HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ

RENAE EVANS & ANOR — APPELLANTS

AND

AIR CANADA — RESPONDENT

Evans v Air Canada
[2025] HCA 22
Date of Hearing: 12 March 2025
Date of Judgment: 14 May 2025
S138/2024

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with M Tanevski for the appellants (instructed by Shine Lawyers)

J T Gleeson SC with G O J O'Mahoney and L G Moretti for the respondent (instructed by Norton White)

CATCHWORDS

Evans v Air Canada

Aviation – Carriage of passengers by air – Contract of carriage – Where Air Canada's International Passenger Rules and Fares Tariff ("Air Canada Tariff") formed part of contract of carriage with passengers – Where defences to liability recognised by Convention for the Unification of Certain Rules for International Carriage by Air (1999) ("Montreal Convention") – Where treaty provisions given effect in domestic law – Where liability rules of Montreal Convention expressly incorporated into Air Canada Tariff – Where partial defence in Art 21(2) of Montreal Convention raised – Whether open to Air Canada to waive partial defence limiting extent of passengers' recovery of damages for bodily injury allegedly caused by turbulence experienced on flight – Whether any waiver of partial defence in Air Canada Tariff.

Words and phrases – "aviation", "bodily injury", "context", "contract of carriage", "damages", "defence", "financial limit", "liability cap", "liability rules", "partial defence", "purpose", "tiers of liability", "travaux préparatoires", "treaty", "treaty interpretation", "unlimited liability", "waiver".

Civil Aviation (Carriers' Liability) Act 1959 (Cth), ss 9B, 11.
Convention for the Unification of Certain Rules for International Carriage by Air (1999), Arts 17, 21, 25.
Vienna Convention on the Law of Treaties (1969), Arts 31, 32.

GAGELER CJ, EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ.

Introduction

1 This appeal concerns the meaning of Arts 17, 21 and 25 of the Convention for the Unification of Certain Rules for International Carriage by Air (1999)[1] ("the Montreal Convention") and the application of those provisions in Air Canada's International Passenger Rules and Fares Tariff ("the Air Canada Tariff"), which formed part of its contract of carriage with passengers.

2 The issue in this Court arises from a claim, made by two passengers who travelled on an Air Canada flight from Vancouver to Sydney in July 2019, for damages arising from spinal and psychological injury allegedly caused by turbulence experienced on the flight. In the Supreme Court of New South Wales, the passengers sought damages from Air Canada for these bodily injuries under Art 17 of the Montreal Convention, as incorporated into Australian law.[2] Air Canada relied upon a partial defence in Art 21(2) of the Montreal Convention, available where the damage was not due to negligence or any other wrongful act or omission by Air Canada or its servants or agents. Under that partial defence, damages would be subject to a cap that limited the extent of the passengers' recovery to 113,100[3] Special Drawing Rights (an international reserve asset created by the International Monetary Fund[4]) which is approximately $240,000 at present exchange rates. The appellant passengers replied that, under Art 25, Air Canada had waived the partial defence in Art 21(2) because the Air Canada Tariff provided in r 105(C)(1)(a) that "[t]here are no financial limits in respect of death or bodily injury".

3 In the Supreme Court of New South Wales, two questions were reserved for the consideration of the Court. One of the questions concerned the applicability to the quantum of the appellant passengers' claim for damages of Pt 2 of the *Civil*

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1 2242 UNTS 309.

2 *Civil Aviation (Carriers' Liability) Act 1959* (Cth), s 9B.

3 Although expressed as 128,821 Special Drawing Rights in a separate question referred to the primary judge, there was no dispute in the Court of Appeal or in this Court, following the observations of the primary judge, that the correct cap at the relevant time was 113,100 Special Drawing Rights.

4 See Montreal Convention, Art 23(1).

Liability Act 2002 (NSW). That question was answered by the primary judge (Rothman J) in favour of Air Canada. No appeal was brought from that answer. The other question was as follows:

> "Does Rule 105(C) [of the Air Canada Tariff] provide and have the effect that if this Court assesses each plaintiff's compensatory damages in Australian dollars in an amount in excess of [113,100] Special Drawing Rights (SDR), each is entitled to recover that sum from the defendant even if the defendant can prove that the damages were not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or such damage was solely due to the negligence or other wrongful act or omission of a third party?"

