damage or loss is caused to property on land or water by an aircraft in flight, taking off, landing, or alighting, or by any person or article in or falling from any such aircraft, damages shall be recoverable from the owner of the aircraft, without proof of negligence or intention or other cause of action, as if the damage or loss was caused by his or her fault, except where the damage or loss was caused by or contributed to by the fault of the person by whom the loss was suffered.⁶⁴ There are no applicable caps relevant to claims for surface damage.

System of Law

As a former British colony, the New Zealand system of law is based largely on the English system, making New Zealand a common law country.

Application of Customary Laws

The parliament of New Zealand has regard to the customs, traditions, usages and values of the Maori people of New Zealand. Whilst customary law is no longer formally recognised as a general source of law in New Zealand, the customs of the Maori people remain a consideration.

The Treaty of Waitangi, an agreement between the British Crown and Maori Chiefs, signed on 6 February 1840, affirms Maori customary law in New Zealand by guaranteeing Maori people *'the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'*. The Waitangi Tribunal, established in 1975, is a permanent commission of inquiry responsible for investigating claims brought by Maori people relating to actions or omissions of the Crown which breach the Treaty of Waitangi and so needs to be considered where investigations are required to be taken out on the land in the possession of the Maori people.

Court System

The New Zealand Court system is hierarchical in structure, ensuring a right of appeal from the decision of an inferior court and supporting the doctrine of precedent. A lower court will be bound by the decision of a higher court with the Supreme Court binding all courts.

The Supreme Court, Court of Appeal, High Court and District Court are of general jurisdiction where both criminal and civil matters are heard. Where, however, a case concerns an amount exceeding NZ\$200,000 or is of a serious criminal nature, those matters will be heard by the High Court.

Appeals are made to the higher court, with the Supreme Court existing as the final appellant court. Cases only go to the Supreme Court where leave to appeal has been granted. In this regard, the case will need a significant legal point or a matter of general and public importance to be tested.

In addition to the District Court, High Court, Court of Appeal and Supreme Court there exists specialist courts and tribunals, such as the Employment Court, the Environment Court, the Maori Land Court, the Waitangi Tribunal, Coroners Courts, and the Courts-Martial Appeal Authority. The High Court has supervisory jurisdiction of these specialist courts through the judicial review process.

⁶⁴ *Civil Aviation Act 1990* (NZ) s 97.

Status of International Law Instruments

The Warsaw Convention was ratified on 6 April 1937 and came into force on 5 July 1937.

Before New Zealand attained independence, acceptance of the Warsaw Convention was effected by the United Kingdom on 6 April 1937.⁶⁵

The international conventions have now been incorporated into the *Civil Aviation Act 1990* (NZ). Part 9A of the *Civil Aviation Act 1990* (NZ) regulates the liability of an international air carrier.

Hague Protocol was signed on 19 March 1958, ratified on 16 March 1967 and came into force on 14 June 1967.

The Guadalajara Convention was ratified on 19 May 1969 and came into force on 17 August 1969.

The Montreal Convention was signed on 13 July 2001, ratified on 18 November 2002 and came into force on 4 November 2003.

New Zealand is not a party to the Rome Convention.

Case Law

*Eastern & Global (NZ) Limited v Air New Zealand Limited*⁶⁶ was a cargo case involving a consignment of 1.2 tons of fresh cut flowers transported from Auckland to Tokyo. The consignment was to be carried on an Air New Zealand flight on 8 November 2000, to arrive at 7pm for sale on the same day. The aircraft was turned back to Auckland and the flight cancelled because of an engineering problem. The flowers were repackaged by Eastern & Global (NZ) Limited's (the plaintiff) agent and sent on another Air New Zealand flight the next day. The flowers arrived too late for sale on Friday and were held over for an auction on the following Monday. Some of the flowers were unsaleable because they had been 'rubbed' or had rotten stems or flowers. The remainder of the flowers were sold, but were less valuable because, by that time, they had a shorter shelf life.

The plaintiff claimed that Air New Zealand was liable for damage under art 18 of the Warsaw Convention and for loss or damage occasioned by delay under art 19.

The Court accepted the aircraft having to turn back due to a technical malfunction was an 'occurrence' within the meaning of art 18, but that such an 'occurrence' had not caused any physical damage to the cargo, and the claim for damage under art 18 failed.

In addition, insofar as the flowers had been damaged by rubbing and were affected by rot, the evidence established this was caused as the result of a packing defect and the rot was a result of pathogens at the time of harvest. These, the Court found, were covered by the phrase 'inherent defect, quality or vice' within the terms of the defence available under art 18(3)(a). The Court also found that, in the event the plaintiff had a claim under art 18 for damages for the shorter shelf life and diminished value of the flowers as a result of the occurrence, the defence under art 18(3)(a) would also have been available because the diminution in value was caused by the inherent nature of cut flowers to have a very short shelf life.

⁶⁵ International Civil Aviation Organization, Status of Individual States with regard to international air law multilateral treaties http://www.icao.int/icao/en/leb/StatusForms/new_zealand_en.pdf at 3 June 2011.

⁶⁶ District Court of Auckland (unreported), Judge Gittos, 23 December 2004 (Civ 2002-004-2759).

The Court finally held that a condition of carriage which exempted Air New Zealand from liability for deterioration of cargo which was the result of the inherent quality or nature of the cargo was permitted by art 23(2) of the Warsaw Convention, which permits an exception (and a complete defence) to the prohibition on contracting out of liability for cargo loss.

In *Tasman Pulp & Paper Co Ltd v Brambles JB O’Loghlen Ltd*,⁶⁷ Pan American World Airways Inc (the carrier) made an Application to be dismissed from the action before the High Court of New Zealand. The plaintiff had brought an action claiming damages of NZ\$41,738.18 for a package of fabric which was damaged in transit when it was carried by air from Copenhagen to be delivered at the plaintiff’s premises in Kawerau. The plaintiff alleged the carrier, an American company which operated an airline in New Zealand, was in breach of an express or implied term of a contract of affreightment and, alternatively in breach of its duty of care as a bailee. The plaintiff was not identified as the consignor or consignee on the air waybill issued by the airline. Therefore, the carrier contended the Warsaw Convention ‘precluded any person who was not on the face of it either the consignor or consignee named in the waybill from suing the airline on any action arising from damage to the goods’.

Examining the Warsaw Convention, the High Court of New Zealand found arts 12 and 13 conferred upon a consignor or consignee rights they ‘would not normally possess as agents of the owners of air cargo’, and art 14 enabled the enforcement of these rights. However, the Court noted the Warsaw Convention did not deprive the owner of the goods a right to sue an air carrier at common law for goods lost or damaged while in custody of the carrier. Subsequently, the High Court held the carrier had ‘not made out such a case to justify dismissing it from the action’ and dismissed the Application.

In *Emery Air Freight Corporation v Nerine Nurseries Ltd*,⁶⁸ the Court of Appeal of New Zealand considered a High Court decision which found Emery Air Freight Corporation (the carrier) liable for damage occurring in transit to goods owned by Nerine Nurseries Ltd (the respondent).

The case involved the transportation of flower bulbs from Palmerston North to Amsterdam. The respondent contracted with Jarratt Sandes & Co Limited which sent the bulbs by road to Auckland and contracted with the carrier for the carriage of the goods to Amsterdam. The carrier subsequently contracted with Alitalia to carry the goods from Sydney, Australia to Amsterdam, Holland. The goods were damaged at Sydney Airport while under the control of Alitalia.

The respondent brought a claim for the damage and obtained summary judgment in the District Court against Jarratt, which went into receivership. Consequently, the respondent applied for summary judgment against the carrier, which succeeded on the ground it was ‘a contracting carrier within the meaning of the Warsaw Convention’. The carrier appealed to the High Court of New Zealand.

The High Court examined waybills between both the respondent and Jarratt and the carrier and Jarratt in light of the Warsaw Convention. The Court determined the format of the waybills suggested that Jarratt had contracted as principal rather than agent with both parties. As there was no direct contractual relationship between the carrier and the respondent, the Court held that the carrier was not liable as the ‘carrier’ under art 30 (1) of the Warsaw Convention, or as the ‘contracting carrier’ under art 2 of the Guadalajara Convention. However, the Court upheld summary judgment on the basis the carrier was held as a bailee at common law and the applicant appealed to the Court of Appeal.

⁶⁷ [1981] 2 NZLR 225.

⁶⁸ [1997] 3 NZLR 723.

The issues identified by the Court of Appeal focused initially on whether the carrier could be held liable under the Warsaw or Guadalajara Conventions. Secondly, if the interpretation of these Conventions did not lend themselves to the finding that the carrier was liable, could the respondent rely on the common law cause of action based on bailment, independent of the Warsaw Convention, to sue the carrier.

The Court of Appeal referenced the House of Lords' view in *Sidhu v British Airways plc* [1997] 2 WLR 26 that claims inconsistent with the Conventions should not be pursued. The Court favoured the English interpretation of the Conventions as a '*uniform international code*' which provides '*the exclusive cause of action and sole remedy*' to air carriage claims without recourse to domestic law.

The Court of Appeal held the respondent '*was not entitled to sue under common law as the Warsaw Convention carefully spelt out which carriers were to be liable for damage to goods. No claim might be brought in bailment against a carrier on whom their provisions, properly construed, did not impose liability.*' In contrast to *Tasman Pulp & Paper Co Ltd v Brambles JB O'Loughlen Ltd*,⁶⁹ the liability claim was brought by the consignor named in the air waybill. Therefore the claim was not concerned with whether the respondent had title to sue, but an action outside the Conventions was available to the respondent when no remedy is provided under the Conventions. Subsequently, the Court of Appeal allowed the carrier's appeal and set aside the respondent's summary judgment in favour of the applicant.

⁶⁹ [1981] 2 NZLR 225.

INDONESIA

REPUBLIC OF INDONESIA (INCLUDING BALI AND WEST PAPUA)



LOCATION

South-eastern Asia.

The archipelago is located between the Indian and Pacific Oceans.¹

Geographic Coordinates

5 00 S, 120 00 E.

Area

Total 1,904,569 sq km.

Elevation

Highest point: Puncak Jaya 5,030 m.

Boundaries

Coastline 54,716 km

Land Boundaries 2,830 km.

Capital

Jakarta.

Independence

The Netherlands declared Indonesia's independence on 27 December 1949. However, an announcement was made by the Netherlands in 2005, stating that Indonesia has had de facto independence since 17 August 1945.

Population

245,613,043 (July 2012 est).

¹ The World Factbook, *East and Southeast Asia: Indonesia* (2011); Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>> at 9 August 2012.

INTRODUCTION

The archipelago of Indonesia is made up of 17,508 islands which spread across the Indian and Pacific Oceans. Of these islands, only around 6,000 are occupied. Java, Sumatra, Bali, Kalimantan, Sulawesi, Papua, Halmahera and Seram are the main islands in Indonesia.²

By July 2012, it was estimated that Indonesia's population would be 245,613,043 people. Indonesia's official language is Bahasa Indonesia. Other languages spoken in Indonesia are English, Dutch, and local dialects, with Javanese being the predominant local dialect.

The Pacific Basin is surrounded by a volcanic arc and fault lines, and creates what is known as the 'Ring of Fire'.³ Indonesia is located within the 'Ring of Fire', which increases the chances of a natural disaster or volcanoes occurring in Indonesia.⁴ There will be high levels of disruption if a seismic event takes place as there are limited 'emergency response capabilities'⁵ and warning systems in Indonesia. An example of this occurred in 2006 and 2010, when air travel was disrupted by Mt Merapi erupting.⁶ The eruption occurred near Yogyakarta, and air travel was disrupted in Jakarta which is approximately 428 km north west of Yogyakarta.⁷

In contrast to other countries, the occurrence of aircraft accidents in Indonesia is quite high. As a result, the European Union banned Indonesian-registered aircrafts from flying within its airspace.⁸ The ban on a number of Indonesian carriers was lifted in 2009; however, some Indonesian carriers still remain banned from flying within the European Union airspace.⁹

Airports

Indonesia's primary international airports are the Soekarno-Hatta International Airport, Jakarta and the Ngurah Rai Airport or Bali International Airport, Bali. In total, there are 684 airports and airstrips throughout the archipelago of Indonesia.¹⁰

Airports with hard (paved) runways – Primary

Total: 171

- There are four paved runways with more than 3,047 m length;
- There are 19 paved runways extending from 2,438 m to 3,047 m in length;
- There are 50 paved runways extending from 1,524 m to 2,437 m in length;
- There are 64 paved runways extending from 914 m to 1,523 m in length; and,
- There are 34 paved runways with less than 914 m length.

Airports with soft (unpaved) runways – Secondary

Total: 513

² Travel.State.Gov, *Indonesia Country Specific Information* (n.d.) US Department of State <http://travel.state.gov/travel/cis_pa_tw/cis/cis_2052.html> at 15 June 2011.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Asiaone Travel, *New Indonesian Aviation Law Hailed* (2008) Asiaone Travel <<http://www.asiaone.com/Travel/News/Story/A1Story20081218-108836.html>> at 15 June 2011.

⁹ The *Sydney Morning Herald*, *Indonesia bans Chinese-made plane from three airports* (2011) The *Sydney Morning Herald* <<http://www.smh.com.au/travel/travel-incidents/indonesia-bans-chinesemade-plane-from-three-airports-20110526-1f5yj.html>> at 15 June 2011.

¹⁰ Ibid.

- There are four unpaved airstrips extending from 1,524 m to 2,437 m in length;
- There are 25 unpaved airstrips extending from 914 m to 1,523 m in length; and
- There are 484 unpaved airstrips with less than 914 m length.

The following table outlines many of Indonesia’s major primary and secondary airports/airstrips:

Airport	Primary	Secondary
Abdul Rachman Saleh	•	
Achmad Yani	•	
Adi Sumarmo Wiryokusumo	•	
Adisutjipto	•	•
Aek Godang	•	
Andi Jemma	•	
Aru	•	
Babo	•	
Bali International	•	
Banding Agung	•	
Batu Licin	•	
Bunyu	•	
Cakung	•	
Cibeureum	•	
Dabo	•	
Depati Amir	•	
Dominique Edward Osok	•	
Dr Ferdinand Lumban Tobing	•	
Dumatubin	•	
El Tari	•	•
Fak Fak	•	
Fatmawati Soekarno	•	
Frans Kaisiepo	•	
Gading Wonosari	•	
Gatot Subrato	•	
H AS Hanandjoeddin	•	
H Hasan Aroeboesman	•	
Husein Sastranegara	•	
Iskandar	•	
Iswahyudi	•	
Jalaluddin	•	
Kaimana	•	
Kalimaru	•	
Lhok Sukon	•	
Maimun Saleh	•	
Mali	•	
Malikus Saleh	•	
Moses Kilangin	•	
Muara Badak Pujangan	•	
Mutiara	•	
Mutiara II	•	

Airport	Primary	Secondary
Nabire	•	
Naha	•	
Nanga Pinoh I	•	
Nangasuri	•	
Nusawiru	•	
Padang Kemiling	•	
Pagerungan	•	
Polonia	•	
Pondok Cabe	•	
Pongtiku	•	
Sam Ratulangi	•	
Satar Tacik	•	
Selaparang	•	
Sentani	•	
Soekarno Hatta Intl	•	
Supadio	•	
Susilo	•	
Syamsudin Noor	•	
Tabing	•	
Tjilik Riwut	•	
Tunggul Wulung	•	
Wai Oti	•	
Wamena	•	
Warukin	•	
Wolter Monginsidi	•	

Civil Aviation in the Republic of Indonesia

Civil aviation in Indonesia operates within a system established and maintained in accordance with the *Aviation Act 2009* (ID) (the AA). The objects of the AA are:

- to regulate the security requirements of Indonesia’s national transportation system in supporting the economic growth and regional development of Indonesia, as well as strengthening international relations and the nation’s sovereignty;¹¹ and,
- to ensure aircrafts flying in and around Indonesia are effective and efficient, safe and secure, can transport passengers quickly, use advanced technology and are well managed.¹²

In the event an issue arises in relation to a carrier’s liability for death or injury of a passenger, loss or damage to baggage or cargo, or delay or surface damage, the AA empowers the ‘Ministerial Regulation’, a regulation or decree issued by a Minister, to determine the total amount of compensation to be awarded.¹³ The ‘Ministerial Regulation’ as referenced in the AA is the *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers (*Peraturan Menteri Perhubungan No. PM 77 Tahun 2011 tentang Tanggung Jawab Pengangkut Angkutan Udara*) (the Regulation) which was promulgated by the Ministry of Transportation and came into force on 1 January 2012.

¹¹ *Aviation Act 2009* (ID) Preamble (b).

¹² *Aviation Act 2009* (ID) Preamble (c).

¹³ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 2.

Local Aviation Authorities

The Directorate General of Civil Aviation (DGCA) is the authority which regulates aviation in Indonesia.¹⁴ The DGCA must comply with its responsibilities under the *Chicago Convention* and the AA.¹⁵

The functions of the DGCA are to:¹⁶

- provide the Ministry of Transportation with policy frameworks regarding aviation;
- implement aviation policies;
- supervise, control, enforce, evaluate and report on the implemented aviation policies;
- prepare ‘*guidance, criteria, system and procedures for*’¹⁷ aviation; and,
- ‘*perform certification and/or licensing*’.¹⁸

One of the predominant goals of the DGCA is ‘*to guarantee quality of service, comfort, safety, security and law enforcement in accomplishing air transportation*’.¹⁹

The National Transportation Safety Committee (NTSC) regulates the safety of aviation systems in Indonesia.²⁰ The NTSC investigates and reports on accidents and incidents involving aircraft, and reports safety deficiencies to the Minister of Communications.²¹ The NTSC complies with the *Chicago Convention*²² when investigating aircraft accidents and the AA empowers the NTSC to operate efficiently.²³

Domestic Carriers Liability Legislation

Article 8 of the AA regulates the responsibilities held by a carrier. The AA defines ‘*Carrier Responsibility*’ as an obligation owed by the carrier to its passengers, shippers and third parties, whereby the carrier ensures all losses suffered by its passengers, shippers and third parties are replaced.²⁴

A predominant responsibility of a carrier is ensuring that people, cargo and mail are transported in accordance with either a passenger’s ticket or cargo documents.²⁵

In the event an aircraft accident causes the death or injury of a passenger, or baggage or cargo is lost or damaged, a passenger is entitled to claim an amount of compensation as stipulated in the Regulation. If a passenger is awarded a notional amount of compensation and believes the amount of compensation is unreasonable, the passenger can commence legal action against the carrier. If such circumstances arise, the onus is on the passenger to prove the carrier was negligent.

¹⁴ Directorate General of Civil Aviation, *Our Vision, Mission, Goals, Strategy* (2009) Ministry of Transport Republic of Indonesia <<http://hubud.dephub.go.id/?en+page+detail+12>> at 5 April 2011.

¹⁵ *Aviation Act 2009* (ID) arts 450 and 451.

¹⁶ Directorate General of Civil Aviation, *Main Tasks* (2009) Ministry of Transport Republic of Indonesia <<http://hubud.dephub.go.id/?en+page+detail+13>> at 5 April 2011.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Directorate General of Civil Aviation, *Our Vision, Mission, Goals, Strategy* (2009) Ministry of Transport Republic of Indonesia <<http://hubud.dephub.go.id/?en+page+detail+12>> at 5 April 2011.

²⁰ National Transportation Safety Committee, *Aviation Safety* (2000) National Transportation Safety Committee <http://www.dephub.go.id/knkt/ntsc_aviation/aaic.htm> at 5 April 2011.

²¹ *Ibid.*

²² *Ibid*; *Convention on International Civil Aviation (Chicago Convention)*, Annex 13.

²³ *Aviation Act 2009* (ID) art 449.

²⁴ *Aviation Act 2009* (ID) art 1, para 22.

²⁵ *Aviation Act 2009* (ID) arts 140(1) and (3).

The AA and the Regulation do not clearly establish whether there is a cap on the damages available to a passenger who commences legal action. The Regulation does stipulate that a passenger's ability to commence legal action in an Indonesian Court or arbitration tribunal is not limited by the amounts of compensation provided in the Regulation.

It is suggested that the cap on damages available to a passenger will be dependent on the judgment made by the Indonesian Court or Arbitration Tribunal as the Regulation does not:

- outline the grounds or circumstances in which a passenger can commence legal action against a carrier, whereby the passenger is claiming an amount of damages which exceeds the amount of compensation stipulated in the Regulation; and
- provide a cap on the amount of damages to be claimed by a passenger if he or she believes the notional amount of compensation awarded under the Regulation is unreasonable.

Death & Injury

If an incident occurs when an aircraft is transporting a passenger, and the incident causes the death, permanent disability or injury of the passenger, the carrier is responsible for the loss suffered. The carrier is also responsible for the death, permanent disability or injury of a passenger who is embarking or disembarking an aircraft.²⁶ The carrier's responsibility will not be limited if the carrier is at fault or deliberately caused the accident.²⁷

If an aircraft accident causes the death of a passenger, the beneficiary of the deceased passenger is entitled to IDR1.25 billion in compensation.²⁸ If the death of a passenger occurs when the passenger embarks or disembarks an aircraft, the beneficiary of the deceased passenger is entitled to IDR500 million in compensation.²⁹

If a passenger suffers from an injury, whether the injury is permanent or only requires hospitalisation, a doctor must declare the passenger's injury within 60 business days of the occurrence of the aircraft accident.³⁰

If a passenger suffers from a permanent injury, the passenger will be entitled to claim IDR1.25 billion in compensation.³¹ A permanent injury includes the loss of sight in both eyes, the loss of using both hands or feet, the loss of using one hand and one foot or the loss of using one wrist and one ankle.³²

If a passenger suffers from a permanent partial injury, the passenger will be entitled to claim the following amounts of compensation:³³

²⁶ *Aviation Act 2009* (ID) art 141(1).

²⁷ *Aviation Act 2009* (ID) art 141(2).

²⁸ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(a).

²⁹ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(b).

³⁰ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(c).

³¹ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(c).

³² *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(d).

³³ Compensation amounts are sourced from *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers Annexure; conversion from Indonesian Rupiah to Australian dollars sourced from Bank Indonesia, *Exchange Rates Calculator*, <<http://www.bi.go.id/web/en/Moneter/Kalkulator+Kurs/>> at 4 November 2011.

- IDR150 million for the loss of sight in one eye;
- IDR150 million for deafness;
- ranging from IDR35 million to IDR125 million for injury to a thumb or finger, with the amount being awarded depending on the particular finger or thumb injured.

If a passenger suffers from an injury which is not listed above, and is required to be hospitalised, the passenger is entitled to claim up to IDR200 million in hospital costs.³⁴

If a passenger does not believe the amount of compensation received is reasonable:

- the carrier and the passenger can reach a settlement on a higher quantum of compensation to be granted to the passenger;³⁵ else,
- the disabled or injured passenger, or the beneficiary of the deceased passenger, can commence legal action in an Indonesian Court to seek additional compensation for loss suffered from the incident.³⁶ Such an action has a two year limitation period.³⁷

At least once a year, the Minister who controls aviation issues and affairs will evaluate the above notional amount of compensation granted to the passenger, which may result in the amount of compensation being changed.³⁸

Baggage and Cargo

Baggage

A carrier will be responsible for the loss suffered by a passenger:

- if a passenger's baggage is lost or damaged;³⁹ and,
- the passenger who suffers loss proves the carrier caused the loss.⁴⁰

Checked baggage is defined as baggage which is under supervision of the carrier once it has been transferred from the passenger to the carrier with which the passenger is travelling.⁴¹ 'Carry-on' baggage is baggage which is under the supervision of the passenger.⁴²

If a passenger's checked baggage is under the carrier's supervision, and such baggage is damaged, lost or destroyed, the carrier will be responsible for the loss suffered by the passenger.⁴³ However, the carrier will not be liable for the loss suffered by a passenger whose carry-on baggage is damaged or lost, unless the passenger establishes the carrier or its employees caused the loss.⁴⁴

A carrier will not be liable for loss to valuable goods stored in checked baggage, unless the passenger disclosed and presented the valuable goods when checking in the baggage and the carrier agreed to load same. If such circumstances arise, the carrier may require the passenger to insure the goods.⁴⁵

³⁴ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 3(e).

