

# Aviation Liability 2020

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# Aviation Liability

## 2020

**Contributing editors****Andrew J Harakas, Jeff Ellis, Chris Carlsen and Kevin Sutherland**

Clyde &amp; Co US LLP

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Lexology Getting The Deal Through is delighted to publish the third edition of *Aviation Liability*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on New Zealand and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Andrew J Harakas, Jeff Ellis, Chris Carlsen and Kevin Sutherland of Clyde & Co US LLP, for their continued assistance with this volume.



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# New Zealand

Simon Cartwright and Anna Barnett

Hesketh Henry

## APPLICABLE TREATIES

### Major air law treaties

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

New Zealand is party to:

- the Montreal Convention (1999) (ratified 2002);
- the Tokyo Convention (1963) (ratified 1974); and
- the Warsaw Convention (1929) (ratified 1937) and its amending instruments: the Hague Protocol (1955) (ratified 1967), the Guadalajara Convention (1961) (ratified 1969) and the Montreal Protocol No. 1 (1975) (ratified 1999), No. 2 (1975) (ratified 1999) and No. 4 (1975) (ratified 1999).

The provisions of the Montreal Convention, the Warsaw Convention (as amended by the Hague Protocol, the Montreal Protocol Nos. 1, 2 and 4) and the Guadalajara Convention have been implemented into New Zealand domestic law by section 91C of the Civil Aviation Act 1990.

The Aviation Crimes Act 1972 has given force to certain provisions of the Tokyo Convention (1963), the Hague Convention (1970), the Montreal Convention 1971 and the Montreal Protocol (1988), in legislating for offences on board and affecting aircraft and the safety of civil aviation and airports in New Zealand domestic law.

## INTERNATIONAL CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

### Montreal Convention and Warsaw Convention

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

New Zealand courts have not directly commented on this point. However, New Zealand courts will generally interpret domestic legislation that incorporates international conventions (including the Conventions) in the same way as other common law jurisdictions.

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

In *Emery Air Freight Corp v Nerine Nurseries* [1997] 3 NZLR 723 the New Zealand Court of Appeal expressly adopted the decision of the House of Lords in *Sidhu v British Airways* [1997] AC 430, which provided that the Montreal Convention and the earlier Warsaw conventions provide the sole basis for liability of an air carrier performing international carriage.

### Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

There is no authority in New Zealand around who considered to be a 'carrier' under the Conventions; however, for the reasons set out in question 2, it is likely that the courts would follow *Rolls-Royce plc & Anor v Heavylift-Volga Dnepr Ltd & Anor* [2000] CLC 1120 and would consider that ground handling agents and other service providers are not carriers under the Conventions.

### Carrier liability condition

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

New Zealand courts have not yet interpreted or considered the meanings of 'accident', 'bodily injury' or 'in the course of any of the operations of embarking or disembarking' under the Conventions. However, for the reasons set out in question 2, it is likely that the New Zealand courts will interpret these words and phrases in line with the interpretations made by other common law jurisdictions.

Accordingly, New Zealand courts would likely follow the positions taken by the United Kingdom, Canada and Australia in applying the United States decision of *Air France v Saks* (1985) 470 US 392, where the Supreme Court held that accident means 'an unexpected or unusual event or happening that is external to a passenger'.

'Bodily injury' is likely to be interpreted in accordance with the UK House of Lords decision *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, which clarified that 'bodily' means physical injury to the body and as such the only way to claim for mental injuries is where there is some physical manifestation of the injury.

It is less clear how the New Zealand courts will interpret 'in the course of any of the operations of embarking or disembarking', but it is likely that the general tests of activity (what the passenger is doing at the time), control and location (is the passenger in a place where they are obliged to be for the process of embarkation or disembarkation) will apply.

### No negligence defence

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

New Zealand courts have not yet considered these standards, but would likely consider the United Kingdom line of authorities on these points extremely persuasive, including *Singhal v British Airways PLC* County Court (Wandsworth) 2008 WL 4820370 on the exoneration defence, *Antwerp United Diamond BVBA v Air Europe* [1993] All ER 469 on the application of the 'all reasonable measures' defence pursuant to article 20, and *Horabin v British Airways* [1952] 2 All ER 1016 on the interpretation of wilful misconduct.