4 The primary judge held that Art 25 of the Montreal Convention allowed a carrier to remove entirely the partial defence to liability provided by Art 21(2)[5] and that the clear and unambiguous language of r 105(C)(1)(a) had done so.[6] The Court of Appeal (Leeming JA, with whom Payne JA and Griffiths A-JA agreed) granted leave and allowed the appeal.[7] The Court of Appeal held that it was open to Air Canada to waive the partial defence in Art 21(2), although the Court of Appeal did not decide whether such a waiver would occur under Art 25 or Art 27, or both, because the Court held that Air Canada had not waived the partial defence under r 105(C)(1)(a).[8]

5 For the reasons below, Art 25 empowered Air Canada to waive the partial defence in Art 21(2) but, as the Court of Appeal correctly concluded, Air Canada did not do so. When regard is had to the context of r 105(C)(1)(a) of the Air Canada Tariff, particularly the meaning of Arts 17 and 21 of the Montreal Convention, r 105(C)(1)(a) must be seen as no more than declaratory of the effect of Art 17, and therefore subject to the defences to liability recognised by the Montreal Convention.

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5 *Evans v Air Canada* [2023] NSWSC 1535 at [51].

6 *Evans v Air Canada* [2023] NSWSC 1535 at [61].

7 *Air Canada v Evans* (2024) 114 NSWLR 433.

8 *Air Canada v Evans* (2024) 114 NSWLR 433 at 457 [88]-[90], 458 [94], [95].

International principles of interpretation

6 The *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the Civil Aviation Act") gives the Montreal Convention[9] and (replacing earlier legislation[10]) the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929)[11] ("the Warsaw Convention"),[12] as amended,[13] domestic legal effect in Australian law. However, although the appellant passengers' claim is brought under the Civil Aviation Act as a matter of domestic law, the treaty provisions that are given effect in domestic law have meaning in public international law which has not been altered by the Civil Aviation Act. As four members of this Court said in *Povey v Qantas Airways Ltd*,[14] "international treaties should be interpreted uniformly by contracting states". And as this Court has reiterated,[15] the text of an international treaty is to be interpretated in accordance with the interpretative rules of the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention"). Consideration of the historical context of a treaty, including related treaty instruments and the travaux préparatoires to the treaty, is an important aspect of that interpretative process.

7 Article 31(1) of the Vienna Convention requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The definition of "context" in Art 31(2) is narrow, referring to (in addition to the general text of the

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9 *Civil Aviation (Carriers' Liability) Act*, s 9B.

10 See *Carriage by Air Act 1935* (Cth); *Civil Aviation (Carriers' Liability) Act 1959* (Cth), s 4(1) (as made).

11 137 LNTS 11.

12 *Civil Aviation (Carriers' Liability) Act*, s 11.

13 See Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (1955) 478 UNTS 371.

14 (2005) 223 CLR 189 at 202 [25]; see also at 211 [60].

15 Most recently in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 316 [38]-[39]; *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2024) 98 ALJR 445 at 452 [30]; 417 ALR 173 at 181.

treaty, including the preamble and any annexes) certain agreements and instruments related to the treaty. Nevertheless, consistently with ordinary conventions of language, the International Law Commission[16] and the International Court of Justice[17] have emphasised that treaty interpretation is a holistic exercise to ascertain meaning, without separation of "context" in Art 31(1) from the broad range of materials which can be considered as part of the "supplementary means" of interpretation in Art 32.

8 Article 32 permits resort to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", to confirm the meaning of the provision arising from the application of Art 31, or to determine the meaning of the provision if that meaning is ambiguous (including latent ambiguity) or obscure or "[l]eads to a result which is manifestly absurd or unreasonable". The distinction in Art 32 between confirming a meaning and determining a meaning was not intended to be, and has not been, applied rigidly or independently of the considerations of context, object, and purpose in Art 31.[18] The intention was one of "frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear".[19]

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16 International Law Commission, *Report of the International Law Commission on the work of its seventieth session (30 April–1 June and 2 July–10 August 2018)*, UN Doc A.CN.4/SER.A/2018/Add.1 (Part 2), in [2018] *Yearbook of the International Law Commission*, vol 2, 1 at 26 [52], Draft Conclusion 2.5.

17 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment* [2007] ICJ Rep 43 at 109-110 [160]; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Preliminary Objections, Judgment* [2017] ICJ Rep 3 at 29 [64]; *Arbitral Award of 3 October 1899 (Guyana v Venezuela), Preliminary Objection, Judgment* [2023] ICJ Rep 262 at 287 [88].

18 Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 348-349. See also *JTI Polska sp z oo v Jakubowski* [2024] AC 621 at 633-634 [32].