³⁵ *Aviation Act 2009* (ID) art 166.

³⁶ *Aviation Act 2009* (ID) arts 141(3) and 176.

³⁷ *Aviation Act 2009* (ID) art 177.

³⁸ *Aviation Act 2009* (ID) art 172.

³⁹ *Aviation Act 2009* (ID) art 143.

⁴⁰ *Aviation Act 2009* (ID) art 143.

⁴¹ *Aviation Act 2009* (ID) art 1(24).

⁴² *Aviation Act 2009* (ID) art 1(25).

⁴³ *Aviation Act 2009* (ID) art 144.

⁴⁴ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 4(1).

⁴⁵ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 6.

The passenger is required to file a claim:

- upon collection of the damaged checked baggage;⁴⁶
- when he or she should have collected the checked baggage which is delayed or lost;⁴⁷ and,
- for missing carry-on baggage and checked baggage, 14 days after landing at the desired destination.⁴⁸

The carrier will provide total compensation considering the maximum loss that is suffered by the passenger.⁴⁹ The Regulation ensures the amount of compensation being awarded is proportionate to the weight of the damaged, lost or destroyed baggage.⁵⁰

If a carrier or its employees caused carry-on baggage to be damaged or lost, the passenger will be awarded the value of the real loss of the baggage as the maximum amount of compensation.

If checked baggage is damaged, lost or destroyed, the passenger is entitled to claim IDR200,000 per kilogram of checked baggage.⁵¹ The maximum amount of compensation which can be awarded to a passenger is IDR4 million per piece of checked baggage.⁵² If checked baggage cannot be located within 14 days of the aircraft arriving at its destination, the checked baggage will be declared as being lost.⁵³ The passenger is entitled to claim IDR200,000 for each day the passenger is waiting for the checked baggage to be located, with such an entitlement being limited to IDR600,000 or three days.⁵⁴

If the passenger does not believe the amount of compensation received is reasonable, the carrier and the passenger can agree on higher settlement terms in compensation of the property lost, damaged or destroyed.⁵⁵ The passenger or the beneficiaries of such a passenger, can commence legal action against the carrier in an Indonesian State Court should settlement not be achieved.⁵⁶ Such an action has a two year limitation period.⁵⁷

At least once a year, the Minister who controls aviation issues and affairs will evaluate the notional amount of compensation granted to the passenger,⁵⁸ which may result in the amount of compensation being changed.⁵⁹

⁴⁶ *Aviation Act 2009* (ID) art 174(1).

⁴⁷ *Aviation Act 2009* (ID) art 174(2).

⁴⁸ *Aviation Act 2009* (ID) arts 174(3) and 174(4).

⁴⁹ *Aviation Act 2009* (ID) art 167.

⁵⁰ *Aviation Act 2009* (ID) art 168.

⁵¹ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 5(1)(a).

⁵² *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 5(1)(a).

⁵³ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 5(2).

⁵⁴ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 5(3).

⁵⁵ *Aviation Act 2009* (ID) art 169.

⁵⁶ *Aviation Act 2009* (ID) art 176.

⁵⁷ *Aviation Act 2009* (ID) art 177.

⁵⁸ *Aviation Act 2009* (ID) art 172(1).

⁵⁹ *Aviation Act 2009* (ID) art 172(3).

In *Abdul Rahman Imam v PT Garuda Indonesia*,⁶⁰ Abdul Rahman Imam, the plaintiff, made a claim against Garuda Indonesia Airlines, the defendant, for checked baggage which was lost when the plaintiff was a passenger on an aircraft that flew from Medan to Jakarta.

The plaintiff was flying from Medan to Jakarta to meet the Indonesian President and Vice President to organise a ceremony which was part of a project for a foundation for which the plaintiff was a chairman. Before boarding the flight, the plaintiff had baggage containing ‘*various documents, drawings, models, budget plans and photographs of the planned project*’. The baggage was lost upon arrival at Jakarta, and it took one month to recover the lost baggage. Items within the baggage remained lost. The meeting with the Indonesian President and Vice President did not transpire, and there was a delay in the performance of the ceremony because the baggage was lost for one month.

In accordance with arts 1366 and 1367 of the Civil Code, the District Court held the defendant liable for committing a ‘*tortuous act*’ by losing the plaintiff’s baggage, and ordered the defendant to pay IDR100 million of ‘*damages for material compensation*’, IDR4.8 million of ‘*immaterial losses*’, and IDR114,000 of legal costs.

The defendant appealed the District Court’s decision to the Supreme Court. The defendant submitted that its relationship with the plaintiff was based in contract, and therefore, the defendant could not be liable for committing a ‘*tortuous act*’ against the plaintiff. The defendant stated that ‘*the relevant Indonesian aviation regulations, the conditions of the passenger’s ticket and the General Conditions of Carriage for Passengers and Baggage (Edition 2000)*’ should have been relied on. The regulations applicable at the time stipulated that a passenger who had his or her baggage lost could claim a maximum of IDR100,000 per kilogram for the baggage that was lost. The Supreme Court held in favour of the defendant and the plaintiff received IDR800,000 as compensation for the lost baggage which weighed 8 kilograms.

Cargo

The carrier is responsible if cargo is under its supervision and becomes damaged, lost or destroyed, resulting in the sender of the cargo suffering loss.⁶¹ It is the responsibility of the carrier to ensure that important documents and perishable cargo have priority.⁶²

Claims for cargo being damaged, lost or destroyed must be filed:

- when the receiver receives the cargo;⁶³
- when the receiver should have received the cargo which has been delayed or lost;⁶⁴ and
- for missing cargo, 14 days after landing at the desired destination.⁶⁵

If the sender does suffer loss, it has a right to be granted compensation. The Regulation ensures the amount of compensation being awarded is proportionate to the weight of the damaged, lost or destroyed cargo.⁶⁶

⁶⁰ *Abdul Rahman Imam v PT Garuda Indonesia* 2600 K/Pdt/2003, International Air Transport Association (2008) 11 *The Liability Reporter*.

⁶¹ *Aviation Act 2009* (ID) art 145.

⁶² *Aviation Act 2009* (ID) art 158.

⁶³ *Aviation Act 2009* (ID) art 175(1).

⁶⁴ *Aviation Act 2009* (ID) art 175(2).

⁶⁵ *Aviation Act 2009* (ID) art 175(3).

⁶⁶ *Aviation Act 2009* (ID) art 168.

If cargo is lost or destroyed, the amount of compensation that can be claimed is IDR100,000 per kilogram of cargo.⁶⁷ If cargo is not delivered within 14 days of the date of scheduled delivery noted on the air waybill, then the cargo will be declared as being lost.⁶⁸ If cargo is partially damaged, the amount of compensation that can be claimed is IDR50,000 per kilogram of cargo.⁶⁹

If the air waybill notes the value of the cargo, the amount of compensation that can be claimed is the amount noted on the air waybill.⁷⁰

If the sender does not believe the amount of compensation received is reasonable, the carrier and the sender can agree on alternate settlement terms,⁷¹ else the sender can commence legal action against the carrier in an Indonesian State Court.⁷² Such an action has a two year limitation period.⁷³

As noted earlier, the Minister who controls aviation issues and affairs will evaluate annually the notional amount of compensation granted to the sender,⁷⁴ which may result in the amount of compensation being changed.⁷⁵

Delay

If there is a delay in transporting passengers, cargo or baggage, and such a delay causes loss, the carrier is responsible for such loss.⁷⁶ However, the carrier will not be responsible for the loss if it is proven that technical issues or the weather caused the delay.⁷⁷

A claim should be filed when the passenger or receiver should have collected the checked baggage or cargo which is delayed.⁷⁸

The three types of delay that are compensated under the Regulation are a delayed flight, denial of boarding or a cancelled flight.⁷⁹ The Regulation will determine the amount of compensation to be granted if there is a delay,⁸⁰ as follows:

⁶⁷ Regulation of the Minister of Transportation No. PM 77 of 2011 regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 7(1)(a).

⁶⁸ Regulation of the Minister of Transportation No. PM 77 of 2011 regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 7(2).

⁶⁹ Regulation of the Minister of Transportation No. PM 77 of 2011 regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 7(1)(b).

⁷⁰ Regulation of the Minister of Transportation No. PM 77 of 2011 regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 7(1)(c).

⁷¹ Aviation Act 2009 (ID) art 169.

⁷² Aviation Act 2009 (ID) art 176.

⁷³ Aviation Act 2009 (ID) art 177.

⁷⁴ Aviation Act 2009 (ID) art 172(1).

⁷⁵ Aviation Act 2009 (ID) art 172(3).

⁷⁶ Aviation Act 2009 (ID) art 146.

⁷⁷ Aviation Act 2009 (ID) art 146.

⁷⁸ Aviation Act 2009 (ID) arts 174(2) and 175(2).

⁷⁹ Regulation of the Minister of Transportation No. PM 77 of 2011 regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 9.

⁸⁰ Aviation Act 2009 (ID) art 170.

Flight Delay

If a flight is delayed for more than four hours, a passenger is entitled to claim IDR300,000 in compensation.⁸¹ If a flight is delayed and a re-routing flight is offered by the carrier and the transportation to the destination is provided by the carrier, a passenger is entitled to claim IDR150,000 in compensation.⁸² However, if a carrier diverts the flight to the following flight or a different carrier, then the carrier is not liable to pay compensation to a passenger. If such circumstances arise, no additional costs are to be incurred by the passenger; however, if a class downgrade is required, the balance must be refunded by the carrier to the passenger.⁸³

Boarding Denied

In the event the carrier does not have capacity and the boarding of a passenger is denied, the carrier is responsible to ensure the passenger is diverted to a different flight. However, if there are no flights available to the passenger's destination, the carrier must provide meals, accommodation and transport costs.⁸⁴

Flight Cancelled

If a flight is cancelled, the carrier must notify the passenger of such a cancellation at least seven days prior to the scheduled flight date and the ticket for the cancelled flight must be refunded.⁸⁵ If a flight is cancelled and the carrier provides a passenger less than seven days notice of such a cancellation, the passenger will be entitled to claim the amount of compensation available to a passenger whose flight is delayed.⁸⁶

An example of the amount of compensation that can be claimed is provided in Citilink Garuda Indonesia's Conditions of Carriage.

Surface Damage

If someone on the ground or a third party to the carrier, passenger or owner of goods suffers loss, the individual who is operating the aircraft will be responsible for compensating such loss.⁸⁷ It must be proven the loss suffered by the third party was caused by the:

- aircraft's operations;
- an accident involving the aircraft; or
- an aircraft object falling during the aircraft's operations.⁸⁸

The Regulation will determine the:

- compensation to be granted to the third party;
- terms of compensation; and
- procedure for receiving compensation.⁸⁹

⁸¹ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 10(a).

⁸² *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 10(b).

⁸³ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 10(c).

⁸⁴ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 11.

⁸⁵ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 12(1) and 12(2).

⁸⁶ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 12(3).

⁸⁷ *Aviation Act 2009 (ID)* art 184(1).

⁸⁸ *Aviation Act 2009 (ID)* art 184(1).

⁸⁹ *Aviation Act 2009 (ID)* art 184(3).

If an aircraft accident causes the death of a third party, IDR500 million is available in compensation.⁹⁰

If a third party suffers from an injury, a doctor must declare the passenger's injury within 60 business days of the occurrence of the aircraft accident.⁹¹ If a third party suffers from a permanent injury, the third party is entitled to claim IDR750 million in compensation.⁹² If a third party suffers from a permanent partial injury, the third party is entitled to claim the amount of compensation detailed earlier under 'Death and Injury'.

If a passenger suffers from an injury which is not listed above under 'Death and Injury', and is required to be hospitalised as either an inpatient or outpatient, the passenger is entitled to claim up to IDR100 million⁹³ in compensation.⁹⁴

If a third party's property is damaged, the amount of compensation awarded is proportionate to the real loss suffered. A third party will therefore be entitled to claim the following amounts of compensation:⁹⁵

- up to IDR50 billion where the maximum capacity of the aircraft is 30 seats;
- up to IDR100 billion where the maximum capacity of the aircraft is 30 to 70 seats;
- up to IDR175 billion where the maximum capacity of the aircraft is 70 to 150 seats; and,
- up to IDR250 billion where the maximum capacity of the aircraft is more than 150 seats.

System of Law

Before the archipelago of Indonesia declared its independence in 1945, it adhered to Dutch law.⁹⁶ However, before the Dutch colonised Indonesia, Indonesia's legal system consisted of customary laws which were established and enforced by Indonesia's indigenous people.⁹⁷

As Indonesia declared its independence from the Dutch on 17 August 1945, it now has a '*national legal system based on Indonesian precepts of law and justice*'.⁹⁸ Indonesia's current laws are influenced by Dutch law, customary law and Islamic law.⁹⁹ It must be noted that matters involving civil law are the only matters in which Islamic law applies.¹⁰⁰

⁹⁰ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 14(a).

⁹¹ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 14(b).

⁹² *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 14(b).

⁹³ Bank Indonesia, *Exchange Rates Calculator*, <<http://www.bi.go.id/web/en/Moneter/Kalkulator+Kurs/>> at 4 November 2011.

⁹⁴ *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers ch 2, art 14(c).

⁹⁵ Compensation amounts are sourced from *Regulation of the Minister of Transportation No. PM 77 of 2011* regarding Responsibilities of Air Transporters/Air Carriers Chapter 2, Article 14(d); conversion from Indonesian Rupiah to Australian dollars sourced from Bank Indonesia, *Exchange Rates Calculator*, <<http://www.bi.go.id/web/en/Moneter/Kalkulator+Kurs/>> at 4 November 2011.

⁹⁶ Bey, F, *IALS Conference – Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World* (2007) International Association of Law School <<http://www.ialsnet.org/meetings/enriching/bey.pdf>> at 22 March 2011.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

As Indonesia's legal system is based on civil law rather than common law, all legal matters of a private nature are regulated by the Indonesian Civil Code.¹⁰¹ Regulations from the Dutch Civil Code were included in the Indonesian Civil Code.¹⁰² Even though some Dutch influence still remains, the Indonesian Civil Code continues to develop and the differences between the two codes are more defined.¹⁰³

Unlike common law legal systems, Indonesia's civil legal system does not require lower courts to adhere to decisions made by the higher courts, as precedents are *not* binding in Indonesia.¹⁰⁴ Therefore, by not having precedents which determine the basis of a decision in a like case, the courts have broader discretionary powers.¹⁰⁵

Application of Customary Laws

Indonesia does not have a single set of customary laws, with each island having its own.¹⁰⁶ Decisions regarding customary law are made by the following bodies:

- judges;
- village leaders;
- religious leaders; and
- village assembly.¹⁰⁷

The majority of customary law is in the non-statutory form.¹⁰⁸

It must be noted that Indonesia's indigenous people sourced their law from customary law, with the Islamic religion influencing such laws when Indonesia commenced trading with middle-eastern merchants.¹⁰⁹

Indonesian customary laws and their application are not specifically regulated by its Constitution.¹¹⁰

Court System

The Indonesian Constitution authorises the Supreme Court and other Indonesian courts to be granted judicial power.¹¹¹

¹⁰¹ ASEAN Law Association, *Chapter II Legal System* (2010) ASEAN Law Association <<http://www.aseanlawassociation.org/papers/LegalSystem.pdf>> at 22 March 2011.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Martindale-Hubbell(R) Law Digest – Asian Law Digests, *5.01 Actions* (2010) LexisNexis <http://www.lexis.com/research/retrieve?_m=f9abc5cc5817770905f71ff55d3025cf&csv> at 7 April 2011.

¹⁰⁵ *Ibid.*

¹⁰⁶ ASEAN Law Association, *Chapter II Legal System* (2010) ASEAN Law Association <<http://www.aseanlawassociation.org/papers/LegalSystem.pdf>> at 22 March 2011.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Indonesian Constitution* art 24.

The Supreme Court is Indonesia's highest and final court,¹¹² with the key role of supervising and controlling the lower Indonesian courts, ensuring the courts uphold the Indonesian law,¹¹³ and resolving the lower courts' cessation matters.¹¹⁴ If a party wishes to appeal a High Court decision to the Supreme Court, a party must file an 'Application for Appeal' within 14 days of the High Court handing down the decision.¹¹⁵

In each jurisdiction, the High Courts are the '*courts of first appeal, as matter of right*'.¹¹⁶ In each jurisdiction, the District Courts are the '*courts of first instance*'.¹¹⁷ When a case is heard in the District Court, a minimum of three judges are to preside over and deliver the decision of the case.¹¹⁸

Status of International Law Instruments

The provisions of the Warsaw Convention were signed on 2 February 1952, however, had been effective since 17 August 1945 as the Warsaw Convention had been effective in the Netherlands since 1 July 1933.¹¹⁹

The provisions of the Guadalajara Convention were signed on 6 July 1972.¹²⁰

Indonesia is not a party to the Hague Protocol, Rome Convention or the Montreal Convention.

¹¹² ASEAN Law Association, *Chapter III Judicial System* (2010) ASEAN Law Association <<http://www.aseanlawassociation.org/papers/JudicialSystem.pdf>> at 22 March 2011.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Martindale-Hubbell(R) Law Digest – Asian Law Digests, *5.01 Actions* (2010) LexisNexis <http://www.lexis.com/research/retrieve?_m=f9abc5cc5817770905f71ff55d3025cf&csv> at 7 April 2011.

¹¹⁶ Martindale-Hubbell(R) Law Digest – Asian Law Digests, *6.01 Courts* (2010) LexisNexis <http://www.lexis.com/research/retrieve?_m=b76f3a9f7833baff4ed36bbca9862fb5&csv> at 7 April 2011.

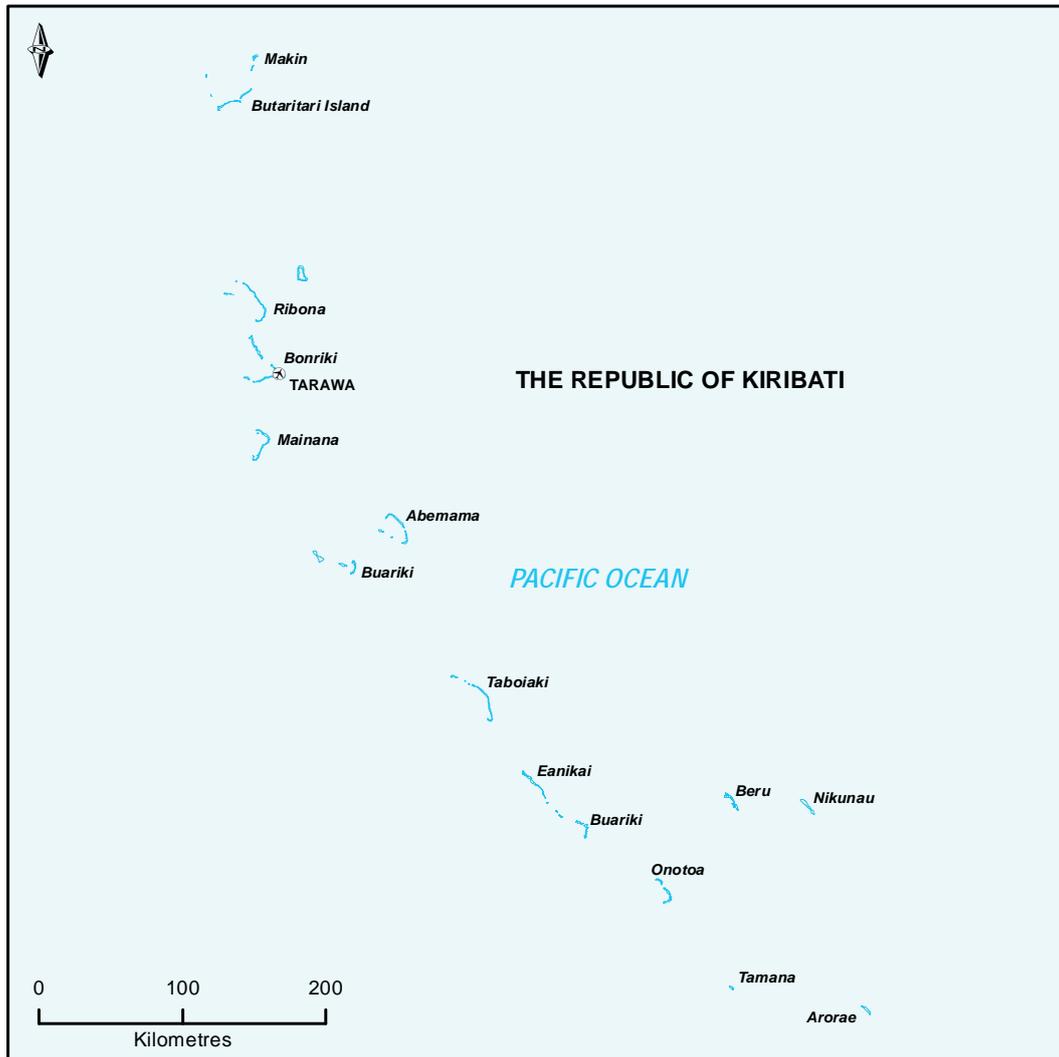
¹¹⁷ Martindale-Hubbell(R) Law Digest – Asian Law Digests, *6.01 Courts* (2010) LexisNexis <http://www.lexis.com/research/retrieve?_m=b76f3a9f7833baff4ed36bbca9862fb5&csv> at 7 April 2011.

¹¹⁸ ASEAN Law Association, *Chapter III Judicial System* (2010) ASEAN Law Association <<http://www.aseanlawassociation.org/papers/JudicialSystem.pdf>> at 22 March 2011.

¹¹⁹ *Ibid.*

¹²⁰ International Civil Aviation Organisation, *Convention, Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier Signed at Guadalajara on 18 September 1961* (2010) International Civil Aviation Convention <<http://www.icao.int/icao/en/leb/guadalajara.pdf>> at 7 April 2011.

REPUBLIC OF KIRIBATI



LOCATION

Oceania, group of 33 coral atolls in the Pacific Ocean, straddling the Equator.¹

Geographic Coordinates

1 25 N, 173 00 E.

Capital

Tarawa.

Area

Total 811 sq km.

Independence

12 July 1979 (from the United Kingdom).

Elevation

Highest point: unnamed elevation on Banaba 81 m.

Population

101,998 (July 2012 est).

Boundaries

Coastline 1,143 km.

¹ Bureau of East Asian and Pacific Affairs, *Background Note: Kiribati* (2011) US Department of State <<http://www.state.gov/r/pa/ei/bgn/1836.htm>> at 9 August 2012.

INTRODUCTION

The Republic of Kiribati is a nation of 33 low-lying atolls scattered across 3.5 million square kilometres of ocean equivalent in size to the continental United States. Located in the central Pacific, Kiribati is the only country situated on both sides of the Equator.

