THE LAWS AND LITIGATION AVIATION

Please see more details on our website.
Aircraft accidents are extremely complex from a technical perspective, as are the laws that apply to them. The following is a guide, but for more detailed information and advice please speak with one of the specialist aviation lawyers at Ashfords.

**LAWS ON LIABILITY**

**Liability of the operator - international flights**

There are a number of international laws currently in existence that provide a world-wide system of standards and rules for air travel and in particular, rules regarding the liability for the death or injury of passengers.

The two most important sources of international air law governing liability are the Warsaw Convention 1929 and the Montreal Convention 1999 which, it is important to note, govern the liability of the airline only. If a party other than the airline is at fault, different rules will apply.

The Conventions are not intended to deal with every aspect of international carriage by air, but they are exclusive on those matters they do cover.

**The Warsaw Convention**

The Warsaw Convention was the first international code of its kind to establish a framework for the liability of air carriers in respect of loss, injury and damage sustained in the course of, or arising out of, international carriage by air.

Prior to this legislation, the liability of air carriers simply depended on the general law as to carriage. This meant that different jurisdictions and legal systems approached particular situations in different ways, and in turn caused uncertainty and problems for those involved in the growing world of international air travel.

Although The Warsaw Convention removed some of the uncertainty, an unfortunate aspect of this was that it set a maximum financial limit of around $25,000 on the losses that could be recovered for death or injury.

Over the years a number of amendments were made to the Warsaw Convention which, collectively with the original Convention, are known as the "Warsaw System", and which subsequently culminated in the Montreal Convention of 1999.
The Montreal Convention
The aim of the Montreal Convention was to modernise, unify and simplify the complex system that was by then in place, by amending a number of the provisions of the Warsaw Convention. This new Convention meant that there was just one single legal instrument, instead of the various pieces of legislation that made up the Warsaw System.

Key features of the Montreal Convention include:

• Unlimited liability in the event of death or injury of passengers.

• Strict liability up to 113,100 Special Drawing Rights (SDR) (approximately $150,000) - the airline cannot dispute proven damages up to this amount provided the passenger is not to blame for his or her injuries.

• For proven damages that exceed 113,100 SDR, the airline is liable unless it can prove that the accident was not caused by their negligence or was caused by the negligence of a third party.

• Advanced payments to meet immediate needs.

As an air accident normally involves a chain of contributing factors, it is extremely difficult for the airline to avoid paying all proven damages beyond 113,100 SDR. As such, it is very common for the damages paid by airlines to exceed 113,100 SDR.

An important point to note is that under the conventions, the airline is only liable for bodily injury. If the injury is psychiatric, such as PTSD, the airline is not liable for this injury under the convention. In these circumstance, another cause of action would need to be pursued, such as a product liability case (see below).

The liability limits are set in Special Drawing Rights, which are a mix of currency values established by the International Monetary Fund and which are reviewed by the International Civil Aviation Organisation at five-year intervals.

To date, 122 countries have signed up to the Montreal Convention, including all members of the European Union, the USA, China and Japan.
**Applicable Convention**

As the Montreal Convention has not been signed by all countries, which convention applies needs to be determined. To do this, the conventions that both the departure and destination countries have signed up to need to be considered:

- Are both countries signatories to the Montreal Convention?
  - **YES** → Montreal Convention
  - **NO**
    - Is one country a signatory to both Conventions but the other country is only a signatory to the Warsaw Convention?
      - **YES** → Warsaw Convention
      - **NO**
        - Are both countries signatories to the Warsaw Convention?
          - **YES** → Warsaw Convention
          - **NO**

If the journey is a round trip involving several flights, the convention that applies depends on the country of departure and the final destination country of the round trip.
Jurisdiction
For air accidents, the victims and families will often have several jurisdictions to choose from. Under the Montreal Convention, an action for damages can be brought against the airline in:

- The country where the airline is domiciled.
- The country where the airline has its principal place of business.
- The country where the airline has a place of business through which the contract was made.
- The destination country for the flight.
- The country where the passenger has his or her principal and permanent residence and the airline operates passenger carriage services in that country.