### Advance payment for injury or death

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

Under sections 91T(1)(a) and (b) of the Civil Aviation Act 1990, the Governor-General may order advance payments for compensation, or arrangements for making advance payments for compensation, to relatives of passengers injured or killed during international air carriage, in accordance with article 28 of the Montreal Convention. This power has not been exercised by the Governor-General to date.

### Deciding jurisdiction

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

The New Zealand courts have not yet interpreted each of the jurisdictions set out in article 33 of the Montreal Convention and article 28 of the Warsaw Convention. International carriage within the meaning of the Warsaw Convention is governed by the provisions of the otherwise repealed Carriage by Air Act 1940. Pursuant to the First Schedule of the Carriage by Air Act 1940, a plaintiff has the choice to bring an action for damages relating to carriage performed by a contracting carrier in the territory of one of the high contracting parties, either before the court that has jurisdiction where the carrier is ordinarily resident, has its principal place of business, or has an establishment by which the contract has been made, or before the court that has jurisdiction at the place of destination.

New Zealand courts recognise the doctrine of forum non conveniens. There is no case law under New Zealand law where the courts have been asked to apply the doctrine to an action under the Montreal Convention or Warsaw Convention.

### Period of limitation

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

The New Zealand courts have not yet considered the interpretation of the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention but the Court of Appeal expressly adopted the decision of the House of Lords in *Sidhu v British Airways* [1997] AC 430, which provided that the Montreal Convention and the earlier Warsaw conventions provide the sole basis for liability of an air carrier performing international carriage (see question 3).

Commentators have argued that the New Zealand Court of Appeal decision *Danzas AG v Hally Press Ltd* [2005] 3 NZLR 146 goes against

New Zealand courts strictly applying the two-year limitation period. In this case, the passenger erroneously commenced proceedings under the Warsaw Convention in the admiralty jurisdiction of the High Court; however the Court of Appeal permitted the claim to be transferred to the High Court's civil jurisdiction.

### Liability of carriage

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

The New Zealand courts considered the liability of a person other than the contracting carrier in *Emery Air Freight Corporation v Nerine Nurseries Ltd*. The Court of Appeal held that performance in the Warsaw Convention is limited to physical and not contractual performance. As Emery was not the contracting carrier or physical carrier, it was not liable for the loss.

New Zealand courts have not yet considered the liability of carriage under code-sharing agreements.

## DOMESTIC CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

### Governing laws

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

New Zealand has a no-fault accident compensation scheme governed by the Accident Compensation Act 2001. The ACC scheme (as it is known) provides compensatory cover for those who suffer a personal injury in New Zealand, regardless of whether the injured party is a New Zealand citizen. The scheme also covers nervous shock or mental injuries that occur as a result of a physical injury or a sexual assault.

The ACC scheme bars proceedings being brought for damages arising directly or indirectly out of any personal injury covered by the ACC scheme, either by the injured party, or by the Accident Compensation Corporation after it has paid compensation to the injured person.

Accordingly, an air carrier's liability for passenger injury or death occurring during domestic carriage is limited to damages arising out of a mental injury not covered by the ACC scheme, and exemplary damages (which is expressly excluded from the ACC scheme's statute bar), both of which would be governed by ordinary principles of negligence.

The ACC scheme explicitly provides that persons not ordinarily resident in New Zealand do not have cover under the scheme for personal injuries suffered while on board an aircraft (or while embarking or disembarking) during international carriage, or where the person is on the domestic leg of an international flight that they have travelled on. This reflects that the ACC scheme should not derogate from entitlements under the Conventions.

### Nature of carrier liability

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

To the extent that the ACC scheme does not apply, the air carrier's liability will generally be fault-based, in accordance with the ordinary principles of negligence.

A claim for mental injury that is not covered by the ACC scheme would generally arise following a plaintiff having witnessed an event or making a sudden discovery of negligence. For a passenger to successfully make a claim for mental injury caused by an air carrier's negligence, they must show that they have suffered a recognisable

psychiatric illness over and above what is considered to be 'normal' grief, distress and sorrow, as a result of the air carrier's actions.