The Republic of Kiribati was previously known as the Gilbert Islands which were invaded by Fiji and Tonga. In 1892, the Gilbert Islands became a British protectorate.² In World War II, some of the atolls which made up the Gilbert Islands were seized by Japan.³ The United States engaged Japan in a battle in 1943, which was recognised as ‘a turning point for the war in Central Pacific’.⁴ In 1977, the Gilbert Islands ‘obtained internal self government’ and on 12 July 1979 declared its independence and was renamed as Kiribati.⁵

When compared with the other Pacific Islands, the Republic of Kiribati is considered to be one of the least developed countries and has minimal natural resources.⁶

Airports

Kiribati has two international airports, the Cassidy International Airport (also known as the Kiritimati Airport) located on Christmas Island, and the Bonriki International Airport located on Tarawa Island. Even though there are a total of 19 airports and airfields in Kiribati, the Cassidy International Airport and the Bonriki International Airport are the only airports servicing international flights.⁷ The remaining 17 airports are used for local flights only.⁸

Airports with hard (paved) runways – Primary

Total: 4

- There are four paved runways extending from 1,524 m to 2,437 m in length.

Airports with soft (unpaved) runways – Secondary

Total: 15

- There are 11 unpaved airstrips extending from 914 m to 1,523 m in length;
- There are four unpaved airstrips with less than 914 m length.

The following table outlines Kiribati’s primary and secondary airports/airstrips:

Airport	Primary	Secondary
Abaiang Airport		•
Abemama Airport		•
Aranuka Airport		•
Arorae Island Airport		•
Beru Airport		•
Bonriki International Airport	•	

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Central Intelligence Agency, World Factbook (2011) <<https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html>> at 17 June 2011.

⁷ Travel.MapsofWorld.com, *Airports in Kiribati* (n.d.) Travel.MapsofWorld.com <<http://travel.mapsofworld.com/kiribati/kiribati-travel/airports.html>> at 6 June 2011.

⁸ Ibid.

Airport	Primary	Secondary
Butaritari Antakana Airport		•
Canton Airfield	•	
Cassidy International Airport	•	
Kuria Airport		•
Maiana Airport		•
Makin Airport		•
Marakei Airport		•
Nikunau Airport		•
Nonouti Airport		•
Onotoa Airport		•
Palmyra Airport	•	
Tabiteuea North Airport		•
Tamana Airport		•

Civil Aviation in the Republic of Kiribati

Civil aviation in Kiribati operates within a system established and maintained by the *Civil Aviation Act 2004* (KI) (the CAA (KI)). The CAA (KI) establishes the functions and obligations of Kiribati's Minister of Civil Aviation, the Civil Aviation Authority and the Director of Civil Aviation.⁹

Local Aviation Authorities

The Directorate of Civil Aviation is the local aviation authority of the Republic of Kiribati as established under section 6 of the CAA (KI).¹⁰ The Directorate of Civil Aviation's principal function is carrying out '*activities which promote safety in civil aviation at a reasonable cost*'.¹¹ Other functions of the Directorate of Civil Aviation include creating standards which enable the civil aviation system to be entered into safely and securely;¹² as well as monitoring and reviewing the compliance to such standards.¹³

Domestic Carriers Liability Legislation

The CAA (KI) only regulates carriers' liability for claims relating to surface damage, and does not regulate carriers' liability for claims relating to injury, death, delay, baggage and cargo from air travel.

⁹ *Civil Aviation Act 2004* (KI) pt II.

¹⁰ AirlineUpdate.com, International Airline Directories (2010) <http://www.airlineupdate.com/content_subscription/authorities/oceania/kiribati.htm> at 7 June 2011.

¹¹ *Civil Aviation Act 2004* (KI) s 8(1).

¹² *Civil Aviation Act 2004* (KI) s 8(2)(a).

¹³ *Civil Aviation Act 2004* (KI) s 8(2)(b) and (c).

As domestic legislation regulating carriers' liability in Kiribati is absent, the laws regulating these areas fall back to the English *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) (the 1967 Order) as amended by the *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1969* (UK) (the 1969 Amendment Order).¹⁴ As the *Kiribati Independence Order 1979 No. 719* (UK) states English law which flows through is the law as it was prior to independence (12 July 1979), the relevant provisions from the 1967 Order (UK) which have force in Kiribati are those from the 1967 Order (UK) as it stood amended by the 1969 Amendment Order at independence, and not as amended from time to time.¹⁵

Although the CAA (KI) does not address carriers' liability, the liability areas that are addressed, such as surface damage, still have effect, and the English law is relied upon only to supplement or 'fill gaps' in the existing domestic Kiribati legislation. As such, for claims arising from injury, death, delay or those related to baggage or cargo, the 1967 Order (UK) is applied. Kiribati's domestic CAA (KI) regulates liability for surface damage.

Death and Injury

If an incident occurs when an aircraft is transporting a passenger and the incident causes the death or injury of the passenger, the carrier is liable for the damage sustained to the passenger.¹⁶ The carrier is also responsible for the death or injury of a passenger who is embarking or disembarking an aircraft.¹⁷

The liability of a carrier is strictly enforced against the carrier, and if a contract containing an express term or condition attempts to limit such liability, that express term or condition will be void.¹⁸ A carrier will not be liable for the damage and loss suffered by the passenger, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents.¹⁹

The carrier's liability is limited to 875,000 francs²⁰ per passenger and, if the Court allows, such a payment can be made periodically.²¹ However, the carrier and the passenger can enter into a special contract, whereby both parties agree the carrier is subject to a 'higher limit of liability'.²²

¹⁴ Section 5 of the *Kiribati Independence Order 1979 No. 719* (KI) states, '(1) Subject to the provisions of this section, the existing laws shall, notwithstanding the revocation of the existing Orders or the establishment of a Republic in Kiribati, continue in force on and after Independence Day as if they had been made in pursuance of this Order. (2) The existing laws and any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council (other than Kiribati Act 1979 or this Order) having effect as part of the law of Kiribati or any part thereof immediately before Independence Day shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.' As the date of Independence was 12 July 1979, the *Carriage by Air Acts (Application of Provisions) (Amendment) Order 1969* (UK) and the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) has effect.

¹⁵ Ibid.

¹⁶ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 17.

¹⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 17.

¹⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 23(1).

¹⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 20.

²⁰ When converting francs, art 22(5) of the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) states 'The sums mentioned in francs in this art shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgement.'

²¹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(1). Section 8(1)(b)(iii) of the *Laws of Kiribati Act 1989* (KI) establishes that, when converting currency, £1 is equivalent to \$2 (AUD).

²² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(1).

An exception to the limited liability of a carrier will arise if it is proven the carrier or its employees or agents intentionally or recklessly caused damage.²³ For such an exception to apply, the carrier or its employees or agents must have been aware that it was likely that such an act or omission would cause damage, and the carrier's employees or agents must have been acting within the scope of their employment.²⁴

The 1967 Order (UK) prescribes a two year limitation period for bringing a claim for damages.²⁵

Contributory Negligence

A carrier will not be liable (entirely or partially) for the damage and loss suffered by a passenger if the carrier establishes the passenger negligently caused or contributed to the damage.²⁶

Baggage and Cargo

A carrier will be liable if 'registered' baggage or cargo is destroyed, lost or damaged 'during the carriage by air'.²⁷ However, a carrier will not be liable for the damage and loss suffered, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents.²⁸

If the baggage or cargo is received by the person entitled to the delivery, without complaint, same is considered *prima facie* evidence the baggage or cargo is delivered to the entitled person in good condition.²⁹

Upon receipt of the damaged baggage or cargo, the entitled person must make a written complaint to the carrier upon discovery of the damage, or within seven days upon receipt of the baggage and within 14 days upon receipt of the cargo.³⁰ If a written complaint is not made within the specified time periods, a claim can not be made against the carrier, unless the carrier acted fraudulently.³¹

²³ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 25.

²⁴ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 25.

²⁵ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 29.

²⁶ Carriage by Air Acts (Application of Provisions) Order 1967 (UK) sch 3, art 21.

²⁷ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 18(1); art 18(2) of the Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) defines 'carriage by air' as 'the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever'.

²⁸ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 20.

²⁹ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 26(1).

³⁰ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, arts 26(2) and 26(3).

³¹ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 26(4).

The carriers' liability is limited to 250 francs per kilogram of destroyed, lost or damaged baggage, cargo or object within same.³² Liability is limited to the total weight of the specific part of the baggage, cargo or object that is destroyed, lost or damaged.³³ However, if the specific part of the baggage, cargo or object diminishes the value of other packages, the carrier will be liable for the damage to the other packages.³⁴ The limitation will not apply if the passenger or consignor makes a "special declaration of interest in delivery at destination"³⁵ and pays a fee when giving the baggage or cargo to the carrier.³⁶ If such a case arises, the carrier will be liable to pay the declared amount, unless the carrier can prove the declared amount exceeds the passenger's or consignor's interest in delivery.³⁷

A carrier's liability is limited to 5,000 francs per passenger, for baggage or objects that are carried onto the aircraft and are in the charge of the passenger.³⁸

An exception to the limited liability of a carrier will arise if it is proven the carrier or its employees or agents intentionally or recklessly caused damage by partaking in an act or omission.³⁹ For such an exception to apply, the carrier or its employees or agents must have been aware that it was likely that such an act or omission would cause damage, and the carrier's employees or agents must have been acting within the scope of their employment.⁴⁰

As noted earlier, the liability of a carrier is strictly enforced against the carrier, and if a contract containing an express term or condition attempts to limit such liability, that express term or condition will be void.⁴¹ However, this does not apply if the cargo has an inherent defect, quality or vice which causes the loss or damage suffered.⁴²

Delay

If there is a delay in transporting passengers, cargo or baggage, the carrier is liable for damage caused by the delay.⁴³ However, a carrier will not be liable for the damage caused by the delay, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents.⁴⁴

When a case involves the delay of a passenger, and the carriage of the passenger is via 'various successive carriers',⁴⁵ a claim can only be made against the carrier who performed the carriage in which the delay took place.⁴⁶ An exception to this arises when the first carrier expressly agrees to assume liability for the entire journey.⁴⁷

³² Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(a).

³³ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(b).

³⁴ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(b).

³⁵ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(a).

³⁶ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(a).

³⁷ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(2)(a).

³⁸ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 22(3).

³⁹ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 25.

⁴⁰ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 25.

⁴¹ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 23(1).

⁴² Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 23(2).

⁴³ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 19.

⁴⁴ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 20.

⁴⁵ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 30(1).

⁴⁶ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 30(2).

⁴⁷ Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967 (UK) sch 3, art 30(2).

When a case involves the delay of baggage or cargo, and the carriage of the baggage or cargo is via 'various successive carriers',⁴⁸ the passenger or consignor can make a claim against the first carrier, and the passenger or consignee who was entitled to the delivery of the baggage or cargo can make a claim against the last carrier.⁴⁹ The passenger, consignor and the consignee can also make a claim against the specific carrier who performed the carriage in which the delay occurred.⁵⁰ The carriers' liability will be joint and several.⁵¹

The carriers' liability is limited to 250 francs per kilogram of delayed baggage, cargo or object within same.⁵² Liability is limited to the total weight of the specific part of the baggage, cargo or object that is delayed.⁵³ However, if the specific part of the baggage, cargo or object diminishes the value of other packages, the carrier will be liable for the damage to the other packages.⁵⁴ The limitation will not apply if the passenger or consignor makes a 'special declaration of interest in delivery at destination' and pays a fee when giving the baggage or cargo to the carrier.⁵⁵ If such a case arises, the carrier will be liable to pay the declared amount, unless the carrier can prove the declared amount exceeds the passenger's or consignor's interest in delivery.⁵⁶

Upon receipt of the delayed baggage or cargo, the passenger or consignee has 21 days to make a written complaint to the carrier.⁵⁷ If a written complaint is not made within this period, a claim can not be made against the carrier, unless the carrier acted fraudulently.⁵⁸

Surface Damage

If an aircraft, or a person or object from the aircraft, falls and causes damage or loss to property, whether it be on land or in water, the aircraft's owner will be liable for damages.⁵⁹ Liability is not dependent on the aircraft's owner being negligent or intending to cause such damage or loss. This regime applies 'except where the damage or loss was caused by or contributed to by the fault of the person by whom the same was suffered'.⁶⁰ There is no statutory cap on damages recoverable.

The aircraft owner can, however, seek an indemnity from someone else who is liable for the damage,⁶¹ and may also achieve a discount to any damages as a result of the claimant's contributory negligence.

⁴⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 30(1).

⁴⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 30(3).

⁵⁰ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 30(3).

⁵¹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 30(3).

⁵² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(2)(a).

⁵³ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(2)(b).

⁵⁴ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(2)(b).

⁵⁵ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(2)(a).

⁵⁶ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 22(2)(a).

⁵⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, arts 26(2) and 26(3).

⁵⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 3, art 26(4).

⁵⁹ *Civil Aviation Act 2004* (KI), s 60(3); That is, negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from any statutory provision in respect of contributory negligence, give rise to the defence of contributory negligence: *Civil Aviation Act 2004* (KI) s 60(8).

⁶⁰ *Civil Aviation Act 2004* (KI) s 60(3).

⁶¹ *Civil Aviation Act 2004* (KI) s 60(4).

System of Law

The common law of Kiribati comprises the English common law and doctrines of equity.⁶² The effect of any law of England enacted after 1 January 1961 on Kiribati's rules shall be disregarded except where such law had or has effect as part of the law of Kiribati.⁶³ Kiribati has taken on the laws and statutes of the Parliament of the United Kingdom (including statutes of general application in force) on 1 January 1961.⁶⁴

Application of Customary Laws

Customary law is recognised as a source of law in Kiribati. Customary law is also to be applied in preference to common law, but only with regard to specified matters. However, those specified matters are ones where customary law is most likely to be relevant, such as land and water.⁶⁵

Court System

While the UK's Privy Council is still used by Kiribati, it only has relevance to decisions involving the interpretation of the Constitution. The Court of Appeal has jurisdiction to hear civil appeals from any High Court decision on a question of law. It will also hear civil appeals with leave where an order was made by consent or as to costs only and where the order or judgment is interlocutory. The High Court appears to have unlimited original jurisdiction in civil cases and appeals lie to the High Court from decisions of the Magistrates Court in any claim in which the amount involved exceeds AU\$20. The Magistrates Courts have jurisdiction within the limits of the district in which they are situated and may determine claims in contract and tort where the amount involved does not exceed AU\$3,000.

Status of International Law Instruments

Kiribati is not a party to the Warsaw Convention, Hague Protocol, Rome Convention, Guadalajara Convention or the Montreal Convention.⁶⁶

⁶² *Laws of Kiribati Act 1989* (KI) s 6(1).

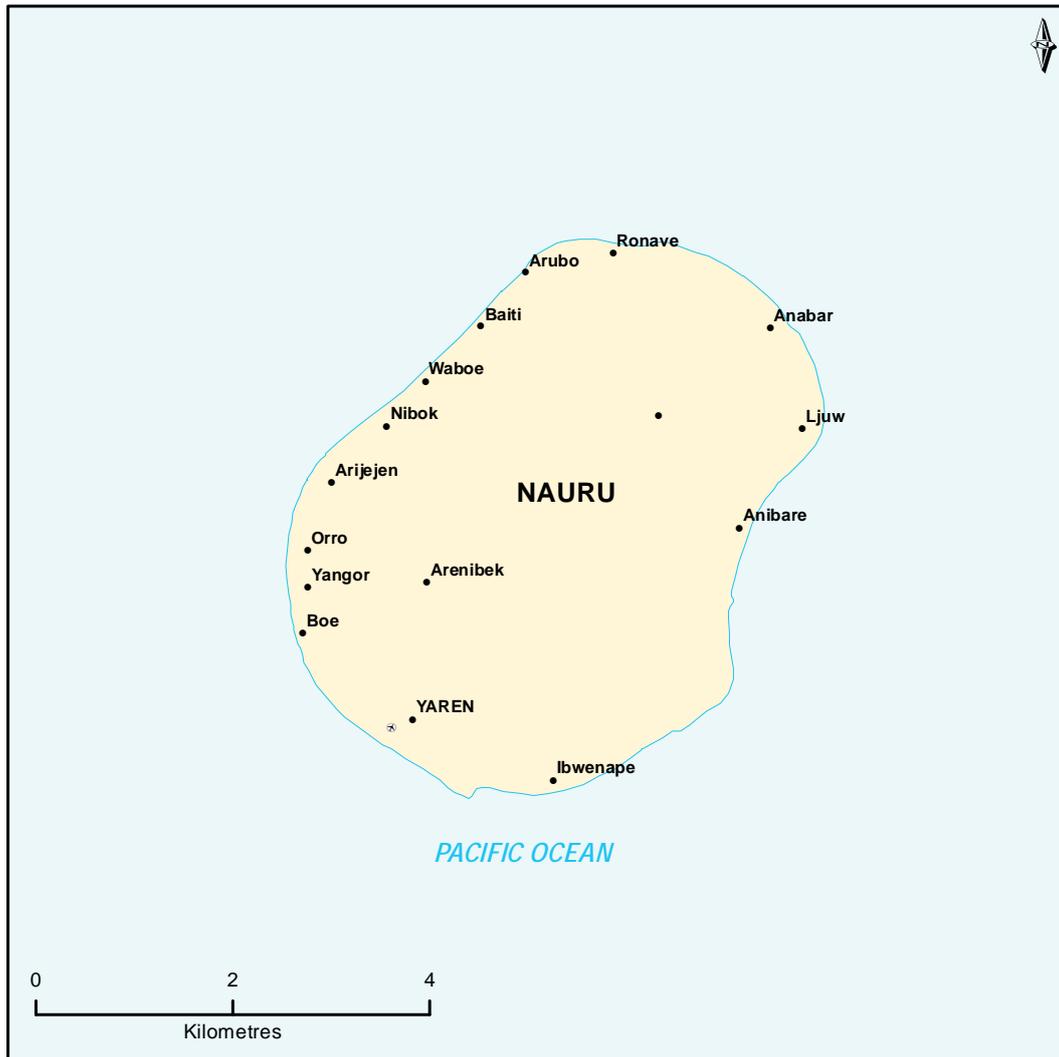
⁶³ *Laws of Kiribati Act 1989* (KI) s 6(2).

⁶⁴ *Laws of Kiribati Act 1989* (KI) s 7.

⁶⁵ *Laws of Kiribati Act 1989* (KI) ss 6(3)(b) and 5(3).

⁶⁶ *Ibid.*

REPUBLIC OF NAURU



LOCATION

Oceania, island in the South Pacific Ocean, south of the Marshall Islands.¹

Geographic Coordinates

0 32 S, 166 55 E.

Area

Total 21 sq km.

Elevation

Highest point: unnamed elevation 61 m.

Boundaries

Coastline 30 km.

Capital

No official capital.

Independence

31 January 1968 (from the Australia, New Zealand and UK administered UN trusteeship).

Population

9,378 (July 2012 est).

¹ Central Intelligence Agency, The World Factbook

<<https://www.cia.gov/library/publications/the-world-factbook/geos/nr.html>> at 9 August 2012.

INTRODUCTION

The Republic of Nauru is an island nation in the South Pacific Ocean, approximately 41 kilometres south of the equator. Nauru is the world's smallest island nation and independent republic. The island has one airport, Nauru International Airport.

Nauru became partially isolated from the outside world between December 2005 to September 2006 after Air Nauru, the airline which serviced the island, had its sole aircraft seized and subsequently ceased operating, leaving Nauru only accessible by ship. The airline was given monetary aid from Taiwan to restart operations under the name Our Airline in September 2006.

Airports

Nauru International Airport is the only airport on the island.

Airports with hard (paved) runways – Primary

Total: 1

- There is one paved runway extending from 1,524 m to 2,437 m in length.

Civil Aviation in the Republic of Nauru

Civil aviation in Nauru operates within a system established and maintained in accordance with the *Civil Aviation Act 2010* (NR) (the CAA). The primary object of the CAA is to regulate the civil aviation system of Nauru to ensure and improve safety, security and efficiency,² and to implement Nauru's obligations under international aviation and meteorological agreements.³

The CAA applies to every person, aircraft, aeronautical product, air service or aviation related service in Nauru,⁴ all Nauru registered aircraft both within and outside Nauru,⁵ holders of aviation documents who are exercising or purporting to exercise privileges under the document both within and outside Nauru,⁶ and foreign registered aircraft operating in Nauru.⁷

Local Aviation Authorities

The Civil Aviation Authority of Nauru was established pursuant to s 11 of the CAA. The principal function of the Authority is to promote safety and security in civil aviation.⁸

² *Civil Aviation Act 2010* (NR) s 3(a).

³ *Civil Aviation Act 2010* (NR) s 3(b).

⁴ *Civil Aviation Act 2010* (NR) s 4(a).

⁵ *Civil Aviation Act 2010* (NR) s 4(b).

⁶ *Civil Aviation Act 2010* (NR) s 4(c).

⁷ *Civil Aviation Act 2010* (NR) s 4(d).

⁸ *Civil Aviation Act 2010* (NR) s 12(1).

Domestic Carriers Liability Legislation

The CAA regulates the liability of a carrier for surface damage. While not yet tested before Nauru Courts to date, it would appear the regulation of domestic carriers' liability for death, injury, delay and cargo is guided by s 4 of the *Custom & Adopted Laws Act 1971* (NR) which allows for all English rules, regulations and orders in force before 31 January 1968 to remain in force as laws of Nauru, unless either (a) contradictory to other laws, or (b) expressly repealed.⁹ While some of England's aviation laws were rejected by Nauru, the relevant provisions regulating domestic carriage appear to have remained in force, in particular, the *Carriage by Air Act 1961* (UK).¹⁰

The mechanism of English to Nauru law is by reference to the *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) (1967 Order) which applies, as a law of Nauru, the United Kingdom's adoption of laws similar to the Warsaw Convention.¹¹ Schedule 2 to the 1967 Order is crucial in regulating civil aviation consumer protection measures, including setting the limits for passenger injury or death, delay and cargo and baggage loss.

Unlike other nations that rely on the above, it would not appear Nauru has implemented an updated currency equivalent regulation to affect liability limits.

Death & Injury

Where the carriage of a passenger falls within the scope of sch 2 of the 1967 Order, the carrier will be held liable for the death of a passenger or any personal injury suffered by that passenger if it resulted from an accident that took place on board the aircraft or in the course of any operations of embarking or disembarking.¹²

The liability of the carrier for injury or death is limited to 875,000 francs¹³ or such higher sum as specified in the contract of carriage.¹⁴

The right of a person to bring a claim for death or injury is extinguished if the claim is not brought within two years after the date of arrival of the aircraft at the destination, or, in the event the aircraft did not arrive at its destination: (a) 'the date on which the aircraft ought to have arrived at the destination'; or (b) 'the date on which the carriage stopped'.¹⁵

⁹ *Custom & Adopted Laws Act 1971* (NR) s 5. The first schedule of this Act lists those parts of the statute law of England which, per s 6, shall not apply or have force and effect in Nauru. While 'Aviation' is listed in this Schedule, this prohibition does not apply to the *Carriage by Air Act 1961* (UK), and the *Carriage by Air Acts (Supplemental Provisions) Act 1962* (UK).

¹⁰ The first schedule of this Act lists those parts of the statute law of England which, per s 6, shall not apply or have force and effect in Nauru. While 'Aviation' is listed in this Schedule, this prohibition does not apply to the *Carriage by Air Act 1961* (UK), and the *Carriage by Air Acts (Supplemental Provisions) Act 1962* (UK).

¹¹ *Carriage by Air Act 1961* (UK) under which the *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* was made per ss 9–10 and s 5 of the *Carriage by Air Acts (Supplemental Provisions) Act 1962* (UK).

¹² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 2, art 17.

¹³ When converting francs, art 22(5) of the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) states 'The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgement.'

¹⁴ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 22(1).

¹⁵ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 1, pt 1, s 5 and sch 2, art 29.