Liability of the operator - domestic flights
The Warsaw / Montreal Conventions will not apply to domestic flights within one country unless such a flight is part of an international round trip involving successive flights. As such, for purely domestic flights different rules apply.

EU member States - Regulations 889/2002 and 2027/97
EU Member States introduced these Regulations to improve and unify the liability regime in the event of death or injury to passengers of EU airlines. The effect is that all flights by a community air carrier are subject to the provisions of the Montreal Convention, even if the flight is domestic within a single EU Member State.

Non-EU Countries
For domestic flights within non-EU countries, a detailed understanding of the domestic law of the country of accident, the airline’s terms and conditions of carriage and other agreements that the airline has in relation to passenger liability / damages is required. How this affects the passengers’ rights can vary greatly from country to country. For instance, for a domestic flight in some countries there can be a draconian cap on damages that can be claimed for each passenger (e.g. $25,000), whereas in other countries there is no cap, or they incorporate the provisions of the Montreal Convention into their own domestic legislation.

In addition, Regulation 889/2002 provides that the Community Air Carrier will make an advance payment within 15 days of identifying the person entitled to compensation. In the event of death it provides that the advance payment shall not be less than 16,000 Special Drawing Rights. For an injured passenger, the advance payment should be as may be required to meet immediate economic needs on a basis proportional to the hardship suffered.
Manufacturers liability
It is quite common for a problem with the aircraft, a system or a component to have contributed to the accident, either in part or to a considerable extent. In these circumstances there is another cause of action in addition to the case against the airline. This in turn can mean that there is an additional jurisdiction available which may be more favourable than those available under the Montreal Convention.

A large proportion of aircraft and aviation components are manufactured in the US. Even aircraft manufactured outside the US are likely to contain many components that are manufactured by US corporations. Where a US component has contributed to a crash, the victims and passengers may be able to bring a claim in the US, where the damages available are often significantly higher than those available in other countries. The Ashfords Aviation Team uses its professional aviation expertise to assess each accident to determine if there is a product liability or other claim that could provide a better legal outcome for the victims and families, especially if there can be a case in the US against a US manufacturer. (See the Pamir, Schweizer and Pioneer 400 cases on the Ashfords Aviation webpages)

For products manufactured in other countries, product liability laws will vary from country to country. In the absence of a US product liability cause of action, the Ashfords Aviation Team would assess whether any other product liability cause of action would enhance the case.

For the UK and some other EU member States, there are similar rules for product liability law based on their implementation of the Product Liability Directive 85/374/EEC. In the UK, this Directive has been incorporated into national law by the Consumer Protection Act (CPA) 1987.

The CPA introduces strict liability, which means that a claimant does not have to prove that the producer of the defective product was negligent if it can be shown that the defect was a cause of the injuries suffered. For some foreign air accidents, bringing a case in England against an English manufacturer may be the best cause of action.
Other Types of Liability
Beyond the Warsaw / Montreal Convention and product liability causes of action, there are potentially a number of other causes of action / defendants available in an air accident, depending on the circumstances. The following are some examples: package tour provider (see the Sita case); employer liability for injury to airline staff (see the Manx2 case); maintenance provider; air traffic control (see the Pamir case); liability of a pilot for a private flight; direct action against the insurer.

Liability for ground victims
The laws relating to ground victims vary in different countries.

In the UK, where a person on the ground is injured or killed by an aircraft crash or debris from an aircraft, section 76 (2) of the Civil Aviation Act 1982 imposes strict liability on the owner of the aircraft. This means that damages for losses and injuries are recoverable from the owner without having to prove negligence.

A very stark example of such a case is the Shoreham Airshow crash in England in 2015, where a flying display aircraft crashed onto a road, killing 11 on the ground and injuring a number of others (see the Shoreham case on the Ashfords aviation webpages).
THE VALUE OF THE CLAIM

How the claim is valued will depend on the country where the case is litigated and the applicable law. For instance, the US has by far the best laws in relation to the damages that can be awarded. Not only are victims / families compensated for past and future financial losses and expenses, they can also be awarded significant damages for the pain and suffering element of their claims. This non-economic element can amount to millions of dollars for each person who can claim for pain and suffering (this covers the victims injuries and the pain suffered by those who lose family members).