In New Zealand, exemplary damages are only awarded in exceptional cases involving outrageous conduct. In negligence cases the plaintiff must show that the defendant has either intended to cause harm or is consciously reckless, which involves being subjectively reckless in the sense of having a conscious appreciation of the risk of causing harm as a component of acting in an outrageous manner.

### Liability limits

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

To the extent that the ACC scheme does not apply, the air carrier's liability for personal injury or death is not limited under statute; however, a carrier can limit its liability in its conditions for domestic carriage.

### Main defences

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

The main defence to a personal injury action, other than denial that a negligent act or omission was committed, is that the plaintiff was contributorily negligent (see question 16).

### Damages

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

Common law provides that an air carrier's liability for damages arising out of a tortious act is joint and several.

### Rule for apportioning fault

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

Section 3(1) of the Contributory Negligence Act 1947 provides that where any person suffers damage as the result partly of his or her own fault and partly of the fault of any other person or persons, the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage. It is likely that a court would place significance on a plaintiff's age and mental capacity when deciding a just and equitable reduction of the damages recoverable.

### Statute of limitations

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

The Limitation Act 2010 came into force on 1 January 2011. Section 11 of this Act contains a general principle that any claim for monetary relief at common law must be brought within six years from the date of the act or omission on which the claim is based. The section goes on to state that if a plaintiff has late knowledge of a claim, they can bring proceedings up to three years from the date that knowledge of the relevant facts is gained or is reasonably ought to have been gained. Section 11 also provides for a longstop period of 15 years from the date of the act or omission on which the claim is based, regardless of whether a plaintiff has late knowledge of a claim or not.

Section 4(7) of the Limitation Act 1950 (which applies to causes of actions based on acts or omissions prior to 1 January 2011) provides that an action in respect of bodily injury to any person must be brought within two years from the date on which the cause of action accrued.

This provision does, however, allow for the court to agree an extension of the relevant limitation period to six years if it considers that the delay in bringing the action was occasioned by mistake of fact or law, or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his or her defence or otherwise by the delay, such that it would be just to grant the extension.

## THIRD-PARTY ACTIONS

### Seeking recovery

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

If litigation has been commenced, the correct procedure for seeking recovery from a third party is provided for in the High Court Rules 2016 (HCR). Where the defendant claims it is entitled to a contribution or an indemnity from a person who is not a party to the proceeding, it may issue a third party notice to the third party pursuant to rule 4.4 of the HCR.

### Time limits

19 | What time limits apply?

In the absence of a limitation period provided by contract, the Limitation Acts apply (see question 17).

## LIABILITY FOR GROUND DAMAGE

### Applicable laws

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

There is no specific legislation that governs the liability of an air carrier for injury or damage caused to persons on the ground by an aircraft accident. New Zealand is not a signatory to the Rome Convention 1952.

### Nature and conditions of liability

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

To the extent that the ACC scheme does not apply, the air carrier's liability will generally be fault-based, in accordance with the ordinary principles of negligence.

### Liability limits

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

To the extent that the ACC scheme does not apply, the air carrier's liability for personal injury or death caused to persons on the ground by an aircraft accident is not limited under statute.

### Main defences

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

The main defence to a personal injury action is that the plaintiff was contributory negligent (see question 16).

## LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

### Applicable laws

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

New Zealand does not have any legislation that deals specifically with the liability of an air carrier for injury or death caused by an unruly passenger or a terrorist event.

New Zealand's ACC scheme will generally apply in the case of injury or death caused by an unruly passenger or a terrorist event during domestic carriage; accordingly an air carrier's liability for such events is limited to damages arising out of a mental injury not covered by the ACC scheme, or exemplary damages.

Where injury or death is caused by an unruly passenger or a terrorist event during international carriage, an air carrier's liability will be governed by the provisions of the applicable Convention, as per section 91C of the Civil Aviation Act 1990.

### Nature and conditions of liability

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

Where injury or death is caused by an unruly passenger or a terrorist event during domestic carriage, an air carrier's liability will generally be fault-based, in accordance with the ordinary principles of negligence.