Death

The liability of the carrier for the death of a passenger (including the injury that resulted in the death) is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.¹⁶

The liability is enforceable for the benefit of those members of the passenger's family who have sustained damage as a result of the death of the passenger. The action to enforce the liability may only be brought by the personal representative of the passenger or the person for whose benefit the liability is enforceable, i.e. the family member.¹⁷

Importantly, only one claim can be pursued in respect of the death of any one passenger and that claim is to be for the benefit of all persons who have sustained damage as a result of the death of the passenger.¹⁸ In the event of a dispute as to the distribution of the liability, the court may make any order it considers appropriate.¹⁹

The following people will be deemed 'family' for the purpose of recovering damages for a liability in respect of the death of a passenger: a wife or husband; parents; step-parents; grandparents; brothers and/or sisters; half-brothers and or half-sisters; children, step-children and grandchildren.²⁰

Contributory Negligence

A reduction on account of contributory negligence is permitted in circumstances where the carrier proves the damage was 'caused or contributed to by the negligence of the injured person'.²¹

Baggage and Cargo

Where sch 2 to the 1967 Order applies to the carriage of a passenger, the carrier will be liable for damage sustained in the event of the destruction or loss of the baggage of the passenger. The liability of the carrier is limited for destruction or loss of baggage and cargo²² as follows:

- registered baggage: 250 francs per kilogram per passenger or such higher sum as specified in the contract of carriage;²³
- baggage other than registered baggage²⁴: 5,000 francs per passenger.

Baggage

Except where the carrier has been fraudulent,²⁵ a passenger is precluded from pursuing a claim against a carrier in respect of destroyed or lost baggage, unless the person entitled to delivery has made a written complaint, delivered to the carrier by post or in person within the following time periods:

¹⁶ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 1, pt 1 s 3.

¹⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) ss 2 and 3.

¹⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 1, annex to pt 1, ss 2, 3.

¹⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 1, annex to pt 1, ss 2, 3.

²⁰ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) ss 1 and 2.

²¹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) sch 2, art 21.

²² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 18.

²³ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 22(2)(a).

²⁴ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 22(3).

²⁵ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 26(4).

- for loss or destruction of baggage, within seven days from the date of receipt of the baggage;
- for loss or destruction of cargo, within 14 days after the date of receipt of the cargo;
- for delay, within 21 days from the date on which the baggage or cargo have been placed at the disposal of the person entitled to it.²⁶

Surface Damage

Where material loss or damage is caused to any person or property on land or water by an aircraft while in flight, taking off or landing, damages shall be recoverable without proof of negligence or intention or other cause of action,²⁷ unless the loss or damage was caused or contributed to by the claimant.²⁸ There is no statutory cap on damages recoverable.

The aircraft owner can however seek an indemnity from someone else that is liable for the damage,²⁹ and may also achieve a discount to any damages as a result of the claimant's contributory negligence.

System of Law

The principles and rules of equity which were in force in England on 31 January 1968 have been adopted as law in Nauru.³⁰ Such common laws and laws of equity are administered concurrently in civil matters in Nauru, but only to the extent:

- the circumstance of Nauru and the limits of its jurisdiction permit, and
- they are not inconsistent with the laws of Nauru, or the laws of the Commonwealth of Australia, the State of Queensland, the Territory of Papua New Guinea expressly applied in, or adopted as the law of Nauru.³¹

As above, those laws of England, the Commonwealth of Australia, the State of Queensland, and the Territory of Papua New Guinea do not regulate civil aviation.³²

Application of Customary Laws

Common law is inferior to customary law in Nauru.³³ The Nauruan institutions, customs and usages, to the extent they existed before 5 January 1972 shall, unless stated otherwise, be accorded recognition by every Court and are given full force and effect of law to regulate land rights and the interests of Nauruans.³⁴

Court System

The High Court of Australia has jurisdiction to hear appeals from the Supreme Court of Nauru against any final or first instance judgment. The Australian High Court may elect to hear an appeal from the Supreme Court of Nauru exercising jurisdiction in appeals from the District Court.

²⁶ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) art 26(2).

²⁷ *Civil Aviation Act 2010* (NR) s 149(1).

²⁸ *Civil Aviation Act 2010* (NR) s 149(2).

²⁹ *Civil Aviation Act 2010* (NR) s 149(3).

³⁰ *Custom and Adopted Laws Act 1971* (NR) s 4(2).

³¹ *Custom and Adopted Laws Act 1971* (NR) s 4(3).

³² *Laws Repeal and Adopting Ordinance 1922–1936*.

³³ *Custom and Adopted Laws Act 1971* (NR).

³⁴ *Custom and Adopted Laws Act 1971* (NR) s 3.

The Supreme Court of Nauru has unlimited original civil jurisdiction and decides appeals from final decisions of the District Court. The District Court hears and determines all civil cases involving not more than \$3,000.

Status of International Law Instruments

The Warsaw Convention was ratified on 16 November 1970 and came into force on 31 January 1968.³⁵

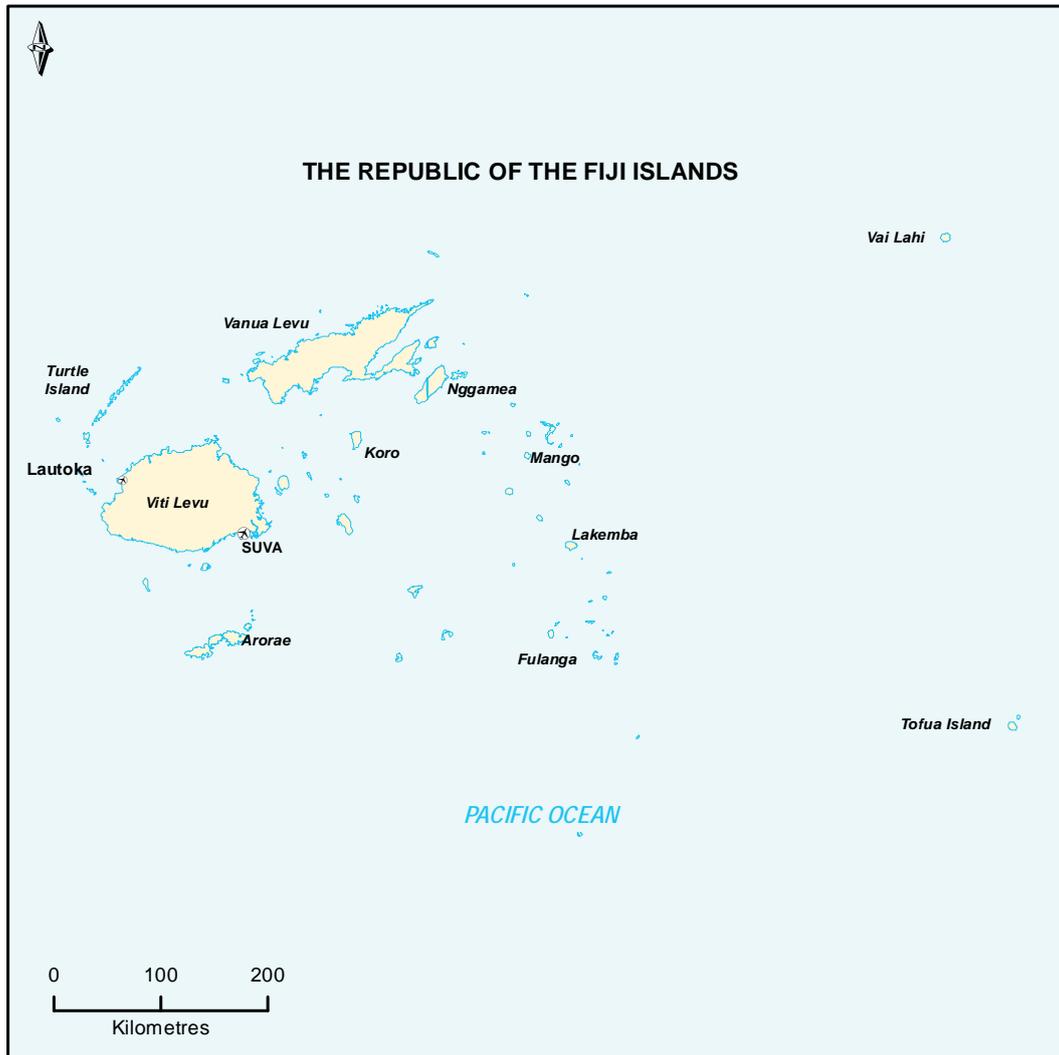
The Hague Protocol was ratified on 4 November 1970 and came into force on 31 January 1968.³⁶

Nauru is not a party to the Rome Convention, Guadalajara Convention or the Montreal Convention.

³⁵ International Civil Aviation Organization Status of Individual States with regard to international air law multilateral treaties http://www.icao.int/icao/en/leb/StatusForms/nauru_en.pdf at 3 June 2011.

³⁶ *Ibid.*

REPUBLIC OF THE FIJI ISLANDS



LOCATION

Oceania, island group in the South Pacific Ocean.¹

Geographic Coordinates

18 00 S, 175 00 E.

Capital

Suva.

Area

Total 18,274 sq km.

Independence

10 October 1970 (from the UK).²

Elevation

Highest point: Tomanivi 1,324 m.

Population

890,057 (July 2012 est).

Boundaries

Coastline 1,129 km.

¹ Central Intelligence Agency, The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/cw.html>> at 9 August 2012.

² Ibid.

INTRODUCTION

Made up of more than 300 islands, the Republic of Fiji is one of the economic powerhouses of the South Pacific region. It is, by comparison to many other South Pacific nations, a well developed economy with commerce and tourism driving much of this progress. It has though had perhaps one of the most fickle contemporary political histories, with four political coups over the last 20 plus years, with the most recent being in 2006. Commentators say this latest coup has caused harm to the nation, its economy and international reputation and remains largely unresolved with democratic elections yet to be held. Fiji nevertheless remains a major attraction for tourism from Australia.

Airports

The Republic of the Fiji Islands' primary international airport is Nadi International Airport, Nadi, on the island of Viti Levu. This hub is supported by the smaller Nausori International Airport on Viti Levu, while Labasa Airport operates for the island of Vanua Levu. The two main islands are mountainous and covered with thick tropical forests. Because of this, and the wide breadth of islands that constitute the nation, there are approximately twenty-five other airports, the majority of which are soft (unpaved) runways as seen in the table below.

Airports with hard (paved) runways – Primary

Total: 4

- There is one paved runway with more than 2,437 m length;
- There are two paved runway extending from 1,524 m to 2,437 m in length;
- There is one paved runways extending from 914 m to 1,523 m in length.

Airports with soft (unpaved) runways – Secondary

Total: 25

- There are four unpaved airstrips extending from 914 m to 1,523 m in length;
- There are twenty-one unpaved airstrips with less than 914 m length.

The following table outlines Fiji's major primary and secondary airports/airstrips:

Airport	Primary	Secondary
Ba Airport		•
Bua Airport (Dama Airport)		•
Castaway Island Airport		•
Cicia Airport		•
Koro Airport		•
Lakemba Airport		•
Lambasa Airport	•	
Laucala Airport		•
Levuka Airport		•
Malolo Lailai Airport		•
Mana Island Airport 1525	•	
Moala Airport		•
Nadi International Airport	•	
Nanuya Lailai Airport (Blue Lagoon Airport)		•
Nausori International Airport	•	

Airport	Primary	Secondary
Ngau Airport		•
Ono-i-Lau Airport		•
Pacific Harbour/Deuba Seaplane Base		•
Rabi Airport		•
Rotuma Airport		•
Saqani Airport		•
Savusavu Airport		•
Taveuni Island Airport		•
Vanuabalavu Airport		•
Vatukoula Airport		•
Vatulele Airport		•
Vunisea Airport		•
Wakaya Airport		•
Yasawa Airport		•

Civil Aviation in the Republic of the Fiji Islands

Civil aviation in Fiji operates within a system established and maintained in accordance with the *Civil Aviation Act 1976* (FJ)³ which is designed to establish aircraft registration, regulate flight and aviation safety and security, and also prescribe mechanisms for airport minimum standards. Penalties and fines are also mandated within this regime for breaches of relevant aviation safety rules.

Local Aviation Authorities

The Civil Aviation Authority is the Fijian Government's aviation regulatory authority charged with ensuring the nation's responsibilities under applicable International Conventions. The Authority regulates the activities of airport operators, air traffic control and air navigation service providers, airline operators, pilots and air traffic controllers, aircraft engineers, technicians, airports and international air cargo operators in Fiji.

Domestic Carriers Liability Legislation

As a former British territory and in the apparent absence of change post independence, the laws regulating passenger injury for domestic travel rely on the English regime, albeit with a Fijian currency conversion for the relevant damages caps.

The mechanism of English to Fijian law is by reference to the *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) (1967 Order) which applies, as a law of Fiji, the United Kingdom's adoption of laws similar to the Warsaw Convention.⁴ Schedule 2 to the 1967 Order is crucial in regulating civil aviation consumer protection measures, including setting the limits for passenger injury or death, delay and cargo and baggage loss.

Before looking at the current regulation of domestic liabilities for air carriage, it is worth quickly considering its judicial history from the case of *Air Fiji Ltd v Flora Seu Houg-Lee*.⁵ The plaintiff was the widow of Michael Anthony Houg-Lee and, following an aircraft accident, brought a

³ Chap 174.

⁴ *Carriage by Air Act 1961* (UK).

⁵ [2005] FJCA 84.

claim against the carrier in the High Court of Fiji for damages. Her husband died as a fare-paying passenger on a domestic flight between Suva and Nadi on 24 July 1999.

The case before the High Court focused entirely on the legal measure of damages applicable to the plaintiff. Judges Barker and Scott put it best:

‘the failure of Fiji to update the British subordinate legislation has led to the morally justifiable complaint of the present [plaintiff] that she has been “short-changed” in her legitimate claim for damages by that legislation’.

Given the fairly emotive terminology used through much of the High Court’s decision, and given the wide-ranging and perhaps even universal commonality in the High Court’s approach to this issue for many other island nations, there is benefit in reproducing extracts of the judgment below.

The background to the case begins with Fiji’s use of legislation, enacted by the British Government before Fiji became independent, linking Fiji to the Warsaw Convention.⁶ This Imperial legislation is the 1967 Order. This Act adopted in the UK the Warsaw Convention as amended by The Hague Convention which regulated the international and domestic carriage of passengers for many of the UK’s colonies.

The 1967 Order allowed UK colonies, from time to time, to specify the liability cap for the purposes of art 22 of the Warsaw Convention. The *Carriage by Air (Fiji Currency Equivalents) Order 1969 (FJ) (CEO)* effectively made the sum of 875,000 francs to be the equivalent of F\$48,369.28. The carrier argued this was the limit of its liability to the plaintiff.

The plaintiff argued against the CEO on a number of grounds.

- The power of the Minister is required to be exercised ‘*from time to time*’ which clearly envisaged a proper equivalence in local currency be maintained with the current value of gold.
- The CEO was invalid because it did not contain a formula which would properly give effect to the relevant value of gold as expressed in Fijian currency at the date of any judgment.
- The sum specified by the CEO had become ‘*leached*’ by inflation, particularly given the discontinuance of the gold standard and the effects of inflation in Fiji over 35 years.
- The CEO infringed the guarantee in s 40(1) of the Fiji Constitution that a person has the right not to be deprived of ‘property’ by the State, otherwise than in accordance with a law. The ‘property right’ the plaintiff argued was an ‘inchoate’ right for a victim of an air accident (or the relatives of a victim) to receive, as maximum provable damages under art 22(5) of the Warsaw Convention, gold to the amount there specified or else to have judgment entered in the Fijian currency equivalent of that amount of gold.

By contrast, the carrier argued.

- There was still the chance that a new CEO could be made by the State prior to judgment which would apply.
- CEOs have been relied on by countless claimants, insurers and carriers, world-wide, for death, injury, baggage and cargo claims. There has never been a challenge to a CEO which indicates a universal acceptance of CEOs in a host of different legal systems.
- There was no evidence to suggest the CEO, when it was made, was other than a genuine attempt at converting the Convention franc entitlements into Fijian currency.
- The right to receive damages is not ‘property’ contemplated by s 40 of the Constitution, and even if it were and the CEO effected a deprivation of property, that deprivation was in accordance with a law.

⁶It is necessary of course to bear in mind that Fiji is not a signatory to the 1999 Montreal Convention.

The Court accepted that there was no argument against the proposition that it is permissible for a State which is a party to the Convention to issue a CEO. Before 1978, many countries (including the United Kingdom) had enacted legislation specifying national currency equivalents of Convention francs. Without such legislation, a country's official gold value of its currency might fluctuate sharply from the free market value or there might be different official rates for different purposes.

As to this specific CEO for Fiji, while the Court accepted the carrier's argument – that it could not interfere with the CEO which was validly made and still part of the law of Fiji, it did not mince words in criticising the CEO. The Court said:

'[We] readily acknowledge the objective justice of the argument that the CEO is obsolete and should have been amended several times over the last 35 years. However the Court has no jurisdiction to substitute its own views. Having identified the injustice, the Court is unable to legislate to remedy it. Nor can it alter the terms of the CEO, validly made in 1969, by the imputation of a "sunset" clause or by the addition of some mechanism tying the values expressed in the CEO with the current gold value.

. . . the Court expresses the strong wish that speedy consideration be given by the Legislature of Fiji to enact its own legislation regarding domestic and international air carriage. Despite the inaction of 35 years, the present is a good time to legislate in this area, given the ability now for Fiji to adopt the Montreal Convention in its own right, to become a signatory state, and to promulgate a CEO which is meaningful in the 21st Century. Anyone could be the victim of an aviation disaster. It would come as an unpleasant surprise to one's executors and dependants to know that such a meagre level of compensation would be payable in that event and that, moreover, the limit of compensation could depend on the regime adopted by the country of the flag of a particular carrier.

Given that legislation takes time to be passed, in the meantime, a new CEO should be issued by the Minister under the existing inherited British legislation. This Order should reflect a more meaningful value in Fijian currency of the entitlements of claimants under the Warsaw Convention in the Courts of Fiji. The Court respectfully suggests to the Minister that this course be adopted promptly, in order to diminish the injustice of the present CEO.' (our emphasis)

The Court concluded by finding no merit in the plaintiff's constitutional argument agreeing entirely with the carrier that s 40 of the Constitution is aimed at compulsory acquisition by the State of real and personal property.

While the Court was clearly unimpressed with its legislature for failing to update a 35 year old piece of law, it did approach the matter with some common sense:

'Air carriers enter into insurance arrangements on the basis of the likely limits of liability in the jurisdiction in which they operate. This would be especially the case for a small domestic carrier such as the carrier here. We take judicial notice of the likelihood that the insurance premiums for such a carrier would rise dramatically if its maximum liability for death or injury per passenger was \$1.5 million instead of the CEO limits. Very high insurance premiums could threaten the viability of any small domestic carrier and possibly larger carriers. Admittedly, there would always be the possibility of a new CEO being issued which could trigger an increase in premiums. For passengers, accident insurance is readily available which, although not an ideal solution, can help assuage the difficulties caused by an obsolete CEO.'

Death & Injury

Where the carriage of a passenger falls within the scope of sch 2 of the 1967 Order, the carrier will be held liable for the death of a passenger or any personal injury suffered by that passenger if it resulted from an accident that took place on board the aircraft or in the course of any operations of embarking or disembarking.⁷

The liability of the carrier for injury or death is limited to 875,000 francs (F\$500,000)⁸ or such higher sum as specified in the contract of carriage.⁹

The right of a person to bring a claim for death, injury or destruction, damage or loss of baggage is extinguished if the claim is not brought within two years after the date of arrival of the aircraft at the destination or in the event the aircraft did not arrive at its destination: (a) 'the date on which the aircraft ought to have arrived at the destination'; or (b) 'the date on which the carriage stopped'.¹⁰

In *Thomas v Turtle Airways Ltd*,¹¹ the plaintiffs were passengers in a Cessna 172 light aircraft which they had chartered from the first-named defendant on 23 November 1981 for a flight from Nadi to Suva. The second-named defendant was the pilot of that aircraft which crashed into the Bay of Islands at Lami near the Tradewinds Hotel at approximately 11.20 a.m. that day. Both passengers suffered serious injuries.

The plaintiffs' alleged:

- Turtle Airways was a commercial airline engaged in public transport by air for reward in and around the Fiji Islands and was the owner and in control of the aircraft in which the plaintiffs were passengers and which crashed;
- the pilot was at all such times employed by the operator as an aircraft mechanic and to fly aircraft, and
- by an agreement made between the operator and the plaintiffs on 23 November 1981, the operator agreed for reward to carry the plaintiffs by air from Nadi to Nausori, Fiji.

The cause of the incident was limited visibility brought about by unusual meteorological conditions and the pilot's inexperience of the route in bad weather.

The key issue for the plaintiffs here was art 25 of the Warsaw Convention as amended at The Hague 1955. Their goal was to persuade the Court that the pilot acted *recklessly and with knowledge that damage would probably result from his action* such that they would be entitled to damages at large. If the plaintiffs failed in that attempt, then limited damages under art 22 of the Convention would apply. In Fiji at the time, on a domestic flight, damages were limited to F\$48,369.28 for personal injury and F\$276.40 for loss of property in the absence of any agreement between the carrier and the passenger to a higher limit to liability.¹² No such agreement was entered into by the parties in this case.

The only expert witness called by the plaintiffs was Mr Gregory Matthews who was an experienced Sydney-based pilot with an accumulated 12,945 flying hours at the time. Mr Matthews was adamant that Turtle Airways' pilot was guilty of gross negligence and conducted the flight recklessly, and with knowledge that damage would probably result. He said,

'1. Neither Turtle Airways nor the pilot should have undertaken this flight given the lack of experience and limitations of the pilot and the aircraft, in the weather conditions then prevailing and threatened;

⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 17.

⁸ *Carriage by Air (Fiji Currency Equivalents) Order 2006* (FJ).

⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(1).

¹⁰ *Ibid* sch 1, pt 1, s 5 and sch 2, art 29.

¹¹ [1998] FJHC 141; HBC1024.83 & HBC1025.83 (21 October 1998).

¹² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) para 2.

2. Both Turtle Airways and the pilot should have aborted the flight when it was clear that it was unsafe to continue;

3. The pilot deliberately flew the aircraft in IFR conditions for which he was not qualified or competent, by training, experience or rating, and for which the plane itself was not rated; and

4. The pilot breached critical regulations and failed to demonstrate an acceptable level of skill in the management and control of the aircraft.’

In short, Mr Matthews said the pilot was reckless primarily by taking off at all from Nadi knowing his inexperience as a pilot in tropical conditions and with the weather report he had of conditions at Nausori.

Judge Byrne of the High Court of Fiji relied on Kirby P in *S.S. Pharmaceutical Co Ltd v Qantas Airways Ltd*.¹³

‘The phrase “recklessly and with knowledge that damage would probably result” involves one composite concept. It requires proof by the claimant seeking the exemption which Article 25 allows that the damage complained of was caused by something significantly more than negligence and carelessness. Even proof of reckless conduct is itself, and alone, not enough. It must be shown that, at the time of the reckless conduct, the servants or agents of the carrier concerned knew that such conduct would cause damage but went ahead regardless.’

Judge Byrne also relied on Lord Justice Eveleigh in *Goldman v Thai Airways International Ltd*.¹⁴

‘When conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. This is the ordinary meaning of the word as I understand it.’

Judge Byrne ultimately found the actions of the pilot indicated no recklessness,

‘but, if anything, cool-headedness in attempting to deal with the emergency in which he suddenly found himself . . . it was not until the pilot discovered that his escape route to Deuba was shut off by weather that had moved up behind him that the pilot had reason to conclude that the situation carried more than the possibility of danger. That he was attempting to avoid trouble is in my view proven by the fact that he had already declined the risk of attempting to reach Nausori to land under the special VFR clearance he had been granted. He thought he could safely go back to Deuba and in attempting to do so in my judgment showed the direct opposite of recklessness but rather a reasoned decision to avoid any further risks.’