19 Waldock, Special Rapporteur, *Sixth Report on the Law of Treaties*, UN Doc A/CN.4/186 and Add 1-7, in [1966] *Yearbook of the International Law Commission*, vol 2, 51 at 99 [20], quoted in Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 347.

The history of, and background to, the Montreal Convention

The importance of the history of the Montreal Convention

9 The system involving the rules governing liability for international air carriers and their application has been described as "an unusual hybrid of public international law and private transnational law";[20] the rules are provided by international treaties but disputes are generally adjudicated by domestic courts. Although this appeal is most directly concerned with provisions of the Montreal Convention, the interpretation of the Montreal Convention requires an understanding of its history and development and particularly its relationship with the Warsaw Convention and the agreements that amended the Warsaw Convention or waived the benefits accruing to carriers under it.

10 The recitals to the Montreal Convention reveal the importance to the development and understanding of the Montreal Convention of the Warsaw Convention and related instruments ("the Warsaw system"). The recitals include recognition of the "significant contribution" of the Warsaw Convention and the "need to modernize and consolidate the Warsaw Convention and related instruments".[21] It has therefore been consistently reiterated in case law, including by the Court of Appeal in this case,[22] that an understanding of the Warsaw system, including authorities on similar or identical provisions,[23] is necessary to appreciate the meaning of many provisions of the Montreal Convention.

The Warsaw system

11 The Warsaw Convention came into force in 1933.[24] It had been the product of a decade of international discussion and negotiation, meticulously set out by

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20 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 251.

21 Montreal Convention, Preamble.

22 *Air Canada v Evans* (2024) 114 NSWLR 433 at 445 [34].

23 See *Cohen v American Airlines Inc* (2021) 13 F 4th 240 at 244-245; Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 42-43.

24 See Warsaw Convention (1929) 137 LNTS 11 at 13.

Lord Reed in *King v Bristow Helicopters Ltd*.[25] For 70 years the Warsaw Convention, as modified by various instruments, governed "virtually all international carriage of passengers, baggage and cargo throughout the world and, thanks to voluntary adoption by States, also much of their domestic carriage".[26]

12 The "main feature"[27] of the Warsaw Convention was Arts 17 and 22(1) which, together with other provisions: (i) created an exclusive regime for damages for personal injury or death "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking";[28] (ii) provided a defence if the carrier proved that the carrier and its "agents [had] taken all necessary measures to avoid the damage or that it was impossible ... to take such measures";[29] and (iii) provided, subject to the carrier and its agents' wilful misconduct[30] and other infringements,[31] a limit to the liability of the carrier of 125,000 French or "Poincaré" gold francs (subject to any contractual agreement between the carrier and passenger for a higher limit).[32] In

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25 2001 SC 54 at 103-104 [6]-[8].

26 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 833.

27 See Oliveto, "Revisiting the Liability System of the Montreal Convention of 1999" (2022) 21 *Issues in Aviation Law and Policy* 177 at 180, citing Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (2010) at 34.

28 Warsaw Convention, Arts 17, 24. See *Sidhu v British Airways Plc* [1997] AC 430 at 447; *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155 at 176; *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 289 ALR 682 at 704-705 [96]-[98].

29 Warsaw Convention, Art 20(1).

30 Warsaw Convention, Art 25.

31 Warsaw Convention, Arts 3(2), 4(4), 9.

32 Warsaw Convention, Art 22(1), (4).

1933, 125,000 Poincaré gold francs was a "modest" amount of approximately US$8,300.[33]

13 In addition to the "all necessary measures" defence, the "severe monetary limitations on the amount of the carrier's liability" came into effect in 1933 "in order to help the international civil aviation industry grow".[34] But the combination of the abandonment of the gold standard (on which many currencies were formerly based), together with inflation and a rising cost of living after the Second World War, led to the 125,000 franc limit becoming "more and more unacceptable", particularly in the United States where claimants bore their own legal costs. Although the airlines, and most other governments, resisted any increase in the limit, the United States agitated for an increase.[35]

14 The Hague Protocol of 1955 ("the Hague Protocol"), operative from 1963,[36] amended the Warsaw Convention to, among other things, increase the liability limit from 125,000 francs to 250,000 francs.[37] Nevertheless, the United States remained dissatisfied, to the point of giving notice of its intention to denounce the Warsaw Convention. Ultimately, the United States did not do so because a private accord, the 1966 Montreal Intercarrier Agreement ("the 1966 IATA Agreement"), was reached between the International Air Transport Association ("IATA") and the United States. Under the 1966 IATA Agreement, members of IATA operating

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33 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 835; Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 261.