Where injury or death is caused by an unruly passenger or a terrorist event during international carriage, an air carrier will be strictly liable to the extent that the event involving unruly passenger or the terrorist event constitutes an 'accident' for the purposes of the applicable Convention or section 91C of the Civil Aviation Act 1990.

### Liability limits

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

In respect of injury or death caused by an unruly passenger or a terrorist event during domestic carriage, see question 13.

In respect of injury or death caused by an unruly passenger or a terrorist event during international carriage, an air carrier's liability is limited in accordance with the applicable Convention (as per section 91C of the Civil Aviation Act 1990).

### Main defences

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

In respect of injury or death caused by an unruly passenger or a terrorist event during domestic carriage, see question 14.

In respect of injury or death caused by an unruly passenger or a terrorist event during international carriage, the defences available to an air carrier are those provided for in the applicable Convention (as per section 91C of the Civil Aviation Act 1990).

## LIABILITY FOR HARM CAUSED BY DRONES

### Applicable legislation

28 | Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

The operation of unmanned aircraft – or drones – is governed by parts 101 and 102 of the Civil Aviation Rules, and failure to comply with these rules will generally be an offence under the Civil Aviation (Offences) Regulations 2006. However, liability for injuries or damage caused by drones is not governed by these regulations, and will instead be governed by ordinary principles of negligence. The application of New Zealand's ACC scheme means that liability for injuries caused by drones in New Zealand will be limited to damage arising out of a mental injury not covered by the ACC scheme, and exemplary damages (see question 11).

## CONSUMER PROTECTION AND PASSENGER RIGHTS

### Applicable legislation

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

Section 91Z of the Civil Aviation Act 1990 provides that an air carrier is liable for damage arising from delay in the domestic carriage of passengers. This liability is limited to the lesser of the amount of damage proved to have been sustained as a result of the delay or an amount representing 10 times the sum paid for the carriage. However, these limits do not apply if the damage resulted from an intentional or reckless act or omission by the air carrier. Section 91Z goes on to provide that an air carrier is not liable for damage caused by delay if the air carrier proves that the delay was caused by weather conditions, compliance with air traffic control information, or obedience to directions given by a lawful authority, or was made necessary by force majeure or for the purpose of saving or attempting to save life. An air carrier's liability for damage arising from delay in the international carriage of passengers is governed by the applicable Convention (as per section 91C of the Civil Aviation Act 1990).

The Civil Aviation Act does not contain any further provisions concerning consumer protection, and there are no further aviation-specific consumer protection laws or regulations. An air carrier's liability for loss of, or damage to, baggage during domestic carriage will be governed by Part 5, Subpart 1 of the Contract and Commercial Law Act 2017 (as well as the terms of the applicable carriage contract), which imposes liability on a contracting air carrier for the loss of or damage to any baggage that occurs while the carrier is responsible for the baggage; however, this liability will generally be limited to NZ\$2,000 per item of baggage. Where baggage is lost or damaged during international carriage, the air carrier's liability is governed by the applicable Convention (as per section 91C of the Civil Aviation Act 1990).

In addition, air carriers must comply with Part 4 of the Consumer Guarantees Act 1993, which includes guarantees that, where services are supplied to a consumer, the service will be carried out with reasonable care and skill, and will be fit for any particular purpose. This Act provides that a consumer can obtain damages from the supplier in compensation for any reduction in value of the service below the charge paid by the consumer, as well as for any loss or damage resulting from the failure to comply with the guarantees.

New Zealand has ratified the United Nations Convention on the Rights of People with Disabilities, which includes articles dealing with accessibility and personal mobility; however, there are currently no

laws or regulations concerning air passengers with reduced mobility or other disability-related needs. The Human Rights Act 1993 provides that it is unlawful for a person to be refused access to an aircraft that members of the public are entitled or allowed to enter by reason of that person's disability, but also provides for an exception where the disability of a person is such that there would be a risk of harm to that person or to others if that person were to have access to the aircraft and it is not reasonable to take that risk.

## LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS

### Relevant laws

30 | What laws apply to the liability of the government entities that provide services to the air carrier?