In finding the pilot had not acted recklessly, Judge Byrne therefore assessed damages under art 22 and awarded each plaintiff an amount not exceeding F\$48,369.28 for personal injuries and F\$276.40 for property damage. Judge Byrne also found that interest was not allowed in view of art 22 of the Warsaw Convention. Despite the nationality of the plaintiffs, Judge Byrne was not satisfied the award should be paid in Australian dollars on the basis the Plaintiffs came to Fiji to sell their company’s products to their representatives in Fiji where the amount of sales would be paid in Fijian dollars.

¹³ (1991) 1 Lloyd’s Rep 288, 302.

¹⁴ (1983) 3 ALL E.R. 693, 699.

Death

The liability of the carrier for the death of a passenger (including the injury that resulted in the death) is in substitution for any civil liability under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.¹⁵

The liability is enforceable for the benefit of those members of the passenger's family who have sustained damage as a result of the death of the passenger. The action to enforce the liability may only be brought by the personal representative of the passenger or the person for whose benefit the liability is enforceable, i.e. the family member.¹⁶

Importantly, only one claim can be pursued in respect of the death of any one passenger and that claim is to be for the benefit of all persons who have sustained damage as a result of the death of the passenger.¹⁷ In the event of a dispute as to the distribution of the liability, the court may make any order it directs regarding the proportionate division of the liability.¹⁸

Finally, the Act prescribes the following people will be deemed 'family' for the purpose of recovering damages for a liability in respect of the death of a passenger: a wife or husband; parents; step-parents; grandparents; brothers and/or sisters; half-brothers and or half-sisters; children; step children; grandchildren; an illegitimate child will be treated as the legitimate child of his mother or reputed father and an adopted person will be treated as the legitimate child of his adopters.¹⁹

In *Saumi v Air Fiji Ltd*,²⁰ the plaintiff sought dependency loss in respect to the crash of Air Fiji Flight PC 121 on 24 July 1999. This was a domestic flight that crashed at Delailasakau about 40 km west of Nausori.

The plaintiff's Statement of Claim asserted the accident occurred as a result of the negligence of the carrier, and also relied on the *Civil Aviation Act 1976* (FJ)²¹ and the regulations made thereunder.

In its defence, the carrier denied negligence and pled that any claim for damages by the Plaintiff ought be brought pursuant to the *Carriage By Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK) (herein, the 1967 Order).

The plaintiff later issued a summons seeking leave to amend the Statement of Claim so as to enable the plaintiff to bring his claim within the auspices of art 25 of the Order. Article 25, except in cases of recklessness, enables awards of damages to the limit imposed by art 22 (i.e. at that time, F\$48,369).

The carrier objected to the plaintiff's application for leave to amend by seeking to strike out the plaintiff's Statement of Claim. The carrier argued that the plaintiff's claim made no mention of the Order since it was pled as a common law claim in negligence albeit brought pursuant to the *Compensation to Relatives Act* (FJ) and the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act* (FJ).

The plaintiff however argued the facts already pleaded were sufficient to create a cause of action in negligence and would, if proved, be capable in the overall context of being found to amount

¹⁵ *Carriage by Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, pt 1, s 3.

¹⁶ *Carriage by Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, annex to pt 1, s 2 and 3.

¹⁷ *Carriage by Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK).

¹⁸ *Carriage by Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK).

¹⁹ *Carriage by Air Act (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, annex to pt 1, ss 1 and 2.

²⁰ [2002] FJHC 41; Hbc0506d.2000s (15 March 2002).

²¹ Ch 174.

to recklessness as required by the Order. The plaintiff also argued that his claim was not time barred because he had commenced an action within the stipulated period.

The Judge held that a claim for damages arising out of the accident was in fact filed promptly and the carrier was not prejudiced by the timing of the Statement of Claim. While the Judge criticised the vagueness of the Statement of Claim as originally pled, he held there was sufficient effect in the wording of the claim to find that it was made in pursuance of the Order.

The Judge said, '*It would have been better if the draftsman of the Statement of Claim had not overlooked the Order but the ends of justice are seldom met by merely placing reliance on unmeritorious technicalities*'.

Contributory Negligence

The Act provides for a reduction on account of contribution in circumstances where the carrier proves the damage was '*caused or contributed to by the negligence of the injured person*'.²²

Baggage and Cargo

Where the 1967 Order applies to the carriage of a passenger, the carrier will also be liable for damage sustained in the event of the destruction or loss of the baggage of the passenger or cargo. However, the Act limits the liability of the carrier for destruction or loss of baggage and cargo²³ as follows:

- registered baggage: 250 francs per kilogram (kg) per passenger (F\$142)²⁴ or such higher sum as specified in the contract of carriage;²⁵
- baggage other than registered baggage:²⁶ 5,000 francs per passenger (F\$2,857).²⁷

Baggage

Except where the carrier has been fraudulent,²⁸ a passenger is precluded from pursuing a claim against a carrier in respect of destroyed or lost baggage, unless the person entitled to delivery has made a written complaint, delivered to the carrier by post or in person within the following time periods:

- for loss or destruction of baggage, within seven days from the date of receipt of the baggage;
- for loss or destruction of cargo, within 14 days after the date of receipt of the cargo; and,
- for delay, within 21 days from the date on which the baggage or cargo have been placed at the disposal of the person entitled to it.²⁹

In *Raibosa v Air Pacific Ltd*,³⁰ the plaintiff (also the appellant) consigned a container of fresh taro to the carrier for carriage by air from Nadi, Fiji to Sydney, Australia on 2 May 1999. The sale price of the taro was \$11,610. After taking delivery of the consignment in Sydney on 4 May 1999, the consignee found 700 kgs of taro was damaged beyond saleability. The balance was sold for only \$6,745. For present purposes the damage to the taro was caused by the carrier's failure to store the container in a cool store. Notice of the damage was not given to the carrier until 25 May 1999. The plaintiff later sued the carrier.

²² *Civil Aviation Act 1976*, (FJ), sch 2, art 21.

²³ *Civil Aviation Act 1976*, (FJ), sch 2, art 18.

²⁴ *Carriage by Air (Fiji Currency Equivalents) Order 2006* (FJ).

²⁵ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(2)(a).

²⁶ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(3); the definition of baggage other than registered baggage are objects for which the passenger takes charge for him or herself.

²⁷ *Carriage by Air (Fiji Currency Equivalents) Order 2006* (FJ).

²⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 26(4).

²⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 26(2).

³⁰ [2004] FJCA 13; ABU0037.2003S (19 March 2004).

The claim was governed by the Warsaw Convention as amended by the Hague Protocol 1955.³¹ The carrier's defence to the claim was that as the consignor had not complained within 14 days of receipt of the cargo, the claim was barred. Articles 18 and 26 provide:

'18(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.'

(2) Carriage by air within the meaning of paragraph (1) comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.'

'26(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date of which the baggage or cargo have been placed at his disposal.'

At trial before Judge Singh, the appellant called evidence as to the condition of the taro when consigned and when received, the action taken to salvage the taro and the resulting sale of part of the cargo. The carrier did not call evidence or challenge the evidence called. At trial, the case therefore turned on whether or not the cargo had been destroyed or only damaged. If it had been destroyed, no complaint is required by the Convention. Judge Singh held that the cargo had not been destroyed but only damaged. That finding was challenged on appeal.

The Fijian Court of Appeal took guidance from the House of Lords in *Fothergill v Monarch Airlines Ltd*.³²

'Having regard, therefore, to the purpose of Article 26 of the Convention which was to ensure the airline received prompt notice to enable it to take the necessary steps in regard to damage to baggage or cargo including, if possible recovery of objects lost, on its true construction Article 26 applied both to damage to baggage (and the contents) and to loss of contents. The plaintiff was therefore required to lodge a complaint for the lost articles within seven days of receiving his baggage, and as the only complaint he had made did not refer to the loss of any articles but only the damage to his suitcase his claim failed.'

Lord Wilberforce was, *'of the opinion, on the whole, that following the sense of the matter and the continental writers, we should hold that partial loss of contents is included in "damage" and that consequent action may be barred in the absence of a timely complaint'*.

³¹ Incorporated into the law of Fiji by the *Civil Aviation Act 1976* (FJ) (Cap 174) and reproduced in the *Carriage by Air (Overseas Territories) Order 1967* (UK).

³² [1980] 1 All ER 696.

The Court also had regard to the following:

*'Notice of complaint is not required in the case of total loss or destruction. Goods may be treated for this purpose as having been destroyed, even if they still physically exist, if they have lost all economic value and utility, being reduced in effect to scrap, but it has been held that this principle can only be applied where the effective destruction is both total and obvious. The distinction between destruction and damage will be drawn for this purpose on the basis of the facts at the time of delivery.'*³³

On appeal therefore, the Court of Appeal agreed with the primary Judge Singh that on the application of the above statements of law, the cargo of taro was 'damaged' and not 'destroyed' in terms of art 26(2). Accordingly, the plaintiff's appeal was dismissed and the carrier was awarded costs.

Surface Damage

Where death or injury to a person or where material loss or damage is caused to any person or property on land or water by an article or person falling from an aircraft while in flight, taking off or landing, damages flowing from such an incident shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft.³⁴ There is no statutory cap on damages recoverable.

The ability however to claim for such damages is predicated on the loss or damage not being caused or contributed to by the claimant's negligence.³⁵ Moreover, where a legal liability is created in some other tortfeasor to pay damages in respect of the said loss or damage, the owner shall be entitled to be indemnified by that tortfeasor against any claims in respect of the said loss or damage.³⁶

The final key point to note in respect to surface damage liability in Fiji is that where an aircraft has been leased to an operator for any period *exceeding 14 days*, and no pilot, commander, navigator or other flight crew member of the operator is in the employment of the owner, the regime above will apply such that the operator has the same strict liability as would the owner have in such a situation.³⁷

System of Law

While Fiji's Constitution makes no reference to common law, it does however establish the High Court as the successor to the Supreme Court, and the rules of common law and equity that were in force in England as of 2 January 1875 under that Supreme Court, continue in effect in Fiji 'so far only as the circumstances of Fiji and its inhabitants and the limits of its jurisdiction permit and subject to any existing and future Acts of the Parliament of Fiji'.³⁸ Thus, pre-1875 common law remains theoretically relevant as a source of law.

³³ Shawcross and Beaumont *Air Law* 4th edition (as at August 2003) [832].

³⁴ *Civil Aviation Act 1976* (FJ) s 16.

³⁵ *Civil Aviation Act 1976* (FJ).

³⁶ *Civil Aviation Act 1976* (FJ), s 16(1)(b).

³⁷ *Civil Aviation Act 1976* (FJ) s 17.

³⁸ *Supreme Court Act 1875* (FJ) s 24, (ch 13). The *Constitution of the Republic of Fiji Islands 1997* (s 195(2)(d)) continues in force s 35 of the *Supreme Court Ordinance 1875*.

In practice, Fijian courts have not been limited to English common law as precedent. Judicial decisions have routinely found persuasive value in courts of other Commonwealth countries, notably Australia and New Zealand. Although English common law remains a source of law for Fiji under the Constitution, there is no longer any appeal to the Privy Council in London which will further erode the already limited precedential effect of modern English cases.³⁹ In *Nair v Public Trustee of Fiji and the Attorney-General of Fiji*,⁴⁰ Judge Lyons, in following the Australian and New Zealand approach to estoppel, said:

'In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more of its direction. This certainly is the implication when reading s 100(3) of the Constitution which establishes that the customary law of Fiji shall become part of the overall body of law of this country, and further, as to the later assertion, this was the sentiment expressed by the Chief Justice when convening the Supreme Court.'

The principles of liability in tort in Fiji are generally similar to those in other common law jurisdictions, and there has been relatively little intervention by Parliament. The role of statute has largely been to create areas of strict liability.

Fiji no longer has the common law defence of contributory negligence which has been replaced with a comparative negligence standard; the court is authorised to reduce a plaintiff's damages *'to such extent as the court thinks just and equitable having regard to the claimant's share in responsibility'*.⁴¹

Civil proceedings begin with a Writ of Summons, which must contain the particulars of the claim. There is provision for interrogatories and for discovery of documents before a trial.⁴² Tortious personal injury claims generally have a limitation period of three years.⁴³

Application of Customary Laws

The Parliament of Fiji must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes. In doing so, the Parliament of Fiji must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.⁴⁴ This notwithstanding, and with the post-1997 Constitution in place, technically customary law is no longer formally recognised as a general source of law. It is therefore only recognised to the extent it existed prior to the 1997 Constitution and by general application on the terms above.

Court System

The Supreme Court is the final appellate court in civil and criminal matters. It has exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal, with leave of the Court of Appeal or special leave of the Supreme Court. This Court is used for final decisions in proceedings involving F\$20,000 or more.

The Court of Appeal has jurisdiction to hear and determine appeals from judgments of the High Court.

³⁹ Section 118 of The Constitution of the Republic of Fiji Islands 1997.

⁴⁰ Unreported, High Court, Fiji, CAN 27/90, 8 March 1996.

⁴¹ *Law Reform (Contributory Negligence and Tortfeasors) Act 1946* (FJ) (ch 30).

⁴² *Magistrates Court Act 1944* (FJ) (ch 14).

⁴³ *Limitation Act 1971* (FJ) (ch 35).

⁴⁴ *Constitution (Amendment) Act 1997* (FJ) s 186.

The High Court has unlimited jurisdiction to hear and determine civil proceedings. It has an appellate jurisdiction in relation to decisions of Magistrates Courts.

Territorial division of Magistrates' Courts is limited to the division in which they are situated. Magistrates have civil jurisdiction to hear claims in contract or tort where the amount involved does not exceed F\$15,000 and all suits involving trespass or recovery of land.

Status of International Law Instruments

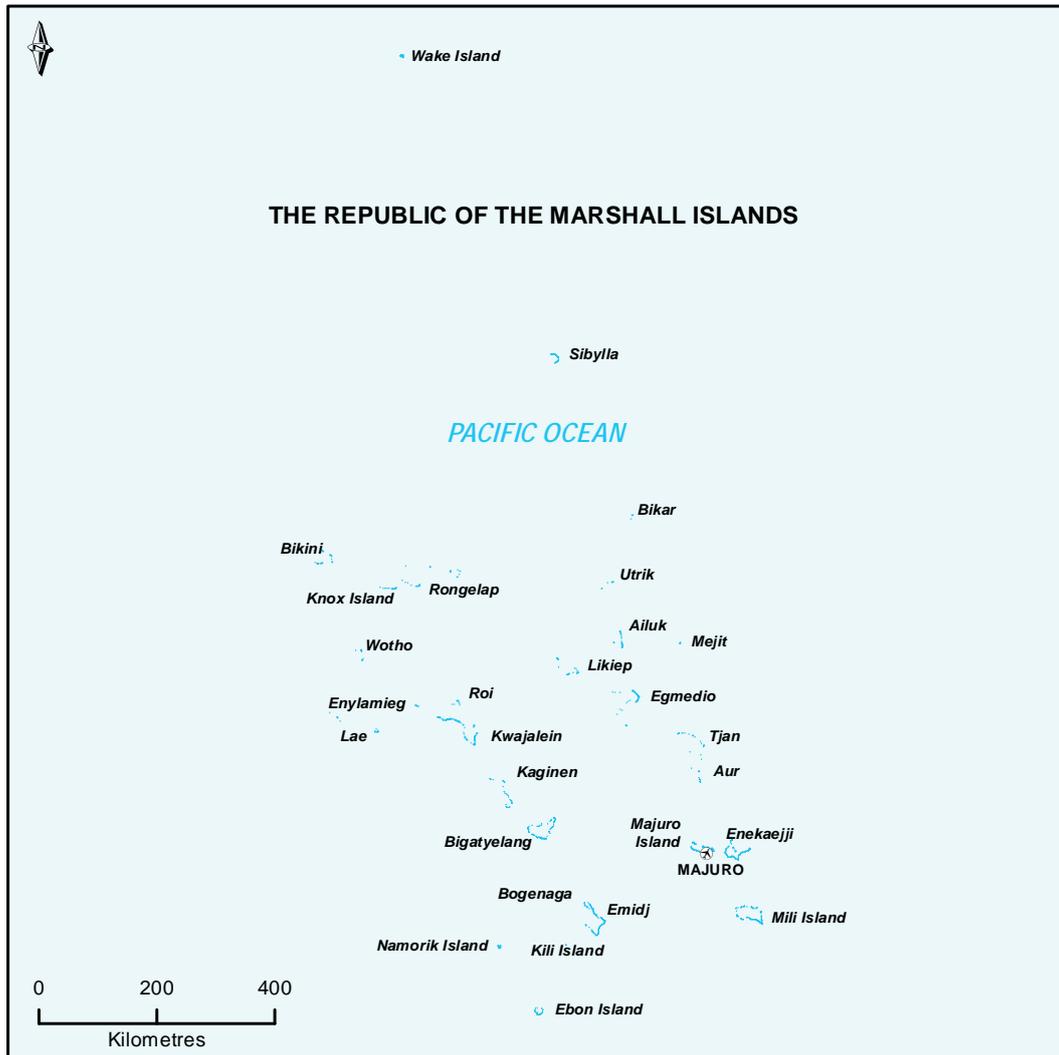
The provisions of the Warsaw Convention were ratified on 15 March 1972 and came into force on 10 October 1970.

The provisions of the Hague protocol were ratified on 15 March 1972 and came into force on 10 October 1970.

The provisions of the Guadalajara Convention were ratified on 18 January 1972 and came into force on 10 October 1970.

Fiji is not a party to the Rome Convention or the Montreal Convention.

REPUBLIC OF THE MARSHALL ISLANDS



LOCATION

Oceania, two archipelagic island chains of 29 atolls, each made up of many small islets, and five single islands in the North Pacific Ocean.¹

Geographic Coordinates

9 00 N, 168 00 E.

Capital

Majuro.

Area

Total 181 sq km.

Independence

21 October 1986 (from the US-administered UN trusteeship).²

Elevation

Highest point: unnamed location on Likiep 10 m.

Population

68,480 (July 2012 est).

Boundaries

Coastline 370.4 km.

¹ Central Intelligence Agency, The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html>> at 9 August 2012.

² Ibid.

INTRODUCTION

The Republic of the Marshall Islands is an archipelago of five isolated islands and 29 atolls in the middle of the Pacific Ocean. The atolls and islands form two groups: the northeastern Ratak Chain and the southwestern Ralik Chain. The islands are located approximately 3,700 kilometres west of Honolulu, Hawaii.

The Marshall Islands, although previously occupied by both the Germans and the Japanese, became a part of the United States Trust Territory of the Pacific Islands, under United Nations Trusteeship in 1947.³ This continued until 1 May 1979, when the Constitution of the Marshall Islands was entered into force and the country's first President was elected.⁴ In 1983, the Marshall Islands signed a Compact of Free Association (COFA) with the United States of America. Pursuant to the COFA, the Marshall Islands are fully sovereign in domestic and foreign affairs but give responsibility for the country's defence to the United States of America.⁵

Airports

The primary international airport in the Republic of the Marshall Islands is the Marshall Islands International Airport located on the island of Majuro. Due to the fact the population of the Marshall Islands is disbursed amongst numerous islands/atolls, there are approximately 35 regional airports servicing the various islands and atolls which make up the Marshall Islands; the majority of these airstrips have soft (unpaved) runways as set out below.

Airports with hard (paved) runways – Primary

Total: 5

- There are three paved runways extending from 1,524 m to 2,437 m in length; and
- There are two paved runways extending from 914 m to 1,523 m in length.⁶

Two of the paved runways (Dyess Army Airfield⁷ and Bucholz Army Airfield) located in the Marshall Islands are owned and operated by the United States Army. It is understood that both continue to be operated by the United States Army, and as such, all civil (and military) operations require 24 hours prior permission.⁸

Airports with soft (unpaved) runways – Secondary

Total: 30

- There are ten unpaved runways extending from 914 m to 1,523 m in length; and
- The remaining unpaved airstrips are less than 914 m length.⁹

The following table outlines many of the Marshall Island's primary and secondary airports/airstrips:

³ <http://www.rmiembassyus.org/Government.htm#History0> at 1 June 2011.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Also known as Freeflight International Airport.

⁸ <[http://travelingluck.com/Oceania/Marshall+Islands/Marshall+Islands+\(general\)/_4040583_Naval+Air+Base+Kwajalein+\(historical\).html#local_map](http://travelingluck.com/Oceania/Marshall+Islands/Marshall+Islands+(general)/_4040583_Naval+Air+Base+Kwajalein+(historical).html#local_map)> at 6 June 2011.

⁹ Central Intelligence Agency, The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html>> at 6 June 2011.

Airport	Primary	Secondary
Ailinglaplap Airport		•
Ailuk Airport		•
Airok Airport		•
Aur Airport		•
Bikini Atoll Airport		•
Bucholz Army Airfield	•	•
Dyess Army Airfield, Kwajalein Atoll	•	
Ebadon Airstrip		•
Ebon Airport		•
Elenak Airport		•
Enejit Airport		•
Enewetak Auxiliary Airfield	•	
Ine Airport		•
Jabot Airport		•
Jaluit Airport		•
Jeh Airport		•
Kaben Airport		•
Kili Airport		•
Lae Airport		•
Likiep Airport		•
Majkin Airport		•
Maloelap Airport		•
Marshall Islands International Airport – Majuro	•	
Meck Airstrip		•
Mejato Airstrip		•
Mejit Airport		•
Mili Airport		•
Namdrik Airport		•
Rongelap Airport	•	
Tinak Airport		•
Ujae Airport		•
Utirik Airport		•
Wotho Airport		•
Wotje Airport		•
Woja Airport		•

Civil Aviation in the Republic of the Marshall Islands

Civil aviation in the Marshall Islands operates within a system established and maintained in accordance with the *Civil Aviation Safety Act 1988* (MH) (the CAS Act). The primary object of the CAS Act is the regulation and promotion of civil aviation in the Marshall Islands and to foster its safe development and for other purposes, incidental to aviation safety.¹⁰ The CAS Act establishes rules of operation for the Marshall Island's Civil Aviation Directorate so as to ensure

¹⁰ *Civil Aviation Safety Act 1988* (MI) [12 MIRC 1].

compliance with the Marshall Islands' obligations under the Compact of Free Association and all other treaties agreed between the government of the Marshall Islands and any foreign country.¹¹

Local Aviation Authorities

The Civil Aviation Directorate of the Marshall Islands was established pursuant to pt 2 of the CAS Act. Its principal function is to promote and encourage the development of safety in civil aeronautics and to attend to the regulation of air commerce to best promote safety.

The only limit placed on the authority of the Directorate is in respect of the defence airfields owned and operated by the United States of America. These airfields remain the responsibility of the Government of the United States and shall do so unless otherwise mutually agreed by the Government of the Marshall Islands.

Domestic Carriers Liability Legislation

Death, Injury, Delay, Surface Damage and Cargo

The Marshall Islands gained independence from the United States of America in 1986, as such it can be said to be a relatively young nation. With this in mind, it is perhaps not surprising there is no legislative provision in the Marshall Islands for the regulation of civil aviation claims for injury, damage or delay. Additionally, the Government of the Marshall Islands have not (at this time) adopted any legislation from the United States of America for the regulation of civil aviation claims for injury, damage or delay.

As such, guidance on the way in which a Marshallese Court will likely treat such claims can therefore be taken from the system of law in the Federated States of Micronesia and the International Conventions and treaties to which it is a signatory (discussed below).