34 Batra, "Modernization of the Warsaw System—Montreal 1999" (2000) 65 *Journal of Air Law and Commerce* 429 at 429. See also Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 50-52; Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 258-259.

35 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 835; Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 26-27.

36 See Hague Protocol (1955) 478 UNTS 371 at 373.

37 See Hague Protocol (1955), Art XI.

international flights with any connecting points in the United States effectively accepted strict liability up to a higher limit, subject only to the defence of contributory negligence, and without the "all necessary measures" defence.[38]

15 The following years saw attempts to address the non-uniform international system that resulted from the operation of the 1966 IATA Agreement only in relation to international flights with connecting points in the United States. In 1971, a protocol was agreed at Guatemala City but never came into force.[39] In 1975, four protocols were agreed in Montreal, with significant changes including the replacement of a gold standard with Special Drawing Rights and a new liability cap of 100,000 Special Drawing Rights.[40] But the United States remained dissatisfied with what it saw as the "unconscionably low"[41] liability cap of the Warsaw system.[42] The Warsaw system was also "plagued by inconsistent and uneven ratifications of its various instruments".[43] The inconsistencies were exacerbated by a group of countries who developed a consensus, described as the "Malta Agreement", from 1974 onwards to increase the limit of liability from the limit in Art 22(1) of the Warsaw Convention (as amended). The inconsistencies were further exacerbated by the decision of Japanese international airlines to accept, in respect of passenger injury or death, liability for claims up to 100,000

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38 See Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 836; Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 269-270.

39 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 266; Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (2010) at 353.

40 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 267.

41 *Dunn v Trans World Airlines Inc* (1979) 589 F 2d 408 at 411.

42 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 268. See also Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 838.

43 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 268.

Special Drawing Rights (subject to a defence of contributory negligence) and, beyond that, unlimited liability subject to defences of lack of fault and contributory negligence.[44]

16 In 1995 and 1996, following negotiations conducted with the benefit of a grant of anti-trust immunity, IATA member airlines and others entered into agreements ("the 1995/6 IATA Agreements") based on the recognition that the Warsaw Convention's "limits of liability ... are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers".[45] Under the 1995/6 IATA Agreements, the airlines agreed to take measures including: (i) waiving the Warsaw Convention's limit of liability in Art 22(1) for personal injury or death arising from an Art 17 accident; and (ii) waiving the Art 20(1) "all necessary measures" defence for that part of any claim that is below 100,000 Special Drawing Rights.[46] The European Union followed suit in 1997 with a regulation requiring waivers to similar effect.[47]

17 The 1995/6 IATA Agreements, like the 1966 IATA Agreement and the Malta Agreement,[48] provided for this waiver of liability to take effect by "incorporating [the waivers] in [carriers'] conditions of carriage and tariffs". This was an application of the provision in Art 22(1) of the Warsaw Convention under

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44 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 840-842; Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 31-32.

45 Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (2010) at 358.

46 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 270-271; Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (2010) at 358 [1], 360 [I(1)-(2)].

47 *Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents* [1997] OJ L 285/1, Art 3.

48 See Cheng, "Air Carriers' Liability for Passenger Injury or Death: The Japanese Initiative and Response to the Recent EC Consultation Paper" (1993) 18 *Air and Space Law* 109 at 117.

which "by special contract, the carrier and the passenger may agree to a higher limit of liability".[49]

The development of, and travaux préparatoires to, the Montreal Convention

18 In December 1994, the International Civil Aviation Organization ("ICAO") Council established the parameters for the ICAO Secretariat to carry out an "analysis of the limits of air carrier liability" as part of "a comprehensive effort to accelerate the modernization of the 'Warsaw System' of air carrier liability". That analysis showed widespread dissatisfaction with the limits of liability imposed by the Warsaw Convention.[50]

19 In 1995, the 31st session of the ICAO Assembly directed the ICAO Council to "continue its efforts to modernize the 'Warsaw System' as expeditiously as possible".[51] In 1997, at the 30th session of the ICAO Legal Committee, "[a]ll attention was focused only on the [1995/6 IATA Agreements] that [were] embodied in the draft presented to the Committee".[52]

20 A draft of the Montreal Convention presented to the International Conference on Air Law convened by ICAO in Montreal in May 1999 ("the Diplomatic Conference") provided for liability for personal injury or death in the same circumstances as provided by Art 17 of the Warsaw Convention. That liability was effectively divided into two tiers for the purposes of a defence contained in draft Art 20. The first tier imposed liability upon the air carrier up to a monetary threshold (subject to an exemption from liability in draft Art 16(1) for "death or injury result[ing] from the state of health of the passenger", which was not included in the final text[53]). The second tier imposed unlimited liability upon

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49 See Shawcross and Beaumont, *Air Law* (2013), vol 1, div 7 at 123 [183.2].