In other jurisdictions the losses that can be awarded are less favourable to varying degrees. For instance, in England victims / families can claim for past and future financial losses and expenses, but for injured victims the pain and suffering element is much lower. For families who lose loved ones, the pain and suffering element (Bereavement payment) is capped at £12,980 for a limited group of close relatives (spouse, civil partner, parents of deceased minor) and there is no bereavement payment for other relatives.

In addition, the value of the damages are influenced by a number of factors including the seriousness of injuries, the extent of the past / future financial losses / expenses, the age and income of a deceased, and the extent to which others were dependant on the deceased.

The Ashfords Aviation Team uses its specialist expertise to assess and quantify the value of each client’s injuries and losses. Then using their aviation expertise, they identify the causes of actions and jurisdictions available to devise a litigation strategy that maximises the prospects of winning the case and recovering a full and fair level of damages.
Instructing a law firm

If someone has been injured or has lost a loved one in an aviation accident, in the immediate aftermath and the weeks that follow they will experience a very traumatic and vulnerable time.

Law firms who are unknown to a victim or family should not make unsolicited contact with them. This type of conduct damages the reputation of the legal profession and is reviled by the majority of legal practitioners. In fact, the US takes a very firm view on this inappropriate conduct and its federal law forbids any unsolicited communications by lawyers to victims or victims’ families within 45 days from the date of the accident. As such, any victim or family who is approached by a US qualified lawyer within 45 days should question the ethics of that lawyer.

Moreover, this ethically focused rule in the US should be followed in spirit by all lawyers for any air accident around the world. So where the victim or family receive an unsolicited approach by a lawyer at any time after an air accident, this should raise questions about the conduct of that lawyer. In these circumstances, victims / families should not be rushed or pressured to sign up with a law firm – the best course of action is not to sign anything then conduct some research on the lawyer and other law firms who have aviation expertise.

In addition to the resource of the internet, there are the regulators of the legal profession who can provide information on lawyers, law firms, areas of expertise and whether there have been any conduct issues in relation to those firms or individual lawyers. In England the relevant bodies for solicitors and barristers are The Law Society, The Solicitors Regulatory Authority, The Bar Council, and the Bar Standards Board. Furthermore, if a victim or family already have a lawyer that they know or use, that lawyer may be able to assist them or will be able to advise on law firms that would be able to handle an aviation claim.

If a victim / family decide that they want to instruct a specialist aviation lawyer, the lawyer needs to demonstrate that they have specialist aviation law experience and expertise. This can involve reviewing their academic qualifications, the cases they have been involved in, and the extent their practice is dedicated to air accident litigation or whether it is just a part of a general personal injury or travel litigation practice.

In addition, if the lawyer claims to have pilot or non-legal aviation industry expertise, they need to be able to demonstrate the depth of that expertise – e.g. what is their qualification / license, were they ever a full time professional in the aviation industry, for how many years, and what was their profession?
Ultimately, the victim / family needs to be confident in the qualifications and experience of the aviation lawyer so that they can be sure of their integrity and competence.

However, if they instruct a lawyer then, at a later date, they have any concerns about the lawyer or the way their case is being handled, they can obtain a second opinion from another aviation law specialist and decide whether they wish to change law firms. Ashfords is happy to provide a second opinion on a no obligation basis, and if the decision is that Ashfords is to take over the case Ashfords will manage the hand-over process, which is often very straightforward.

Legal Limitation Periods
In most cases there is no rush to instruct a law firm and commence formal legal proceedings. As a matter of law, there is a defined time within which legal proceedings should be formally commenced, which is normally at least one year from the date of the accident but is often two years. For instance, a case against an airline under the Montreal Convention must be brought within two years.

Apart from the Montreal Convention, the limitation periods vary depending on the cause of action and the jurisdiction in which the case is brought. There are certain limited circumstances where time may be much shorter than the norm. As such, an advisable action for victims and families would be to identify a lawyer that specialises in aviation litigation as soon as they are able to, and ask them to advise on applicable legal limitation periods or other deadlines.