System of Law

The legal system of the Marshall Islands is 'based on adapted Trust Territory laws, acts of the legislature, common and customary laws'.¹²

The Constitution authorises legislation to be enacted and a common law has developed as a result.¹³ The Marshall Islands' Constitution has continued the common law in effect as the governing law in the Marshall Islands, subject to customary law, traditional practice or constitutional or statutory provisions to the contrary.¹⁴

Judges of the Marshall Islands may have regard to the common law of other nations, but with its longstanding relationship with the United States of America and the Compact of Free Association in place,¹⁵ American common law is likely to be more relevant. This is particularly the case when the constitutional system is somewhat based on that of the United States of America.

Both contract disputes and tortious negligence claims are determined by reference to customary and common law. Contributory negligence is recognised in tortious claims as a discount to damages recoverable by a plaintiff.¹⁶

¹¹ *Civil Aviation Safety Act 1988* (MI) 12 MIRC 1.

¹² Central Intelligence Agency, *The World Factbook* <<https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html>> at 9 August 2012.

¹³ *Constitution of the Republic of the Marshall Islands* art. I, s 3.

¹⁴ *Likinbod v Kejlat*, 2 MILR 65, 66 (RMI Sup Ct 1995).

¹⁵ United States Code, *Title 48 Territories and Insular Possessions*, §1903.

¹⁶ *Marshall Islands Revised Code 1988* (MI) Cap 1, pt X; *Civil Procedure Rules 2004* (MI).

Application of Customary Laws

Substantive customary law is defined as ‘any custom having the force of law in the Marshall Islands’. Customary law achieves this status either via court decisions (in effect, via the common law), or through legislation.¹⁷ While incumbent customs and customary laws will have greater import to judicial decisions, the High Court has clarified that if a custom is firmly established, generally known and peacefully and uniformly acquiesced by those whose rights are affected, then such custom will also be recognised.¹⁸

Court System

The judicial power of the Republic of the Marshall Islands vests in a Supreme Court, a High Court, a Traditional Rights Court, and such District Courts, Community Courts and other subordinate courts as are created by law.¹⁹ It is independent of the legislative branch of government in the Marshall Islands.²⁰

The Supreme Court is a superior constitutional court of record having appellate jurisdiction with final authority to adjudicate all cases and controversies properly brought before it. The High Court has general jurisdiction over disputes of law and fact in the Marshall Islands and appellate jurisdiction over cases originally filed in subordinate courts.²¹

The District Court has original jurisdiction concurrently with the High Court in all civil cases where the amount claimed or the value of the property involved does not exceed \$10,000.²² A Community Court is a statutory court of record for a local government area of which there are 24. Each Community Court has original jurisdiction concurrently with the High Court and the District Court in all civil cases where the amount claimed or the value of the property involved does not exceed \$200.²³

Status of International Law Instruments

The Marshall Islands are not a party to the Warsaw Convention, Hague Protocol, Rome Convention, Guadalajara Convention or the Montreal Convention.

¹⁷ *Constitution of the Republic of the Marshall Islands* art XIV.

¹⁸ *Jacklick v Jejo* Civ Act No 1983-42 (1983).

¹⁹ *Constitution of the Republic of the Marshall Islands* art VI, s 1(1)

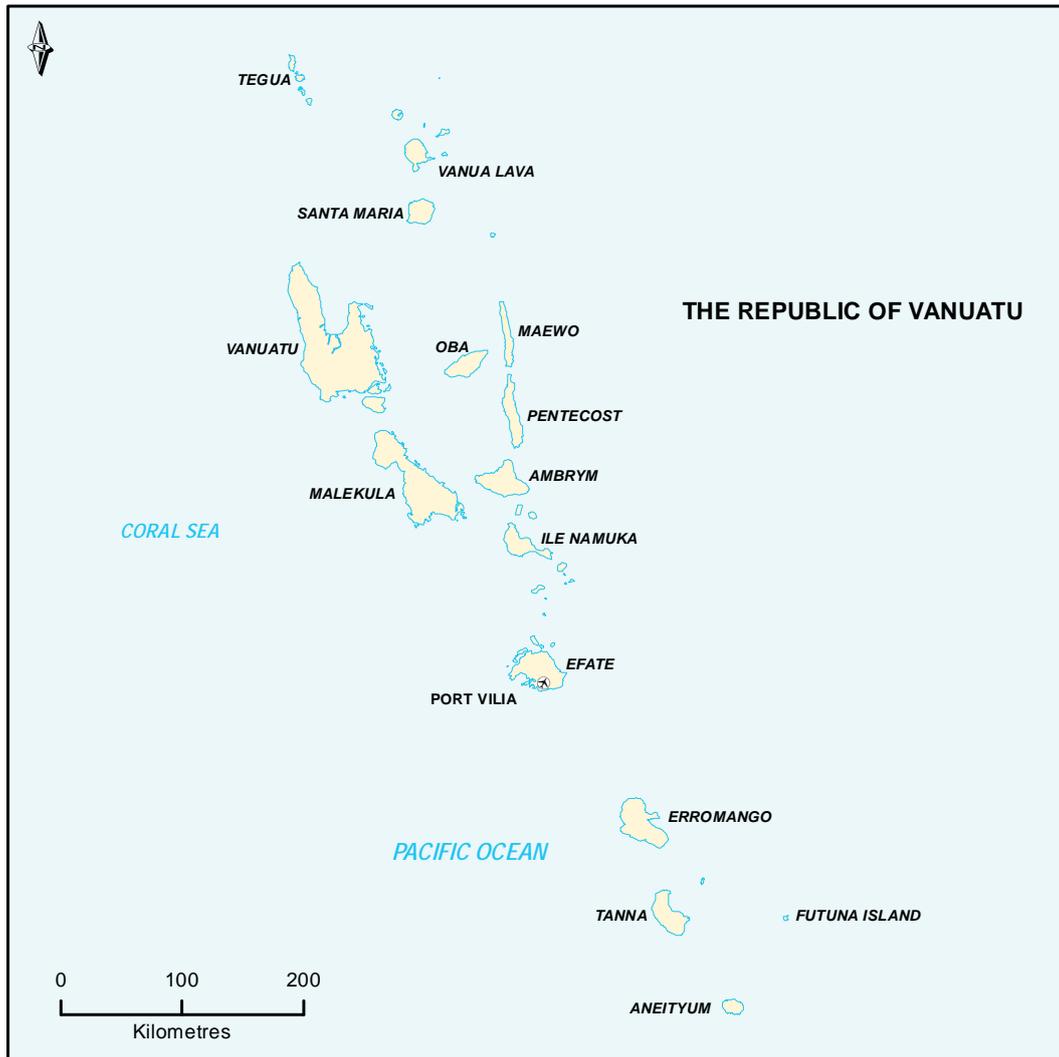
²⁰ Office of the President, <http://rmigovernment.org/about_your_government.jsp?docid=7 > at 7 June 2011.

²¹ *Constitution of the Republic of the Marshall Islands* VI, s 3.

²² *Marshall Islands Revised Code 1988* pt IV.

²³ *Ibid.*

REPUBLIC OF VANUATU



LOCATION

Oceania, group of islands in the South Pacific Ocean, about three-quarters of the way from Hawaii to Australia.¹

Geographic Coordinates

16 00 S, 167 00 E.

Area

Total 12,189 sq km.

Elevation

Highest point: Tabwemasana 1,877 m.

Boundaries

Coastline 2,528 km.

Capital

Port-Vila.

Independence

30 July 1980 (from the UK and France).

Population

227,574 (July 2012 est).

¹ Central Intelligence Agency, The World Factbook

<https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html> > at 9 August 2012.

INTRODUCTION

The Republic of Vanuatu consists of an archipelago of over 80 islands (about 65 of which are inhabited) and is located in the South Pacific Ocean, between Fiji and the Solomon Islands. Vanuatu gained independence in 1980. Prior to this, it was known as New Hebrides and was governed by both British and French administrations.

Vanuatu has a highly diverse ethnic population with over 100 local languages

The terrain of Vanuatu varies considerably throughout the archipelago of islands, with the highest point being Mount Tabwemasana at 1,877 m. Vanuatu experiences significant volcanic activity. It is home to one of the world's most active volcanos (Yasur at some 361 m high). There are at least eight other historically active volcanoes within Vanuatu's archipelago of islands.

Airports

There are 31 airports within Vanuatu's archipelago of islands with three international airports: Bauerfield Airport, Pekoa Airport and Whitegrass Airport. Although some of these airports are relatively small in size, all of their runways have the length capability to accept jets anywhere up to the Boeing 767.²

There are 28 airports in the outer islands of Vanuatu which manage domestic flights. Many, however, are scarcely used.

Airports with hard (paved) runways – Primary

Total: 3 (as at 2010)

- There is one paved runway extending from 2,438 m to 3,047 m in length;
- There is one paved runway extending from 1,524 m to 2,437 m in length;
- There is one paved runway extending from 914 m to 1,523 m in length.³

Airports with soft (unpaved) runways – Secondary

Total: 28 (as at 2010)

- There are five unpaved airstrips extending from 914 m to 1,523 m in length;
- There are 23 unpaved airstrips with less than 914 m length.⁴

The following table outlines many of Vanuatu's major primary and secondary airports/airstrips.

Airport	Primary	Secondary
Anatom Airport		•
Aniwa Airport		•
Bauerfield International Airport	•	
Big Bay Airport		•
Craig Cove Airport		•
Dillon's Bay Airport		•
Epi Airport		•
Futuna Airport		•

² <http://www.vanuatu.travelmaxia.com/airlines/vanuatu_airlines.cfm>.

³ Central Intelligence Agency, The World Factbook <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html> > at 9 August 2012.

⁴ Ibid.

Airport	Primary	Secondary
Gaua Airport		•
Ipota Airport		•
Lamen Bay Airport		•
Longana Airport		•
Lonorore Airport		•
Maewo-Naone Airport		•
Malekoula Airport		•
Mota Lava Airport		•
Norsup Airport		•
Olpoi Airport		•
Paama Airport		•
Redcliffe Airport		•
Santo-Pekoa International Airport	•	
Sara Airport		•
Siwo Airport		•
South West Bay Airport		•
Tongoa Airport		•
Torres Airport		•
Ulei Airport		•
Valesdir Airport		•
Vanua Lava Airport		•
Walaha Airport		•
Whitegrass Airport	•	

Civil Aviation in the Republic of Vanuatu

Civil aviation in Vanuatu operates within a system established and maintained in accordance with the *Civil Aviation Act 1999 (VU) (CAA)*. Like some other Pacific Island nations, the CAA is modelled on New Zealand's *Civil Aviation Act 1990 (NZ)*, and enables Vanuatu to comply with its international obligations, provides a civil aviation regulatory system and promotes aviation safety.⁵

The CAA was amended in 2005⁶ to authorise the adoption and supplementation of the civil aviation rules of another nation as those of Vanuatu. On 21 July 2006, a Notice was signed, adopting all the New Zealand Civil Aviation Rule Parts.⁷ However, as the New Zealand Civil Aviation Rules relate primarily to carrier licensing and regulatory issues, its application to carriers' liability matters is nominal.

Local Aviation Authorities

The Civil Aviation Authority of Vanuatu is the regulator on all civil aviation matters in Vanuatu. The objective of the Authority is to establish and administer sound aviation regulations, procedures and standards necessary to achieve and maintain the safe and efficient conduct of the CAA.⁸

⁵ *Civil Aviation Act 1999 (VU)* s 1.

⁶ *Civil Aviation (Amendment) Act 2005 (VU)*.

⁷ By way of the Civil Aviation Rule Adoption by Reference Notice.

⁸ CAA s 5 <<http://www.airports.vu/Pilots%20&%20Aircraft%20Operators/Civil%20Aviation%20Authority%20Vanuatu.htm>> at 16 June 2011.

Domestic Carriers Liability Legislation

The CAA does not address carriers' liability for claims stemming from injury, death, baggage and cargo and merely details actions available for nuisance, trespass and surface damage.

As such, absent domestic legislation regulating carriers' liability in Vanuatu, the laws regulating these areas fall back to the English *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) (the 1967 Order) as amended by the *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK).⁹ As Vanuatu's Constitution states English law which flows through is the law as it was prior to independence (19 July 1980), the relevant provisions from the 1967 Order (UK) which have force in Vanuatu are those from the 1967 Order (UK) as it stood at independence and not as amended from time to time.¹⁰

Although the CAA does not address carriers' liability, the liability areas that are addressed, such as surface damage, still have effect, and the English law is relied upon only to supplement or 'fill gaps' in the existing domestic Vanuatu legislation.¹¹ Technically, French law can also be relied upon to supplement the absence of domestic legislation in this area. English law, however, is generally given preference.¹²

As such, for claims arising from injury, death, delay or those related to baggage or cargo, the 1967 Order (UK) is applied. The 1967 Order (UK) applies the provisions of the Warsaw Convention to domestic flights and therefore mirrors the Convention.

Death and Injury

The carrier is liable for damage sustained in the event of death or for any personal injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of embarking or disembarking.¹³

Strict liability is imposed on a carrier, notwithstanding any express term or condition in a contract purporting to limit liability for damages.¹⁴ However, a carrier will escape liability if it proves it or its agents had taken all necessary measures to avoid the damage or that it was impossible to undertake such measures.¹⁵ Furthermore, if the carrier proves the damage was caused by or contributed to by the negligence of the person claiming compensation, the carrier shall be wholly or partly exonerated from its liability to the claimant.¹⁶

Liability for each passenger is limited to the sum of 58,000 special drawing rights.¹⁷ Although this sum is an unbreakable minimum limit, the amount may be increased by special contract where the carrier and passenger agree to a higher limit.¹⁸

⁹ Section 49 of the *Constitution of the Republic of Vanuatu* states, 'If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.' Section 95 states, 'all Joint Regulations and subsidiary legislation made under the joint regulations which were in force immediately before independence . . . [and] British and French laws in force or applied in Vanuatu immediately before independence . . . which continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.' The date of Independence was 19 July 1980. As such, the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) has effect.

¹⁰ *Ibid.*

¹¹ *Joli v Joli* [2003] VUCA 27.

¹² *Kong v Kong* [2000] VUCA 8.

¹³ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) art 17, ch III.

¹⁴ *Ibid* art 23, ch III.

¹⁵ *Ibid* art 20, ch III.

¹⁶ *Ibid* art 21, ch III.

¹⁷ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK) s2.

¹⁸ *Ibid.*

The exception to this limited liability regime arises if it is proved the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved they were acting within the scope of their employment.¹⁹ In those circumstances, the limits on liability will not apply.

Although the 1967 Order (UK) prescribes a two year limitation period for bringing a claim for damages, Vanuatu's *Limitation Act No.4 1991* (VU) states actions in respect of damages for personal injuries shall not be brought after the expiration of three years from the date on which the cause of action accrued.²⁰ Pursuant to Vanuatu's Constitution, it would appear the *Limitation Act No.4 1991* (VU) may prevail.²¹

Delay

A carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.²² However, a carrier will not be liable for damages occasioned by delay if it proves it had taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.²³

In regard to passenger delay, action can only be taken against the carrier who performed the carriage during which the delay occurred, except where, by express agreement, the first carrier has assumed liability for the whole journey.²⁴ As regards to baggage or cargo, the passenger (or consignor) will have a right of action against the first carrier and the passenger 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 carriers will be jointly and severally liable to the passenger.²⁵

The liability of a carrier for the delay of baggage or cargo (or any object therein) is limited to 17 special drawing rights per kilogram.²⁶ The weight to be taken into consideration in determining the amount to which the carrier's liability is limited is the total weight of the relevant object concerned.²⁷ However, if the object or part of the baggage affects the value of the entire baggage, the total weight of that baggage will be determinative of the liability limit.²⁸

In the case of delay of baggage, the passenger must make a complaint within 21 days from the date on which the passenger first retains the baggage or cargo²⁹, failing which no action shall lie against the carrier, save in the case of fraud on its part.³⁰ Such a complaint must be made in writing upon the document of carriage or by separate notice in writing given within the aforementioned times.³¹

¹⁹ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 25, ch III.

²⁰ *Limitation Act No. 4 1991* (VU) s 3(1)(a)(i).

²¹ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), s 2.

²² *Ibid* art 19, ch III.

²³ *Ibid* art 20, ch III.

²⁴ *Ibid* art 30(2), ch III.

²⁵ *Ibid* art 30(3), ch III.

²⁶ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), s 2.

²⁷ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK).

²⁸ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK).

²⁹ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 26(2), ch III.

³⁰ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 26(4), ch III.

³¹ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 26(3), ch III.

Baggage and Cargo

A carrier will be liable for damage sustained in the event of loss, damage or destruction of 'registered' baggage or cargo, if it is shown the occurrence which caused the damage took place during the carriage by air.³² The carrier is not liable though if it proves all necessary measures were taken to avoid the damage or that it was impossible for such measures to be taken.³³

Neither the 1961 Order (UK) nor the CAA contain any definition or requirements for baggage to be regarded as 'registered'.

Receipt by the person entitled to delivery of baggage or cargo without complaint is *prima facie* evidence that same was delivered in good condition and in accordance with the document of carriage.³⁴

In regard to damage to baggage or cargo, the person entitled to delivery must complain to the carrier after the discovery of the damage, at the latest, within seven days from the date of receipt in the case of baggage, and 14 days from the date of receipt in the case of cargo.³⁵

The liability for damage sustained to baggage is limited to 17 special drawing rights per kilogram. However, by special contract, a carrier and passenger may agree to a higher limit. The carrier is then liable to pay the higher sum unless it can prove that the sum is greater than the actual interest in the delivery.³⁶

In regard to objects of which the passenger takes charge himself, for example carry-on luggage, the liability of the carrier is limited to 332 special drawing rights per passenger.³⁷

As mentioned, liability will be imposed on a carrier notwithstanding any express term or condition in a contract purporting to limit liability. However, this is not the case with respect to loss or damage resulting from an inherent defect, quality or vice of cargo carried.³⁸

Surface Damage

Where damage is caused to property on land or water by an aircraft in flight, taking off, landing, or alighting, or by any person or article falling from an aircraft, damages shall be recoverable from the owner of the aircraft.³⁹

There is no need to prove negligence, intention or other cause of action as against the owner, except where the damage or loss was caused or contributed to by the fault of the person by whom the damage was suffered.⁴⁰

No period of time in which to bring an action is provided for in the CAA, and there is no statutory cap on damages recoverable.

³² *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 18, ch III. 'Carriage by air' comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

³³ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 20, ch III.

³⁴ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), art 26, ch III.

³⁵ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), s 2.

³⁶ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK), s 2.

³⁷ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK).

³⁸ *Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979* (UK) art 23, ch III.

³⁹ *Civil Aviation Act 1999* (VU) s 128(3).

⁴⁰ *Civil Aviation Act 1999* (VU).

System of Law

Vanuatu is a country consisting of a mixed system which combines both British common law and French civil law.

Application of Customary Laws

The Constitution of Vanuatu makes provision for the continued effect of customary law as a source of law in Vanuatu.⁴¹ It is implied in the Constitution that customary law and common law have equal standing.⁴²

Although there is legislative framework to provide for the integration of common and customary law, practically, there is little fusion.

It is suggested customary law is given little regard by courts as the mechanism available for customary law to be applied is ambiguous.⁴³ Although the Constitution states customary law is to be applied where no rule of law is available, courts can easily circumvent applying customary law as laws of England and France continue to apply in Vanuatu.

This was evident in the case of *Boe & Taga v Thomas*⁴⁴ where a court opted to ignore applicable customary law and apply English legislation from 1846.

As such, although customary law is provided for as a source of law in Vanuatu, it is rarely applied by the courts.

Court System

The court system in Vanuatu follows the standard model of inferior Magistrates Court, Supreme Court, and Court of Appeal. Separate courts administer customary law and deal with customary land and minor local disputes. Appeals from these courts lead back to the standard structure.

The Supreme Court has unlimited jurisdiction to hear and determine civil and criminal proceedings. Decisions of the Supreme Court can be appealed to the Court of Appeal which may substitute its own judgment or opinion, however it may not intervene with the exercise of discretion unless it is deemed manifestly wrong.⁴⁵

Status of International Law Instruments

The provisions of the Warsaw Convention were ratified on 26 October 1981 and came into force on 24 January 1982.

The provisions of the Hague protocol were ratified on 26 October 1981 and came into force on 24 January 1982.

The provisions of the Rome Convention were ratified on 15 January 1982 and came into force on 15 April 1982.

⁴¹ *Constitution of the Republic of Vanuatu* s 95(3).

⁴² *Ibid* ss 47(1) and 95(3).

⁴³ Miranda Forsyth, *Beyond Case Law: Kastom and Courts of Vanuatu* (2004).

⁴⁴ (1980–1994) Van LR 293.

⁴⁵ <http://www.paclii.org/vu/courts.html> at 3 June 2011.

The provisions of the Montreal Convention were ratified on 9 November 2005 and came into force on 8 January 2006.

Vanuatu is not a party to the Guadalajara Convention.

Case Law

In *Estate of Lydia Keith and Windy Keith v Vanuatu Internak Air Services Ltd (Vanair)*,⁴⁶ Lydia Keith purchased a ticket and boarded a Vanair flight to Port-Vila, Efate on 9 May 1999. Before arriving at Port-Vila Airport, the aircraft crashed off the West Coast of Port-Vila and Keith died.

On 28 October 2004, the Estate of Keith (the plaintiff) commenced a claim against the airline (the defendant). The plaintiff relied on the express terms and conditions of the ticket (contract) and submitted that it had been an agreed term of the contract between the parties that the defendant would pay AU\$75,000 as a full and final death benefit to the estate and/or relative of the deceased. As the defendant failed to pay the aforementioned amount, the plaintiff claimed for breach of contract.

The defendant sought to have the claim struck out on two bases. Firstly, it was contended by the defendant the correct cause of action was by way of negligence, as opposed to breach of contract. Secondly, the defendant argued that even if negligence was established, any action was statute barred given the claim was filed outside the prescribed three year limitation period (pursuant to the *Limitation Act No.4 1991 (VU)*).

Further, the defendant submitted that despite the plaintiff relying on the contract to claim an entitlement to \$75,000, the term provided no such entitlement. Rather, the contract contained a limitation of the carrier's liability to a maximum of \$75,000.

In this regard, Counsel for the defendant argued the prescribed limitation was a limitation which applied to an action in negligence and did not bestow upon a passenger any contractual right to claim that amount absent a finding of negligence.