50 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 2 at 165-180.

51 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 1.

52 Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 39.

53 Compare Montreal Convention, Art 17(1).

the air carrier beyond the threshold but subject to the various defences available to the carrier under draft Art 20.[54]

21 During negotiations, the most vocal proponents of draft Art 20 pointed to its similarity to the pre-existing IATA regime, and the need to modernise the Warsaw system without causing "a fragmentation of régimes [which] the Diplomatic Conference was trying to cure".[55] Other states were more sceptical of the proposal, voicing concerns that a system of unlimited liability would raise insurance premiums and adversely impact state-owned carriers and the viability of civil aviation in developing countries.[56] Alternative proposals for the text of draft Art 20 were put forward by India, 53 African states, the member states of the Arab Civil Aviation Commission, Vietnam, and Pakistan. None of these attained significant support from other states or groups of states in the Diplomatic Conference.[57]

22 Faced with this lack of consensus, the Chairman of the Diplomatic Conference identified "a common thread running through the proposals made by the 53 African Contracting States, India and Vietnam ... namely, that they all subscribed to the principle of unlimited liability".[58] This limited consensus was reiterated by the Chairman, in a "Friends of the Chairman" Group meeting

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54 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 2 at 11-28.

55 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 91-92 [7]-[9], 93 [15], 123 [64].

56 See, eg, International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 85 [26], 87 [35], 88-89 [41]-[42].

57 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 85 [25], 86 [30], 87 [33], [35], 96 [24]. See also at 94 [18].

58 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 94 [19].

convened in the second week of negotiations: "the overwhelming majority of Delegates had come around to accepting the principle of strict liability up to a certain *threshold*"[59] and there was "common ground that there would be circumstances in which there would be unlimited liability".[60]

23 The Chairman presented a draft consensus package to the Friends of the Chairman Group with two alternative proposals for draft Art 20. Although one alternative involved two tiers and the other involved three tiers, each involved liability up to a monetary threshold and, after a particular threshold was met, unlimited liability subject to certain conditions.[61] After the Delegate of the United States of America expressed strong dissatisfaction with both alternatives, the Chairman observed that the drafting "exercise had been one of 'blood sweat and tiers'".[62]

24 At a meeting of the Commission of the Whole, the Chairman presented an updated consensus package, which included what would become the final text of Art 21.[63] The Chairman summarised the changes made since the first version of the draft article, noting that the Friends of the Chairman Group had opted to

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59 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 130 [5] (emphasis added).

60 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 129 [5].

61 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 2 at 492.

62 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 177 [10].

63 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 199 [1]; International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 2 at 500.

maintain a two-tier model so as to "ensure the continued predictability of recovery up to a threshold which would apply in the majority of cases" and had concluded that for cases of "unlimited liability arising under [what became Art 21(2)], the burden of proof should be on the air carrier".[64]

25 Following the entry into force of the Montreal Convention on 4 November 2003,[65] there began "[a] new era in the law of international carriage by air".[66] A central feature of that new era was the Arts 17 and 21 scope of liability for death or personal injury which the President of the Diplomatic Conference described at the conclusion of the negotiations as "establishing a two-tier system: a system of strict liability up to 100,000 SDRs; a principle of unlimited liability thereafter, but with the burden of proof on the carrier".[67]

The relevant terms of the Montreal Convention and their meaning

The relevant terms of Ch III of the Montreal Convention

26 Chapter III of the Montreal Convention is entitled "Liability of the Carrier and Extent of Compensation for Damage". Article 17(1) of the Montreal Convention is in similar terms to Art 17 of the Warsaw Convention and provides as follows:

> "**Article 17. Death and Injury of Passengers—Damage to Baggage**
>
> 1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which

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64 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 202 [10].

65 See Montreal Convention (1999) 2242 UNTS 309 at 309.

66 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 833.

67 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 246.

caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

27 Articles 18 and 19 are concerned with liability for damage to cargo and liability for damage occasioned by delay respectively.