Funding the case
Funding of legal costs in complex aviation cases are normally on a "no win no fee" basis, but the method of funding will depend on a number of factors and the country in which the case is litigated.

Funding for cases litigated in the English jurisdiction
There are a number of ways to fund a case, which include:

• **Conditional Fee Agreement** – This is a "no win no fee" agreement where the client’s law firm is only paid if it wins the case, when it will seek recovery of its fees and expense from the defendant.

• **Legal Expenses Insurance** – A client may have an insurance policy (e.g. household or travel insurance) that helps pay legal costs.

• **Trade Union** – A client may be a member of a trade union that may help pay legal costs.
Funding for cases litigated in the US
Cases litigated in the US are funded on a “no win no fee” Contingency Fee Agreement. The legal fee is a percentage of the damages recovered, so the law firm will only be paid if it wins the client’s case.

Funding in other jurisdictions
There are a number of other jurisdictions that also allow Contingency Fee Agreements. For foreign jurisdictions that require a different method of funding, Ashfords identifies the funding options and advises clients accordingly.

Case Procedure
Case procedure is country specific, but in very general terms involves:

• Analysis of the air accident to ascertain the most favourable cause(s) of action, defendant(s) and jurisdiction.
• Gathering information and evidence from victims and families to identify the full extent of injuries, pain and suffering, and financial losses.
• Notifying the defendants of the claim.
• Determination of defendant’s position on liability and whether settlement can be reached without formal proceedings.
• In the absence of a settlement, issue proceedings / file the case with the court.
• Interim legal arguments / hearings.
• Disclosure / discovery of documents.
• Exchange of witness statements / depositions.
• Exchange of expert reports / deposition of experts.
• Exploring the opportunities for pre-trial settlement.
• Trial.

Most cases settle before reaching trial. However, even for cases that settle, it can be a lengthy process. A time of one–three years to achieve a settlement in an aviation case is not unrealistic, but for a complex and heavily contested case the time to settlement or trial can be much longer.

Ultimately, the victim / family needs to be confident in the qualifications and experience of the aviation lawyer so that they can be sure of their integrity and competence.

A particular issue for air accident cases is where an air accident occurs outside the US but is filed in the US courts against US defendant(s) on behalf of foreign nationals. In the majority of these cases the US defendants will raise a legal motion to have the case removed from the US court (forum non conveniens motion) and sent to a more convenient foreign court, such as the court where the claimant is domiciled. This can be a complicated and hard fought legal motion that can take a significant time to resolve, possibly 12 months or more.
Where there is a case in the US for foreign nationals, there are a number of stages where there are opportunities to settle the case, including during the period where the defendants are pursuing a motion to have the cases removed from the US. When these opportunities arise, Ashfords will use its expertise to try and negotiate a fair settlement that is somewhere between the value of the case in the US and the value of the case in the country the claimant is domiciled. This is what is known as a “mid Atlantic settlement” and, given the much higher values of damages awarded in the US, can be an extremely beneficial method of resolving the victim’s / family’s claim.

Ashfords and members of the Aviation Team have extensive experience in complex international litigation, negotiating very favourable mid Atlantic settlements, defeating forum non conveniens motions and successfully pursuing complex and lengthy air accident litigation in the US. Using the unique professional expertise of the Aviation Team, the victims of air accidents can be assured that Ashfords will provide a class leading level of service to secure the best possible settlement and, where necessary, fight fearlessly to the conclusion of the trial.
ABOUT ASHFORDS

Ashfords is a national provider of legal, professional and regulatory services.

We combine legal expertise, commercial experience and our wider network to help our clients achieve their goals. So, to many clients, we are more than lawyers, we are professional advisers, mentors, problem-solvers.

Above all, we believe that every client should expect and receive value for time and value for money. Which means that we always aim to provide advice that is not just technically sound, but that is grounded in our understanding of your world.

KEY CONTACTS

Jim Morris
Partner & Barrister
Head of the Aviation Team
jb.morris@ashfords.co.uk
Mobile +44 (0)7850 506057

Jim specialises in representing the victims of international air accidents. He was a professionally qualified Royal Air Force pilot prior to becoming an aviation lawyer, and has over 26 years’ experience in aviation and litigation.