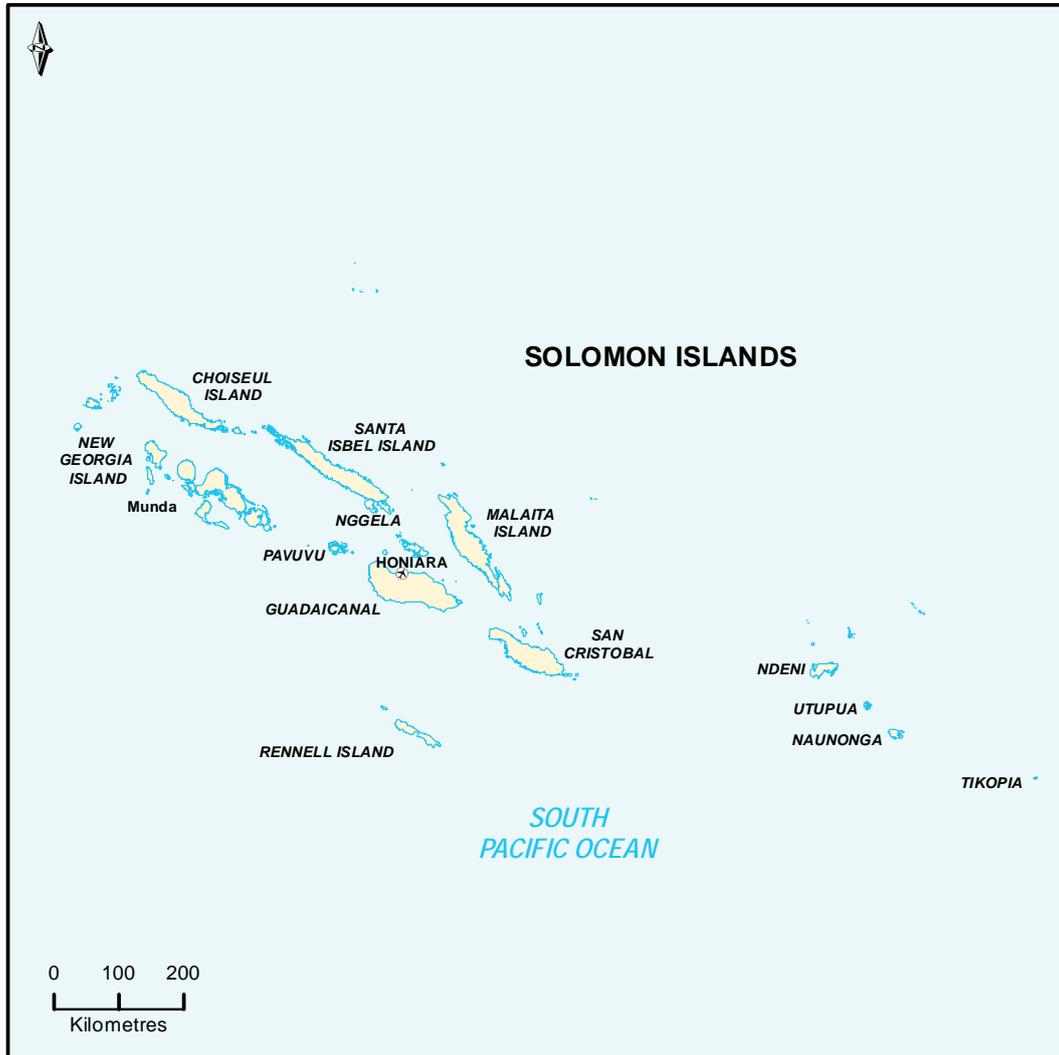
Conversely, the plaintiff's Counsel maintained the claim had been brought on the basis of a contractual agreement and, noting the six year limitation period applicable to contractual claims, was not statute barred. In regard to the \$75,000 referenced in the contract terms, the plaintiff's Counsel conceded this was a limitation.

Judge Lunabek accepted the submissions of the defendant, finding, firstly, the \$75,000 was a limitation rather than an entitlement and, secondly, the proper cause of action was in negligence. Despite failing to plead a reasonable cause of action, the plaintiff's claim was nonetheless statute barred.

The proceedings were dismissed as an abuse of process.

⁴⁶ [2006] VUSC 61.

SOLOMON ISLANDS



LOCATION

Oceania, group of islands in the South Pacific Ocean, east of Papua New Guinea.¹

Geographic Coordinates

8 00 S, 159 00 E.

Capital

Honiara.

Area

Total 28,896 sq km.

Independence

7 July 1978 (from the UK).

Elevations

Highest point: Mount Popomanaseu
2,310 m.

Population

584,578 (July 2012 est).

Boundaries

Coastline 5,313 km.

¹ Central Intelligence Agency, The World Factbook

< <https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html> > at 9 August 2012.

INTRODUCTION

The Solomon Islands is an archipelago of 922 islands in the South Pacific Ocean with a land mass of 28,896 square kilometres. It is located east of Papua New Guinea.

The terrain of the Solomon Islands is mostly rugged mountains with some low coral atolls. There are several active volcanos in the Solomon Islands, including Mount Tinakula which has frequent eruption activity.

The Solomon Islands is a member of the Commonwealth of Nations.

Airports

Honiara International Airport, formerly known as Henderson Field, is the primary airport located on Guadalcanal Island. It is the only international airport in the Solomon Islands and is located eight kilometres from the capital Honiara.²

There has been discussion of upgrading some domestic airstrips to international standard in the Solomon Islands, however this is yet to occur.

Airports with hard (paved) runways – Primary

Total: 2

- There is one paved runway extending from 1,524 m to 2,437 m in length;
- There is one paved runway extending from 914 m to 1,523 m in length.³

Airports with soft (unpaved) runways – Secondary

Total: 34

- There is one unpaved airstrip extending from 1,524 m to 2,437 m in length;
- There are eight unpaved airstrips extending from 914 m to 1,523 m in length;
- There are 25 unpaved airstrips with less than 914 m length.⁴

The following table outlines the Solomon Islands' primary and secondary airports/airstrips:

Airport	Primary	Secondary
Afutara Airport		•
Anuha Island Resort Airport		•
Auki Airport		•
Avu Avu Airport		•
Babanakira Airport		•
Ballalae Airport		•
Barakoma Airport		•
Batuna Airport		•
Bellona/ Anua Airport		•
Choiseul Bay Airport		•

² <http://www.travelmaxia.com/airlines/solomon_islands_airlines.cfm>

³ Central Intelligence Agency, The World Factbook

<<https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html>> at 9 August 2012.

⁴ Central Intelligence Agency, The World Factbook

<<https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html>> at 9 August 2012.

Airport	Primary	Secondary
Fera/ Maringe Airport		•
Gatokae Aerodrome		•
Geva Airport		•
Honiara International Airport	•	
Kaghau Airport		•
Kirakira Airport		•
Kukudu Airport		•
Marau Airport		•
Mbambanakira Airport		•
Mono Airport		•
Munda Airport	•	
Nusatupe Airport		•
Ontong Java Airport		•
Ramata Airport		
Rennell/tingoa Airport		•
Ringi Cove Airport		•
Santa Anna Airport		•
Santa Cruz/ Graciosa Bay/ luova Airport		•
Seghe Airport		•
Suavanao Airport		•
Ulawa Airport		•
Uru Harbour		•
Yandina Airport		•

Civil Aviation in the Solomon Islands

Civil aviation in the Solomon Islands operates within a system established and maintained in accordance with the *Civil Aviation Act 2008* (SB) (CAA). It mirrors most of the provisions in New Zealand's *Civil Aviation Act 1990* (NZ).

The CAA consolidates and amends the laws relating to civil aviation in the Solomon Islands. It also establishes rules of operation and divisions of responsibility within the civil aviation system to ensure the obligations of the Solomon Islands under international aviation agreements are implemented.⁵

The CAA does not provide express regulations on various common areas of liability which emerge in aviation claims. In this instance, as a former British territory lacking any apparent change since independence,⁶ the laws regulating the liabilities not canvassed in the CAA fall back to the English regime, albeit with a Solomon Islands currency conversion for the relevant damages caps.

⁵ *Civil Aviation Act 2008* (SB) s 1.

⁶ Section 2(1) of the *Solomon Islands Independence Order 1978* (SB) states that an “existing law” means any Acts of the Parliament of the United Kingdom, Orders of Her Majesty in Council, . . . having effect as part of the law of Solomon Islands . . . immediately before the appointed day . . .’.

Local Aviation Authorities

The National Civil Aviation Administration division of the Ministry of Communications and Aviation is the local aviation authority of the Solomon Islands. The division is empowered to ensure civil aviation in the Solomon Islands follows the applicable safety and regulatory standards.

Domestic Carriers Liability Legislation

The applicable mechanism of English to Solomon Islands law is by reference to the *Carriage by Airs Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK) (1967 Order) which applies as a law of the Solomon Islands, the United Kingdom's adoption of laws similar to the Warsaw Convention to domestic carriage.

Provisions in sch 2 of the 1967 Order are pivotal in regulating civil aviation consumer protection measures, including setting limits for passenger death or injury, delay and loss of baggage or cargo.

Death and Injury

Where the carriage of a passenger falls within the scope of sch 2 of the 1967 Order, the carrier will be held liable for the death of a passenger or any personal injury suffered by that passenger if it resulted from an accident that took place on board the aircraft or in the course of any operations of embarking or disembarking.⁷

The liability of the carrier for injury or death is limited to 875,000 francs⁸ per passenger or such higher sum as specified in the contract of carriage.⁹

The right of a person to bring a claim for death, injury or destruction, damage or loss of baggage is extinguished if the claim is not brought within two years after the date of arrival of the aircraft at the destination, or in the event the aircraft did not arrive at its destination: (a) 'the date on which the aircraft ought to have arrived at the destination'; or (b) 'the date on which the carriage stopped'.¹⁰

The liability of the carrier for the death of a passenger (including the injury that resulted in the death) is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.¹¹

The liability is enforceable for the benefit of those members of the passenger's family who have sustained damage as a result of the death of the passenger. The action to enforce the liability may only be brought by the personal representative of the passenger or the person for whose benefit the liability is enforceable, i.e. the family member.¹²

⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 17.

⁸ Section 168 of the CAA states that by notice in the *Gazette*, the Governor of the Central Bank may specify the Solomon Islands dollar equivalent to the currency (francs) detailed within the 1967 Order. It is further noted that any currency equivalent notices made under Solomon Islands domestic law before the commencement of the CAA shall continue in force unless replaced. To date however, it does not appear any currency equivalent notices have been made. The only legislation which offers a conversion of francs is the *Post Office Act 1996* (SB), which states that 60 francs equates to 19.6 Special Drawing Rights. Adopting this conversion, one franc would equate to approximately 4 Solomon Island dollars.

⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(1).

¹⁰ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, pt 1, s 5 and sch 2, art 29.

¹¹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, pt 1, s 3.

¹² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, annex to pt 1, ss 2 and 3.

Importantly, only one claim can be pursued in respect of the death of any one passenger and that claim is to be for the benefit of all persons who have sustained damage as a result of the death of the passenger.¹³ In the event of a dispute as to the distribution of the liability, the court may make any order it directs regarding the proportionate division of the liability.¹⁴

In *Eric Fiebig*¹⁵ v *Solomon Islands Airlines Limited*¹⁶, all passengers and crew were killed when a domestic flight crashed on mountainous terrain on Guadalcanal Island, Solomon Islands.

The plaintiff (father of the deceased) as Administrator of the Estate for the deceased brought an action for damages pursuant to the *Carriage by Air Acts (Applications of Provisions) (Overseas Territories) Order 1967* (UK) (the 1967 Order).

Counsel for both the plaintiff and defendant agreed that the 1967 Order was applicable to the claim. Counsel also agreed that the relevant art in the 1967 Order was art 29, which reads:

'(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court seized of the case.'

It was agreed the crucial date upon which the calculation of the limitation period would commence was 27 September 1991, being the date of the accident. However, where Counsel diverged in their opinion was in regard to the construction of ss 3(2) and 39 of the *Limitation Act 1984* (SB) and their application to art 29 of the 1967 Order.

Section 3(2) of the *Limitation Act 1984* (SB) states:

'... where any other law prescribes a period of limitation for any action, that other law shall have effect as if for that period of limitation, the prescribed period were substituted:

Provided that the provisions of this Act shall not affect the period of limitation prescribed by or under the following enactments for an action or arbitration—

...

(c) the Carriage by Air Act 1961 (UK).'

Section 39 of the same Act reads:

'(1) If it appears to the court that it would be equitable to allow an action to proceed or an arbitration to commence having regard to the degree to which—

(a) the provisions of this Act prejudice the plaintiff; and

(b) any decision of the court under this subsection would prejudice the defendant,

the court may direct that those provisions shall not apply to the action, or arbitration or shall not apply to any specified cause of action to which the action or arbitration relates.'

¹³ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, annex to pt 1, ss 2 and 3.

¹⁴ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 1, annex to pt 1, ss 2 and 3.

¹⁵ (as Administrator of the estate of Norleen Fiebig deceased).

¹⁶ (unreported) High Court of the Solomon Islands 282 of 1993 High Court of the Solomon Islands.

Counsel for the plaintiff conceded that s 3(2) above preserved the two year limitation period prescribed by art 29(1) of the 1967 Order. However, the plaintiff argued the other provisions in the Act, including s 39, would still apply. As such, when ss 3(2) and 39 of the Act and art 29(1) of the 1967 Order were read in conjunction with one another, the plaintiff's Counsel argued that s 39(1) affords the court power to direct that the proviso to s 3(2) shall not apply where it would be equitable to do so and where such provisions would prejudice the plaintiff. In other words, it was submitted the court had power to substitute the limitation period of two years to one of six years, resulting in the plaintiff's action being commenced in time.

Conversely, the defendant's Counsel submitted that s 3(2) should be read as having the effect of excluding s 39(1) entirely, which would mean the only limitation period applicable is that of two years as prescribed under the 1967 Order.

After carefully considering the construction of the respective Acts, Judge Palmer stressed the need to read and apply the provisions of the *Limitation Act 1984* (SB) in their proper order of priority.

Having considered and applied the relevant provisions in their proper order, Judge Palmer stated that s 39 did not have the effect inferred by the plaintiff's Counsel. Rather, it was held to simply allow an action to proceed on equitable grounds, despite the fact the period of limitation may have lapsed.

Further, Judge Palmer noted that he must give effect to the plain and clear meaning of the words in the proviso to s 3(2), as intended by Parliament. He stressed that those words did not need any elaborate interpretation. Judge Palmer concluded that the words expressly state that the provisions of the *Limitation Act 1984* (SB) shall not affect the limitation period prescribed in the *Carriage by Air Act 1961* (UK).

The plaintiff's action was deemed time barred pursuant to art 29(1) of the 1967 Order, and accordingly dismissed.

Contributory Negligence

A carrier is afforded a reduction on account of contributory negligence in circumstances where it proves the injury or death was 'caused or contributed to by the negligence of the injured person'.¹⁷

Baggage and Cargo

Where sch 2 to the 1967 Order applies to the carriage of a passenger, the carrier will be liable for damage sustained in the event of the destruction or loss of baggage of the passenger. The liability of the carrier for destruction or loss of baggage and cargo¹⁸ is limited as follows:

- registered baggage: 250 francs per kilogram per passenger or such higher sum as specified in the contract of carriage;¹⁹
- baggage other than registered baggage:²⁰ 5,000 francs per passenger.

Except where the carrier has been fraudulent,²¹ a passenger is precluded from pursuing a claim against a carrier in respect of destroyed or lost baggage, unless the person entitled to delivery has made a written complaint, delivered to the carrier by post or in person within the following time periods:

¹⁷ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 21.

¹⁸ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 18.

¹⁹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(2(a)).

²⁰ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 22(3).

²¹ *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 26(4).

- for loss or destruction of baggage, within seven days from the date of receipt of the baggage;
- for loss or destruction of cargo, within 14 days after the date of receipt of the cargo;
- for delay, within 21 days from the date on which the baggage or cargo have been placed at the disposal of the person entitled to it.²²

Surface Damage

A carrier will be liable for injury or damage caused to any person or property on land or water by an article or person falling from an aircraft while in flight, taking off or landing. Damages flowing from such an incident shall be recoverable without proof of negligence or intention or other cause of action. Compensation will be awarded as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft.²³

The ability, however, to claim for such damages is predicated on the loss or damage not being caused or contributed to by the claimant's negligence.²⁴ Moreover, where a legal liability is created in some other tortfeasor to pay damages in respect of the said loss or damage, the owner shall be entitled to be indemnified by that tortfeasor against any claims in respect of the said loss or damage.²⁵ There is no statutory cap on damages recoverable.

Damages will not be recoverable from the owner in respect of damage or loss caused by a person descending from the aircraft by parachute.²⁶ In this instance, damages will be recoverable from the person descending as if that person were the owner,²⁷ unless the person descending by parachute was required to do so to avoid injury or death.²⁸

The final key point to note in respect to surface damage liability in the Solomon Islands is that where an aircraft has been leased to an operator for any period *exceeding 28 days*, and no pilot, commander, navigator or other flight crew member of the operator is in the employment of the owner, the above provisions will apply such that the operator has the same strict liability as the owner in such a situation.²⁹

System of Law

The Constitution of the Solomon Islands provides that common law and equity shall, subject to express provisions, have effect as part of the law of the Solomon Islands. The Solomon Islands' Constitution also states that the principles and rules of common law and equity shall have effect notwithstanding any revision of them by any Act of Parliament of the United Kingdom which does not have effect as part of the law of the Solomon Islands.

As to what is '*common law and equity*', the High Court of the Solomon Islands held it was not restricted to the law of England, and that the courts of the Solomon Islands were entitled to have regard to other Commonwealth decisions to determine the common law and equity in force in the Solomon Islands.³⁰

²² *Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967* (UK), sch 2, art 26(2).

²³ *Civil Aviation Act 2008* (SB) s 62(3).

²⁴ *Civil Aviation Act 2008* (SB) s 62(5).

²⁵ *Civil Aviation Act 2008* (SB) s 62(4).

²⁶ *Civil Aviation Act 2008* (SB) s 62(6).

²⁷ *Civil Aviation Act 2008* (SB) s 62(7).

²⁸ *Civil Aviation Act 2008* (SB) s 62(8).

²⁹ *Civil Aviation Act 2008* (SB) s 62(9).

³⁰ *Official Administrator for Deceased Estates v Allardyce Lumber Company Ltd* [1980/81] SILR 66.

However, this interpretation was subsequently disapproved in the Court of Appeal of the Solomon Islands in *Cheung v Tanda*,³¹ where it was held that only the common law and equity as applied in England would have force in the Solomon Islands. Further, the Court of Appeal determined that it should not apply the principles of the common law and equity of England as they stood as at 7 July 1978 (i.e. the cut-off date of laws from England under the Constitution), but as they had been corrected by later decisions of English courts.

Application of Customary Laws

The Constitution of the Solomon Islands recognises customary law as a source of law, stating that '*customary law shall have effect as part of the law of Solomon Islands*'.³²

In instances of conflict between common and customary law, the latter prevails.³³ However, the Constitution also states that Acts of Parliament may call for proof of customary law. Given the inherent difficulties which this entails, other sources of law often trump customary law.³⁴

Further, it is currently unclear to which matters customary law applies, such as being limited to actions involving Solomon Islanders or whether it also extends to non-Solomon Islanders.³⁵ There are no judicial decisions on point.

Court System

The Solomon Islands judicial system follows a four-tier model of inferior local courts, Magistrates Courts, High Court and Court of Appeal.

Appeals can be made from Magistrates Courts to the High Court which has unlimited original civil jurisdiction. Appeals can then be made from the High Court to the Court of Appeal, which is the final appellate court in civil matters.

Separate courts, such as the Customary Land Appeal Court, deal with customary land and minor local disputes.

Status of International Law Instruments

The succession of the Warsaw Convention occurred on 9 September 1981 and came into force on 7 July 1978.

The succession of the Hague Protocol occurred on 9 September 1981 and came into force on 7 July 1978.

The Guadalajara Convention was ratified on 15 March 1967 and came into force on 13 June 1967.

The Solomon Islands is not a party to the Rome Convention or the Montreal Convention.

³¹ *Cheung v Tanda* [1984] SILR 108.

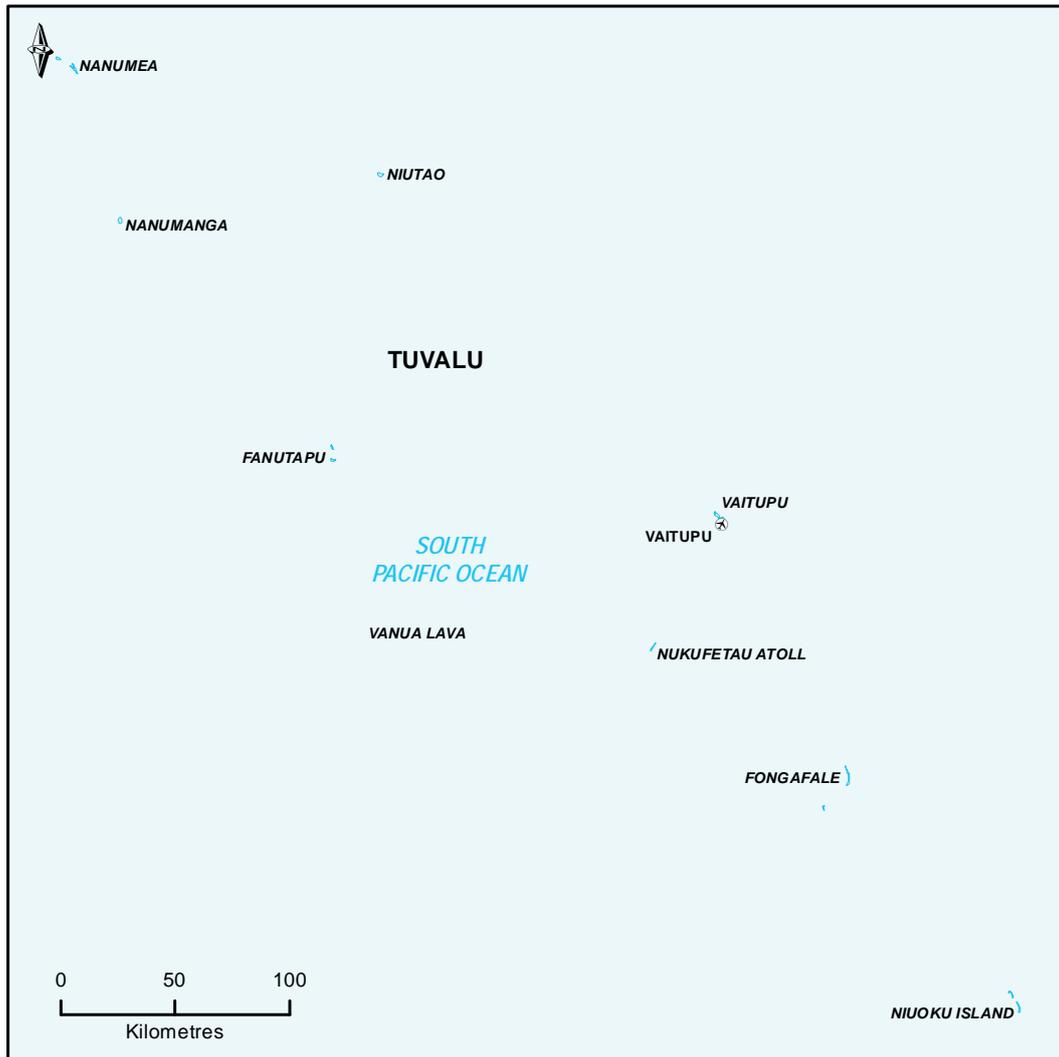
³² *Constitution of Solomon Islands 1978* s 3, sch 3.

³³ *Constitution of Solomon Islands 1978* s 2, sch 3.

³⁴ Car, J, 'Cultures In Conflict: The Role of the Common Law in the South Pacific' (2002) 6 *Journal of South Pacific Law* 28.

³⁵ *Ibid.*

TUVALU



LOCATION

Oceania, island group consisting of nine coral atolls in the South Pacific Ocean.¹

Geographic Coordinates

8 00 S, 178 00 E.

Capital

Funafuti.

Area

Total 26 sq km

Independence

1 October 1978 (from the UK).²

Elevation

Highest point: unnamed location 5 m.

Population

10,619 (July 2012 est).

Boundaries

Coastline 24 km.

¹ Central Intelligence Agency, World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>> at 9 August 2012.

² Ibid.

INTRODUCTION

Tuvalu consists of nine coral atolls in the South Pacific Ocean, approximately halfway between Australia and Hawaii. It is the fourth smallest country in the world, and the third least populated independent country in the world.