The Crown or local authorities own a number of New Zealand's airports. The Airport Authorities Act 1966 gives a range of functions and powers to airport authorities to establish and operate airports; however the liability of New Zealand's airport authorities is governed by the ordinary principles of contract and tort.

A state-owned enterprise, Airways Corporation of New Zealand Limited, is the sole air traffic service provider in New Zealand. As a state-owned enterprise, Airways Corporation's liability is also governed by the ordinary principles of contract and tort.

### Nature and conditions of liability

31 | What is the nature of, and conditions for, the government's liability?

The government's liability will generally be fault-based, in accordance with the ordinary principles of negligence.

### Liability limits

32 | Are there any limitations to seeking recovery from the government entity?

No.

## CRIMINAL PROCEEDINGS

### Responsibility for accidents

33 | Can an air carrier be criminally responsible for an aviation accident?

Part 5 of the Civil Aviation Act 1990 (along with the Civil Aviation (Offences) Regulations 2006) provides for a range of criminal offences including offences relating to safety and security. A range of penalties is also specified, including imprisonment, fines and disqualification. The number of prosecutions brought under the Civil Aviation Act 1990 is low. In addition, section 156 of the Crimes Act 1961 imposes a duty on individuals in charge of a dangerous thing to take reasonable precautions against and to use reasonable care to avoid such danger, and provides that such a person is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

There is no corporate manslaughter offence in New Zealand so it is unlikely that an air carrier could be held criminally responsible for any passenger injury or death that occurs in an aviation accident.

### Effect of proceedings

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

The ACC scheme provides that in a claim for exemplary damages against an air carrier, the Court may have regard to whether a penalty has already been imposed on the air carrier for a criminal offence involving the conduct concerned in the claim for exemplary damages and, if so, the nature of the penalty. This reflects the fact that exemplary damages are punitive rather than compensatory.

Otherwise, it is unlikely that criminal proceedings against an air carrier will have any impact on a civil action by a passenger or their representative

### Compensation

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

Section 32 of the Sentencing Act 2002 allows a court to impose a sentence of reparation if an offender has (through the offence committed) caused the victim to suffer loss of or damage to property, emotional harm or loss or damage consequential on any emotional or physical harm or loss of, or damage to, property. Such consequential losses may include future loss of earnings if the victim is unable to work due to the offence.

The courts will, however, look at whether the victim has a right to bring proceedings against the offender in relation to the consequential loss suffered in determining whether reparation is appropriate and/or the amount of reparation to be made. This provision also explicitly states that courts must not make any reparation orders in respect of any consequential losses for which compensation has been, or is to be, paid under the ACC scheme.

The ACC scheme does not provide full compensation cover for those who suffer a personal injury in New Zealand. Notably, if a person is unable to work because of an injury that is covered by the ACC scheme, that person can only receive up to 80 per cent of their income as weekly compensation. It is clear that the courts are permitted to make reparation orders that cover the difference between what a person receives under the ACC scheme, and their actual consequential losses.

It is unclear whether a court would hold that the provisions of the relevant Convention would apply to prohibit a reparation order being made against an air carrier, where the air carrier had committed the offence during the international carriage by air of a passenger.

## EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

### Liability

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

A carrier's conditions of carriage are contractually binding on a passenger to the extent that such conditions adhere to New Zealand Consumer Law (eg, the Fair Trading Act 1986 and the Consumer Guarantees Act 1993) and New Zealand law generally.



## DAMAGES

### Damage recovery

#### 37 | What damages are recoverable for the personal injury of a passenger?

In the case of passenger injury occurring during domestic carriage, a passenger is limited to seeking damages arising out of a mental injury not covered by the ACC scheme, or exemplary damages. As per question 13, there is no limit to the amount of damages that could be awarded.

The breadth of the ACC scheme means that there is very little guidance in New Zealand as to the likely amount of damages for mental injury awards, although awards for general damages tend to be modest. Awards of exemplary damages in New Zealand have also been relatively modest, with the highest amount of exemplary damages awarded by a New Zealand court being NZ\$85,000.

