

Cruising towards strict liability for holiday claims



The Protocol to the Athens Convention adopted at a diplomatic conference in London on November 1 imposes a new strict liability regime for 'shipping incidents'. Rory Gogarty and James Clanchy consider the scope for claims by passengers and whether cruise companies and ferry operators will be worse off than other players in the travel industry

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THE threat of a terrorist attack on a North Sea ferry recently evoked memories of the terrible loss of life in such recent disasters as the Estonia and the Express Samina . Incidents like these have highlighted the relatively low level of compensation which the law says is payable to passengers by ferry and cruiseship operators. However, change is in sight.

The Athens Protocol 2002, adopted at a diplomatic conference in London at the end of October, will radically reform the passenger liability regime under the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974. The protocol will enter into force 12 months after being ratified by ten states. The final text will be published soon by the IMO.

Like the 1974 convention, the protocol applies to "performing carriers" and to "non-performing carriers" who have merely concluded contracts of carriage, such as tour operators.

Much comment in this newspaper and elsewhere has focused on the steep rises in the limits of liability which carriers will face under the new regime.

The maximum liability per passenger for any one incident will be 400,000 SDR (about \$524,000), which is more than eight times the original 1974 limit of 46,666 SDR. The protocol also provides for an opt-out allowing states to make their own regulations to increase the maximum liability or remove the limit altogether.

The exposure of carriers in the ferry and cruise business to passenger claims will be increased in other ways too, as will the exposure of their P&I clubs.

The protocol introduces a new strict liability regime for "shipping incidents" and obliges carriers to take out compulsory insurance. It will allow passengers to bring claims directly against insurers, a novel concept in the context of shipping claims where traditionally insurers such as the P&I clubs have remained in the background, standing behind their members who are sued. However, in appropriate cases, defendant insurers will have available to them the defence that the damage resulted from the wilful misconduct of the assured.

In some respects, these changes in the passenger compensation regime will impose a greater burden on ferry and cruise operators (and their insurers) than is imposed on other players in the travel industry.

The discussions which led to the adoption of the protocol were partly influenced by the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 (1) and by the discussions which led to the adoption of that convention.

The most significant change which that convention made to the Warsaw Convention 1929 was the introduction of a two-tier regime in relation to an air carrier's liability for death and injury to passengers.

In the first tier, the carrier is liable "upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking" (Article 17, para 1).

For damages not exceeding 100,000 SDR for each passenger, the carrier is not able to exclude or limit its liability (Article 21, para 1), i.e. the carrier is strictly liable for claims up to that limit.

In the second tier, the carrier's liability for damages above the 100,000 SDR level will be unlimited unless it can prove either that such damage was not due to its negligence or other wrongful act or omission or that it was solely due to the negligence or other wrongful act or omission of a third party (Article 21, para 2).

The 2002 Protocol to the Athens Convention does not expose a sea carrier to unlimited liability (2) but it does impose a far higher limit of 250,000 SDR (about \$325,000) per passenger for "shipping incidents" for which the carrier will be strictly liable (subject to exceptions).

A "shipping incident" is defined in the draft protocol as "shipwreck, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship" (Article 3, para 5(a)). The definition of "defect in the ship" limits it to "any malfunction or failure" in parts of the ship or its equipment used for manoeuvring the ship or for passenger embarkation, disembarkation and escape.

The combination of these two definitions should allow carriers to escape strict liability for occurrences in the "hotel" department of a cruise ship or ferry. A cruise line is not going to find itself strictly liable for accidents in its ships' restaurants or swimming pools. The Athens Convention fault-based liability regime for non-shipping incidents will continue to apply, with the burden of proof on the Claimant (Draft Protocol, Article 3, para 2).

The carrier will also escape strict liability for a "shipping incident" if it can prove that the incident fell within two categories of exception. The first category includes the results of acts of war and natural phenomena "of an exceptional, inevitable and irresistible character". The second category covers incidents which were "wholly caused by an act or omission done with the intent to cause the incident by a third party". This must include an attack by terrorists.

If the loss arising from a "shipping incident" exceeds the 250,000 SDR limit, the carrier could be further liable up to a total limit of 400,000 SDR "unless the carrier proves that the incident which caused the loss occurred without fault or neglect of the carrier" (Article 3, para 1).

This new two-tier strict liability regime for cruise lines and ferry operators must be seen not only alongside the conventions governing air travel but also alongside the Package Travel, Package Holidays and Package Tours Regulations 1992 ("PTR 1992") which govern the liability of tour operators for the performance of package holiday contracts.

Until the decision of the High Court in *Hone v Going Places Travel Ltd* (3) (confirmed in the Court of Appeal last year (4)), there was a question as to whether Regulation 15 of the PTR 1992 imposed a strict or fault-based liability on tour operators for the "proper performance" of a holiday contract.

Mr Hone suffered back injury during the evacuation of an aircraft in Turkey. He first collided with a large lady passenger stuck at the bottom of the emergency chute. He was then hit in the back by the hard heeled shoes of his fiancée who followed him. In attempting to help the large lady to her feet, he hurt his back again.

Mr Hone sued his travel agent, Going Places, and relied on Regulation 15 of the PTR 1992 which provides, inter alia:

"...(2) The other party to the contract is liable to the consumer for any damages caused to him by the failure to perform the contract or the improper performance of the contract..."

Longmore LJ in the Court of Appeal rejected the argument that there was improper performance because the parties expected that the air carriage would be safely executed.

He said: "That would only be the position if there was a term of the contract that the air carriage would be safely executed. For my part, I do not consider that there was any such absolute term. In the absence of an express agreement, the implication was that the air carriage would be performed with skill and care."

In his judgment, Longmore LJ then pointed a contrast with the terms of the Warsaw Convention, Article 17 of which "imposes a liability for death or personal injury without any requirement of improper performance".

When in force, the Montreal Convention 1999 and the 2002 Protocol to the Athens Convention will take strict liability for passenger injuries a stage further. Passengers (and their insurers and lawyers) will look carefully at their booking conditions and will be alert to the incorporation and the applicability of these conventions. A travel agent might escape liability to its customers for a collision in an evacuation chute but a cruise line will not be able to escape liability to its passengers for a collision with another ship.

In some ways, the protocol imposes a harsher regime on passengers than exists for other means of transport such as aircraft and railways. The principle of strict liability, the introduction of direct access to insurers and the higher compensation limits also have the potential to cause tensions between passenger and non-passenger members in the traditional P&I clubs.

The knock-on effect in terms of price increases could turn away the very consumers that the reform of the Athens Convention was intended to benefit.

1. Not yet in force: 30 ratifications needed.
2. Although it allows states to do so by national regulations.
3. [2000] All ER (D) 1854.
4. [2001] All ER (D) 102 (Jun).

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