As sea levels are rising, Tuvalu is faced with many issues regarding sinking beaches and erosion.³ This results in floods occurring which has made the government in Tuvalu question whether the population of Tuvalu will have to be evacuated in the future as *'it is believed that Tuvalu will be completely submerged by the end of the 21st century'*.⁴

Airports

Tuvalu's only airport is the Funafuti Atoll International Airport, Funafuti.⁵ The Funafuti Atoll International Airport has a paved runway 1,524m in length.

Civil Aviation in Tuvalu

Civil aviation in Tuvalu operates within a system established and maintained by the *Civil Aviation Act 2008* (TV) (the CAA (TV)). The CAA (TV) establishes the functions and powers of Tuvalu's Director of Civil Aviation,⁶ and regulates civil aviation,⁷ an aircraft's nationality, ownership,⁸ and safety.⁹

Local Aviation Authorities

The Director of Civil Aviation is the local aviation authority of Tuvalu and was established pursuant to s 3 of the CAA (TV). The principal function of the authorities is to create and implement civil aviation policies,¹⁰ manage the registration of aircraft,¹¹ and secure sound development of the air transport industry.¹²

Domestic Carriers Liability Legislation

The CAA (TV) does not regulate carriers' liability for claims stemming from injury, death, delay, baggage, cargo and surface damage.

Accordingly, the laws regulating these areas fall back to the English *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) (the 1967 Order) as amended by the *Carriage by Air*

³ Briney, A, *Geography and History of Tuvalu – Tuvalu and the Impacts Global Warming on Tuvalu* (2010) About.com Geography <<http://geography.about.com/od/tuvalumaps/a/tuvalu.htm>> at 17 June 2011.

⁴ Ibid.

⁵ Airline Codes Web Site <<http://www.airlinecodes.co.uk/aptcoderes.asp>> at 7 June 2011.

⁶ *Civil Aviation Act 2008* (TV) pt II.

⁷ *Civil Aviation Act 2008* (TV) pt III.

⁸ *Civil Aviation Act 2008* (TV) pt IV.

⁹ *Civil Aviation Act 2008* (TV) pt V.

¹⁰ *Civil Aviation Act 2008* (TV) s 4(a) and (b).

¹¹ *Civil Aviation Act 2008* (TV) s 4(c).

¹² *Civil Aviation Act 2008* (TV) s 4(d).

Acts (Application of Provisions) (Second Amendment) Order 1969 (UK) (the 1969 Order).¹³ As the *Tuvalu Independence Order 1978* (UK) states English law which flows through is the law as it was prior to independence (1 October 1978), the relevant provisions from the 1967 Order (UK) which are in force in Tuvalu are those from the 1967 Order (UK) as it stood amended by the 1969 Amendment Order at independence, and not as amended from time to time.¹⁴

Although the CAA (TV) does not address carriers' liability, the English law is relied upon only to supplement or 'fill gaps' in the existing domestic Tuvalu legislation. As such, for claims arising from injury, death, delay, baggage, cargo, or surface damage, the 1967 Order (UK) is applied. The 1967 Order (UK) applies the provisions of the Warsaw Convention to domestic flights and therefore mirrors the Convention.

Death and Injury

If an incident occurs when an aircraft is transporting a passenger and the incident causes the death or injury of the passenger, the carrier is liable for the damage sustained to the passenger.¹⁵ The carrier is also responsible for the death or injury of a passenger who is embarking or disembarking an aircraft.¹⁶

The liability of a carrier is strictly enforced against the carrier, and if a contract containing an express term or condition attempts to limit such liability, that term or condition will be void.¹⁷ A carrier will not be liable for the damage and loss suffered by the passenger, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents.¹⁸

The carrier's liability is limited to 875,000 francs¹⁹ per passenger and, if the Court allows, such a payment can be made periodically.²⁰ The carrier and the passenger can enter into a special contract, whereby both parties agree the carrier be subject to a 'higher limit of liability'.²¹

An exception to the limited liability of a carrier will arise if it is proven the carrier or its employees or agents intentionally or recklessly caused damage by partaking in an act or omission.²² For such an exception to apply, the carrier or its employees or agents must have been aware it was likely that such an act or omission would cause damage, and the carrier's employees or agents must have been acting within the scope of their employment.²³

The 1967 Order (UK) prescribes a two year limitation period for bringing a claim for damages.²⁴

¹³ Section 5 of the *Tuvalu Independence Order 1978* (UK) states, "The revocation of the existing Orders shall be without prejudice as if they had been made, under any of those Orders; and the existing laws shall have effect on and after Independence Day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Tuvalu Act 1978 and this Order". As the date of Independence was 1 October 1978, the *Carriage by Air Acts (Application of Provisions) (Amendment) Order 1969* (UK) and the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) has effect.

¹⁴ *Ibid.*

¹⁵ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 17.

¹⁶ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 17.

¹⁷ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 23(1).

¹⁸ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 20.

¹⁹ When converting francs, art 22(5) of the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) states 'The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgement.'

²⁰ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(1).

²¹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(1).

²² *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 25.

²³ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 25.

²⁴ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 29.

Contributory Negligence

A carrier will not be liable (entirely or partially) for the damage and loss suffered by a passenger if the carrier establishes the passenger negligently caused or contributed to the damage.²⁵

Baggage and Cargo

A carrier will be liable if 'registered' baggage or cargo is destroyed, lost or damaged 'during the carriage by air'.²⁶ However, a carrier will not be liable for the damage and loss suffered, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents,²⁷ or if the cargo has an inherent defect, quality or vice.²⁸

If the baggage or cargo is received by the person entitled to the delivery, without complaint, same is considered *prima facie* evidence that the baggage or cargo is delivered to the entitled person in good condition.²⁹

Upon receipt of the damaged baggage or cargo, the entitled person must make a written complaint to the carrier upon discovery of the damage, or within seven days upon receipt of the baggage and within 14 days upon receipt of the cargo.³⁰ If a written complaint is not made within the specified time periods, a claim cannot be made against the carrier, unless the carrier acted fraudulently.³¹

The carrier's liability is limited to 250 francs per kilogram of destroyed, lost or damaged baggage, cargo or object within same.³² Liability is limited to the total weight of the specific part of the baggage, cargo or object that is destroyed, lost or damaged.³³ However, if the specific part of the baggage, cargo or object diminishes the value of other packages, the carrier will be liable for the damage to the other packages.³⁴ The limitation will not apply if the passenger or consignor makes a 'special declaration of interest in delivery at destination' and pays a fee when giving the baggage or cargo to the carrier.³⁵ If such a case arises, the carrier will be liable to pay the declared amount, unless the carrier can prove the declared amount exceeds the passenger's or consignor's interest in delivery.³⁶

A carrier's liability is limited to 5,000 francs per passenger, for baggage or objects that are carried onto the aircraft and are in the charge of the passenger.³⁷

Delay

If there is a delay in transporting passengers, cargo or baggage, the carrier is liable for damage caused by the delay.³⁸ However, a carrier will not be liable for the damage caused by the delay, if the carrier can prove all measures considered necessary and possible to avoid the damage were carried out by the carrier and its employees and agents.³⁹

²⁵ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 21.

²⁶ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 18(1); art 18(2) of the *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) defines 'Carriage by air' as 'the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.'

²⁷ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 20.

²⁸ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 19.

²⁹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 26(1).

³⁰ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, arts 26(2) and 26(3).

³¹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 26(4).

³² *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

³³ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(b).

³⁴ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(b).

³⁵ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

³⁶ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

³⁷ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(3).

³⁸ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 19.

³⁹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 20.

When a case involves the delay of a passenger, and the carriage of the passenger is undertaken by ‘*various successive carriers*’,⁴⁰ a claim can only be made against the carrier who performed the carriage in which the delay took place.⁴¹ An exception to this arises when the first carrier expressly agrees to assume liability for the entire journey.⁴²

When a case involves the delay of baggage or cargo, and the carriage of the baggage or cargo is via ‘*various successive carriers*’,⁴³ the passenger or consignor can make a claim against the first carrier, and the passenger or consignee who was entitled to the delivery of the baggage or cargo can make a claim against the last carrier.⁴⁴ The passenger, consignor and the consignee can also make a claim against the specific carrier who performed the carriage in which the delay occurred.⁴⁵

The carriers’ liability is limited to 250 francs per kilogram of delayed baggage, cargo or object within same.⁴⁶ Liability is limited to the total weight of the specific part of the baggage, cargo or object that is delayed.⁴⁷ However, if the specific part of the baggage, cargo or object diminishes the value of other packages, the carrier will be liable for the damage to the other packages.⁴⁸ The limitation will not apply if the passenger or consignor makes a ‘*special declaration of interest in delivery at destination*’ and pays a fee when giving the baggage or cargo to the carrier.⁴⁹ If such a case arises, the carrier will be liable to pay the declared amount, unless the carrier can prove the declared amount exceeds the passenger’s or consignor’s interest in delivery.⁵⁰

An exception to the limited liability of a carrier will arise if it is proven the carrier or its employees or agents intentionally or recklessly caused damage by partaking in an act or omission.⁵¹ For such an exception to apply, the carrier or its employees or agents must have been aware it was likely that such an act or omission would cause damage, and the carrier’s employees or agents must have been acting within the scope of their employment.⁵²

Upon receipt of the delayed baggage or cargo, the passenger or consignee has 21 days to make a written complaint to the carrier.⁵³ If a written complaint is not made within the 21 day period, a claim can not be made against the carrier, unless the carrier acted fraudulently.⁵⁴

Surface Damage

It is common for surface damage, and carriers’ liability in relation to same, to be referenced in the domestic *Civil Aviation Act* (or equivalent) of each country in the Asia Pacific. Tuvalu is unique as the CAA (TV) does not outline surface damage in any of its provisions. Therefore, carriers’ liability for surface damage is silent in Tuvalu.

⁴⁰ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(1).

⁴¹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(2).

⁴² *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(2).

⁴³ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(1).

⁴⁴ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(3).

⁴⁵ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 30(3).

⁴⁶ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

⁴⁷ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(b).

⁴⁸ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(b).

⁴⁹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

⁵⁰ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 22(2)(a).

⁵¹ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 25.

⁵² *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 25.

⁵³ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, arts 26(2) and 26(3).

⁵⁴ *Carriage by Air Acts (Application of Provisions) Order 1967* (UK) ch III, art 26(4).

System of Law

The common law of Tuvalu includes the English common law and the doctrines of equity.⁵⁵

Application of Customary Laws

Customary law consists of *'the customs and usages, existing from time to time, of the natives of Tuvalu'*.⁵⁶ Customary law will be an applicable source of law on the condition it is consistent with the Constitution, Acts and applied law.⁵⁷ Customary law can be heard in every court in Tuvalu as long as it is just and is in the public interest to be heard.⁵⁸ If there is a conflict in customary law being heard, the customary law that provides justice will prevail.⁵⁹

In Tuvalu, customary law is to be applied in preference to common law,⁶⁰ but only with regard to specified matters such as disputes relating to customary land or water.⁶¹

Court System

The Privy Council has jurisdiction to hear appeals in any civil case involving \$2,000 or more. The Court of Appeal has jurisdiction to hear civil appeals from the High Court.

The High Court has unlimited original jurisdiction in civil cases. It has jurisdiction to hear appeals from all decisions of the Senior Magistrates Court, other than orders made *ex parte*, by consent, or as to costs only.

The Magistrates Courts have jurisdiction to hear civil cases involving up to \$10,000. It may also hear appeals from Island Courts exercising in any civil matter where the amount involved exceeds \$10, and can also review any civil Island Court case, either on the petition of a party or of its own motion. Island Courts have jurisdiction within the boundaries of the island on which they are established and over inland and adjacent waters. Within that area they have summary jurisdiction to deal with claims in contract and tort where the amount involved does not exceed \$60.

Status of International Air Law Instruments

Tuvalu is not a party in its own right to the Warsaw Convention, Hague Protocol, Rome Convention, Guadalajara Convention or the Montreal Convention.

⁵⁵ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) s 6.

⁵⁶ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) s 5(1).

⁵⁷ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) s 5(2).

⁵⁸ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) sch 1, para 2.

⁵⁹ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) sch 1, para 6(1).

⁶⁰ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) s 6(3)(b).

⁶¹ *Laws of Tuvalu Act 1987* (revised ed, 2008) (TV) sch 1, para 4.

Appendix 1

International Conventions

	Warsaw Convention			The Hague Protocol			Rome Convention			Guadalajara Convention			Montreal Convention		
	Signature	Adherence or Succession	Date of entry into force	Signature	Adherence or Succession	Date of entry into force	Signature	Adherence or Succession	Date of entry into force	Signature	Adherence or Succession	Date of entry into force	Signature	Adherence or Succession	Date of entry into force
Cook Islands															21/07/07
Federated States of Micronesia															
Independent State of Papua New Guinea		12/12/75	16/09/75		12/12/75	16/09/75		15/12/75	16/09/75		03/12/75	02/03/76			
Independent State of Samoa		16/10/63	01/01/62		16/10/72	14/01/73									
Kingdom of Tonga		21/02/77	04/06/70		21/02/77	22/05/77								20/11/03	19/01/04
New Zealand		06/04/37	05/07/37		19/03/58	14/06/67					19/05/69	17/08/69		13/07/01	04/11/03
Republic of Indonesia		21/02/52	17/08/45								06/07/62				
Republic of Kiribati															
Republic of Nauru		4/11/70	31/01/68		4/11/70	31/01/68									
Republic of the Fiji Islands		15/03/72	10/10/70		15/03/72	10/10/70						18/01/72	10/10/70		
Republic of the Marshall Islands															
Republic of Vanuatu		26/10/81	24/01/82		26/10/81	24/01/82		15/01/82	15/04/82					09/11/05	08/01/06
Solomon Islands		09/09/81	07/07/78		09/09/81	07/07/78									
Tuvalu															

Appendix 2

Summary of International Conventions

The Warsaw Convention

Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 12 October 1929 (The Warsaw Convention)

Originally signed in Warsaw, Poland, the 1929 Warsaw Convention created an international civil aviation agreement for the establishment of rules of liability governing international carriage of persons, baggage and cargo by aircraft.¹ The Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.²

Originally written only in French, and deposited in the archives of the Ministry for Foreign Affairs of Poland, the Warsaw Convention contains five chapters which address not only the rules of liability governing international carriage but also requirements for the format and content of international air transport documents and the procedures to be followed in pursuing claims against, or seeking restitution from carriers.³

Key aspects of the Warsaw Convention include:

- Article 3 mandates that carriers must issue passenger tickets;
- Article 4 requires carriers to issue baggage checks for checked luggage;
- Article 29 creates a limitation period of two years within which a claim must be brought against a carrier; and
- Article 22 limits a carriers' liability to the following sums:
 - 125,000 francs for injury or death;
 - 250 francs per kilogram for checked luggage and cargo; and
 - 5,000 francs for objects which the passenger takes charge of (i.e. hand luggage).⁴

While the Warsaw Convention has been amended on a piecemeal basis over succeeding years by a number of protocols, supplementary instruments, rules, regulations and later conventions,⁵ commentators argue that the 1929 Convention has evolved into one of the most important instruments of private international law, adhered to by signatory nations across the globe.⁶

The Hague Protocol

The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 12 October 1929 (The Hague Protocol)

The Hague Protocol, signed in 1955 at The Hague, amended various aspects of the Warsaw Convention. It provided the first major modernisation of the Warsaw Convention, streamlining a number of aspects of the Warsaw Convention including (but not limited to):

- a broadening of the definition of 'international carriage';⁷
- the documentation requirements for international carriage of passengers, baggage and cargo by limiting the information required to be included in cargo air waybills, passenger tickets and baggage checks;⁸

¹ <http://www.infrastructure.gov.au/aviation/international/liability.aspx> at 7 July 2012.

² Article 1 of the Warsaw Convention.

³ <http://www.businessdictionary.com/definition/Warsaw-Convention.html> at 7 July 2012.

⁴ <http://www.dot.gov/ost/ogc/Warsaw1929.pdf> at 12 July 2012.

⁵ <http://www.infrastructure.gov.au/aviation/international/liability.aspx> at 7 July 2012.

⁶ <http://www.businessdictionary.com/definition/Warsaw-Convention.html> at 7 July 2012.

⁷ Article 1, Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 12 October 1929 (the Hague Protocol).

⁸ Article 3–10, Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 12 October 1929 (the Hague Protocol).

- a narrowing of the circumstances under which failure to comply with such documentation requirements related to the carriage of cargo would preclude the application of relevant carrier liability provisions; and
- Article 25 of the Warsaw Convention which allows plaintiffs to exceed the liability limits of art 22 under certain circumstances, namely a modification of the 'willful misconduct' standard with a description of the conduct itself.⁹

The Protocol also went further, generally permitting plaintiffs to recover court costs and other litigation costs incurred in the pursuit of claims against carriers under the Warsaw Convention, as amended¹⁰ and increasing the limits of liability originally set out in the Warsaw Convention as follows:

- Article 11(1) increased the limit of liability for injury/death to 250,000 francs; and
- Article 11(2)(a) increased the limit of liability for registered baggage/cargo to 250 francs per kilogram, unless a special declaration is made when the baggage/cargo is handed over to the carrier.

The Protocol remained in force until 1975, when it was further amended by the Montreal Additional Protocol No.1.

The Rome Convention

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 7 October 1952 (The Rome Convention)

The Rome Convention was a diplomatic conference on International Air Law, convened by the International Civil Aviation Organisation in Rome, Italy in September and October 1952.¹¹

A Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was adopted with a view to ensuring that international rules were established to:

- Unify the law relating to recovery by persons who suffer damage caused on the surface by foreign aircraft while at the same time limiting the liabilities of those responsible for such damage; and,
- Address apportionment of claims, financial security requirements, jurisdiction and enforcement of judgments.¹²

The Rome Convention was prepared in English, French and Spanish and was deposited with the International Civil Aviation Organisation.

⁹ <http://www.glin.gov/view.action?glinID=99799> at 7 July 2012.

¹⁰ <http://www.glin.gov/view.action?glinID=99799> at 7 July 2012.

¹¹ http://www.icao.int/icao/en/hist/stamps/the_rome_convention_and_its_modernization.htm at 7 July 2012.

¹² http://www.icao.int/icao/en/hist/stamps/the_rome_convention_and_its_modernization.htm at 7 July 2012.

The Guadalajara Convention

Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Guadalajara, 8 September 1961 (The Guadalajara Convention)

In 1961 a diplomatic conference was held in Guadalajara, Mexico for the limited purpose of supplementing the Warsaw Convention to address the issue of the indirect carriage of cargo.¹³

The Convention established a definition distinguishing contracting carriers from actual carriers¹⁴ and confirmed that the acts or omissions of an actual carrier shall also be deemed to be those of the contracting carrier and vice versa.¹⁵

The Montreal Protocols of 1975 incorporated the provisions of the newest versions of the international rules established for international air carriage by the Hague and Guatemala Protocols.

The First and Second Montreal Protocols¹⁶ solely addressed the conversion of the liability limits set out in the Warsaw Convention and the Warsaw Convention as amended by The Hague Protocol 1955 from a gold standard to the Special Drawing Rights¹⁷ (SDRs) standard for purposes of calculating all quantitative limitations on liability.¹⁸

Montreal Protocol No. 3¹⁹ relevantly provided rules for the establishment of the following further amendments to the original Warsaw Convention.

- An unbreakable liability limit of 100,000 Special Drawing Rights (SDRs).²⁰
- An amendment to the limit of liability for the carriage of cargo to 17 SDRs per kilogram, unless a special declaration is made when the baggage/cargo is handed over to the carrier.²¹
- A limit of liability of 4,150 SDRs for delay in the carriage of persons and 1,000 SDRs in the case of destruction, loss, damage or delay in the carriage of baggage for each passenger.

¹³ http://www.cargolaw.com/presentations_montreal_cli.html#guadalajara.

¹⁴ Article 1, Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Guadalajara, 8 September 1961.

¹⁵ Article 3, Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Guadalajara, 8 September 1961.

¹⁶ Montreal Additional Protocol No. 1, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929. (Montreal Protocol 1); Montreal Additional Protocol No. 2, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955. (Montreal Protocol 2).

¹⁷ 'The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves. Its value is based on a basket of four key international currencies, and SDRs can be exchanged for freely usable currencies.' See: <http://www.imf.org/external/np/exr/facts/sdr.htm> at 7 July 2012.

¹⁸ http://www.cargolaw.com/presentations_montreal_cli.html at 7 July 2012.

¹⁹ Montreal Additional Protocol No. 3, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971. (Montreal Protocol 3).

²⁰ Article 2, Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.

²¹ Article 2, Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.

- A settlement inducement clause designed to force airlines to settle a claim within six months by subjecting them to legal fees and costs if judgment was received for more than the airline's initial offer.²²

Finally, Montreal Protocol No. 4²³ eliminated the outdated provisions of the Warsaw Convention dealing with cargo documentation and *'thereby facilitating the application of simplified electronic commerce to international air cargo'*.²⁴

The Montreal Convention

Convention For The Unification Of Certain Rules For International Carriage By Air, Montreal, 28 May 1999 (The Montreal Convention)

In May 1999, the Contracting States of the International Civil Aviation Organisation negotiated an agreement to modernise the Warsaw Convention rules, recasting them into a single legal instrument replacing the complex system which was initially established by the Warsaw Convention and as amended by the various instruments which followed,²⁵ while at the same time maintaining where possible the core principles of the original Convention.

The comprehensive legal framework installed by the Montreal Convention provided the following important developments:

- *'The principle of the air carrier's unlimited civil liability in the event of bodily injury is split into two tiers:*
 - *a first tier of strict carrier liability for damages of up to 100,000 SDRs;²⁶ and*
 - *in excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the latter may avoid only by proving that it was not at fault (the burden of proof is on the carrier);*
- *The principle of making advance payments, in the event of bodily injury, to enable victims or the persons entitled to compensation to cover their immediate economic needs;*
- *The creation of a fifth jurisdiction, which allows the victim, or the persons entitled to compensation, to bring suits before the courts in the passenger's principal place of residence;*
- *An increase in the air carrier's liability limits in the event of delay, and in the event of damage caused to baggage;*
- *Modernisation of transport documents (electronic air waybills and tickets);*
- *Clarification of the rules on the respective liability of the contractual carrier and the actual carrier;*
- *Generalised institution of the obligation for air carriers to maintain adequate insurance; and*

²² Article 2, Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.

²³ Montreal Additional Protocol No. 4, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971. (Montreal Protocol 4).

²⁴ http://www.cargolaw.com/presentations_montreal_cli.html at 7 July 2012.

²⁵ http://europa.eu/legislation_summaries/transport/air_transport/l24255_en.htm at 7 July 2012.

²⁶ As a result of the first review of limits of liability conducted by ICAO in accordance with Article 24, the rounded revised limits, effective as of 30 December 2009, in Special Drawing Rights (SDR's), are (1) 19 SDR's per kilogram in the case of destruction, loss, damage or delay in relation to the carriage of cargo (Article 22, paragraph 3); (2) 1, 131 SDR's for each passenger in case of destruction, loss, damage or delay with respect to baggage (Article 22, paragraph 2); (3) 4,694 SDR's for each passenger in relation to damage caused by delay in the carriage of persons (Article 22, paragraph 1); (4) 113,100 SDR's for each passenger for damage sustained in case of death or bodily injury of a passenger (for the first tier) (Article 21, paragraph 1).

- *Introduction of the so-called ‘regional’ clause allowing economic integration organisations such as the European Union to accede to the new Convention.*²⁷

While the Montreal Convention is a relatively new instrument, numerous countries have become signatories to the Convention which is held by, and managed under the authority of the International Civil Aviation Organisation.

²⁷ http://europa.eu/legislation_summaries/transport/air_transport/l24255_en.htm at 7 July 2012.

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