For both domestic carriage (governed by ordinary negligence principles) and international carriage (governed by the provisions of the applicable Convention, as per section 91C of the Civil Aviation Act 1990), recoverable damages would likely include general damages for pain and suffering and special damages for financial losses, including loss of earnings (both part and future) and out-of-pocket expenses such as medical expenses. In the case of passenger injury occurring during international carriage, a passenger is limited to seeking damages provided for in the provisions of the applicable Convention, as per section 91C of the Civil Aviation Act 1990.

#### 38 | What damages are recoverable for the death of a passenger?

The Deaths by Accidents Compensation Act 1952 provides that where a tortfeasor's negligence has caused the death of a person, the tortfeasor will be liable in respect of an action for damages as if the death of the person had not occurred, and regardless of whether the death was caused under circumstances that amount to a criminal offence. Any such action under this Act will be made in the name of the deceased's spouse or civil union partner, parents and children. Actions under the Act are confined to claims for financial losses.

The statutory bar in the ACC scheme means that there is little scope for the families of a passenger who died during domestic carriage by air to bring an action against the air carrier pursuant to the Deaths by Accidents Compensation Act 1952 (although they will be entitled to compensation under the ACC scheme).

The families of a passenger who died during international carriage by air will, however, be entitled to bring an action under the applicable Convention against the air carrier pursuant to the Deaths by Accidents Compensation Act 1952. The families would be limited to the amount of damages provided for in the provisions of the applicable Convention, as per section 91C of the Civil Aviation Act 1990, and recoverable damages would likely include financial losses, including loss of earnings (prior to the death of the passenger), damages for financial support in respect of dependants and out-of-pocket expenses such as funeral and any medical expenses.

## ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

### Investigatory authority

#### 39 | Who is responsible in your state for investigating aviation accidents?

Pursuant to section 4 of the Transport Accident Investigation Commission Act 1990, the Transport Accident Investigation Commission (TAIC) is charged with determining the circumstances and causes of accidents and incidents. The Civil Aviation Authority (CAA) retains an important role

in accident investigation. Pursuant to a memorandum of understanding between TAIC and CAA, the CAA conducts its own investigations into civil aviation accidents that are not investigated by the TAIC. In addition to the powers granted to the TAIC and the CAA, public inquiries may be held into aviation accidents under the Commissions of Inquiry Act 1908. To date, there have only been three public inquiries into major air accidents.

### Disclosure restrictions

#### 40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information of cockpit voice recordings in litigation.

Under New Zealand law, all evidence gathered by the TAIC has extensive legal protection from disclosure. The final report following a TAIC investigation is published and available to the public. Similarly, CAA reports are publicly available.

Pursuant to the Transport Accident Investigation Commission Act 1990, 'records', defined as a statement or submission made to TAIC in the course of an investigation, a recording or transcript of an interview, a note or opinion of a person engaged in an investigation or information provided in confidence to the TAIC are not admissible in any prosecution or proceeding. Records may only be disclosed with the written consent of the TAIC or to the supplier of the record.

Cockpit recordings and certain investigation records supplied to the Commission may only be disclosed with the written consent of the Commission, by order of the New Zealand High Court or to the supplier of the record. Cockpit recordings and investigation records are not admissible in civil proceedings unless the High Court is satisfied that on the balance of probabilities, the interests of justice in the disclosure of the record outweigh the adverse domestic and international impact the disclosure may have on TAIC's investigation or future investigations. In *Director of Civil Aviation v Bach* [2018] NZDC 9072 the New Zealand District Court reiterated the rationale behind the default position of inadmissibility being that purpose of recording devices is to investigate accidents and improve aircraft safety

### Relevant post-accident assistance laws

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

Under the Civil Aviation Act 1990, the Governor-General may order that carriers make advance payments in compensation to natural persons under article 28 of the Montreal Convention. To date this discretionary power has not been utilised.

## INSURANCE REQUIREMENTS

### Mandatory requirements

#### 42 | Are there mandatory insurance requirements for air carriers?

To operate a scheduled international air service to or from New Zealand, an air carrier is required under Part 8A of the Civil Aviation Act to hold a scheduled international air service licence or an open aviation market licence. When a foreign air carrier applies for one of these licences it is required to supply proof of insurance covering liability that may arise from or in connection with the operation of the services in respect of death or bodily injury, or of property damage. A New Zealand air carrier does not have to supply such proof when applying for a licence; however, it must supply this proof prior to commencing the services authorised by the licence.

In addition, section 87ZA of the Civil Aviation Act provides that a licensee (or an applicant for a licence) may be called on to provide proof

that any liability of the licensee (or applicant) for the death of or bodily injury to any person or loss of or damage to any property that may arise out of or in connection with the operation of the service is covered by insurance.

## LITIGATION PROCEDURE

### Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

The decision of which court to bring a civil aviation liability claim in will be dependent on the level of damages being sought by the plaintiff. The most likely court for proceedings to be brought in is the District Court, as it has jurisdiction to hear civil claims with a value of up to NZ\$350,000. If a claim has a value of greater than NZ\$350,000, proceedings will be brought in the High Court. In addition, a claim with a value of less than \$15,000 can be brought in the Disputes Tribunal.

An appeal against a decision of the District Court will generally be heard in the High Court by way of a rehearing, which enables the High Court to come to a different decision to the District Court on the evidence presented and on the law. Further appeals can then be made to New Zealand's other appellate courts (the Court of Appeal and the Supreme Court).

### Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

Both the District Court and the High Court can make an order for either standard or tailored discovery. Standard discovery requires each party to disclose the documents that are in the party's control and that are documents that the party relies on, supports or adversely affects another party's case. Tailored discovery entails more or less discovery than standard discovery would involve. Unless the Court is satisfied to the contrary, there is a presumption that the interests of justice require tailored discovery in certain circumstances.

### Evidence

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

The rules governing procedure in both the District Court and High Court provide that, as soon as a proceeding is reasonably contemplated, a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding. Furthermore, documents in electronic form that are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

### Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

The matters relating to the fixing and payment of costs are at the discretion of the Court. The general rule is that legal costs and disbursements will 'follow the event'; accordingly, courts will generally award a successful party scale costs (determined by a 'fixed scale', rather than actual costs) and disbursements, to be paid by the unsuccessful party. An award of increased costs, or actual or indemnity costs, can also be made in certain circumstances.

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## JUDGMENTS AND SETTLEMENT

### Pre and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

Both pre-judgment and post-judgment interest is provided for under the Interest on Money Claims Act 2016. Section 10 of this Act provides that in every money judgment, a court must award interest as compensation for a delay in the payment of money, unless the Act expressly provides otherwise. Interest is generally calculated using a base rate determined by reference to the Reserve Bank of New Zealand's retail six-month term deposit rate, plus a premium of 0.15 per cent. Helpfully, the Act also requires that the Ministry of Justice establish and maintain an online interest calculator, which can be found on the Ministry of Justice website.

### Settlements

48 | Is court approval required for settlements?

Court approval is not generally required for settlements. Settlements entered into by minors are subject to the provisions of the Contract and Commercial Law Act 2017, which provides that settlement of a claim for money or damages entered into by a minor must be approved by the Court.

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

Following a settlement with a passenger, a carrier may be able to obtain contribution for its liability to the passenger against another contributing party under section 17 of the Law Reform Act 1936; however, the time limits contained in the Limitation Acts will apply (see question 17).

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

No.

**UPDATE AND TRENDS****Key developments of the past year****51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

Work is being carried out on a Civil Aviation Bill, which is intended to replace and consolidate the Civil Aviation Act 1990 and the Airport Authorities Act 1966. A draft bill was released for comment in May 2019. Along with reordering and restructuring current legislation, the draft bill includes new provisions relating to drug and alcohol management by aviation operators, the protection of safety information (implementing a 'Just Culture' approach) and airline cooperative agreements, as well as new provisions clarifying aviation security powers.

At the time of writing, the CAA has attracted criticism of its regulatory oversight function. A May 2019 TAIC report into a fatal helicopter crash on the Fox Glacier in New Zealand's South Island expressed concern that the CAA had not taken appropriate steps in its oversight of the operators, despite having previously identified 'significant and repetitive non-compliance issues with the operator's training system and managerial oversight'. The CAA is expected to take a more assertive approach in its regulatory role in future.

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