28 Article 20 provides for a defence of contributory negligence (or other wrongful act or omission of the claimant or person from whom the claimant derives their rights) adapted from Art 21 of the Warsaw Convention.

29 Article 21 provides as follows:

"**Article 21. Compensation in Case of Death or Injury of Passengers**

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

   (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

   (b) such damage was solely due to the negligence or other wrongful act or omission of a third party."

The defence in Art 21(2), which operates only beyond the limit or threshold specified by reference to Special Drawing Rights, can be loosely described as a "no negligence" defence.

30 Article 22 imposes limits of liability for delay in the carriage of persons and, in the carriage of baggage and cargo, limits of liability in the case of destruction, loss, damage or delay. The limits of liability in respect of destruction, loss, damage or delay of baggage or cargo may be increased to a "declared sum", where the passenger or consignor has made a "special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires".[68]

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68 Montreal Convention, Art 22(2), (3).

31 Article 24, which has been described as an "escalator clause",[69] addresses one of the concerns about the erosion of the limits of liability by inflation. In broad terms, Art 24 provides for inflation-based increases to the "limits of liability" in Arts 21, 22 and 23, subject to disapproval by a majority of state parties, with the limits to be reviewed at least every five years. Subsequent to the events in July 2019 that allegedly caused the injuries of the appellant passengers, the limit of 113,100 Special Drawing Rights for Art 21 was increased under Art 24, with effect from 28 December 2019, to 128,821 Special Drawing Rights.[70]

32 Article 25 provides as follows:

> "**Article 25. Stipulation on Limits**
>
> A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever."

33 Article 26 makes "null and void" any provision that tends "to relieve the carrier of liability or to fix a lower limit than that which is laid down" in the Montreal Convention. Article 27 provides that nothing contained in the Montreal Convention prevents a carrier from "refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict" with the Montreal Convention.

The meaning of Arts 17, 21 and 25 of the Montreal Convention

34 As the history above shows, it was widely understood that the effect of Art 22(1) of the Warsaw Convention upon the carrier's strict liability for personal injury or death under Art 17 was "a *quid pro quo*, whereby the airline's liability was limited in return for almost certain recovery for the [passenger], with the

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69 Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 201; Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 297.

70 See International Civil Aviation Organization, "Revision of limits of liability under the Montreal Convention of 1999—Notification of effective date of revised limits", ICAO Letter LE 3/38.1-19/70, 11 October 2019, given effect in Australia by the gazetted *Notice Pursuant to Civil Aviation (Carriers' Liability) Act 1959* (Cth) (6 December 2019).

presumption of carrier's fault and reversed burden of proof".[71] The Warsaw Convention thus adopted a regime of strict liability (subject to defences) for personal injury or death when the conditions of Art 17 were met, but with a monetary limit to that liability.[72] The quantum of the limit of a carrier's strict liability for personal injury or death under Art 17 was provided in Art 22(1) as "the sum of 125,000 [Poincaré gold] francs". That limit became "doubtless the most controversial issue in the Warsaw system".[73]

35 By contrast, the success of the Montreal Convention lies in the fact that "[u]nlimited liability is the cornerstone principle of the Montreal Convention".[74] As explained above, the travaux préparatoires to the Montreal Convention were replete with references to "unlimited liability" for death or personal injury that fell within the conditions of strict liability in Art 17. In this respect, the Montreal Convention was the natural successor to the scope of liability (subject to defences) provided by the 1995/6 IATA Agreements which, due to the lack of any monetary limit to the liability, had been described in the United States as "absolute liability".[75]

36 It might be said that Art 21 of the Montreal Convention, like Arts 22 and 24 of the Warsaw Convention which it adapted and developed, is "not a model of the clear drafter's art".[76] But once the "cap" or "threshold" in Art 21(2) is understood only as a limit to the first of two tiers of liability for the purposes of a defence, it follows that the repeated references to "unlimited liability" in the travaux préparatoires to the Montreal Convention are an accurate description of

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71 Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 52.

72 See also *Trans World Airlines Inc v Franklin Mint Corp* (1984) 466 US 243 at 256.

73 Cheng, "An Integrated System of Absolute, Unlimited and Secured Liability for Passenger Injury or Death in International Carriage by Air", in Cheng (ed), *Studies in International Air Law: Selected Works of Bin Cheng* (2018) 687 at 702.

74 Havel and Sanchez, *The Principles and Practice of International Aviation Law* (2014) at 283.

75 *Williams v Fidelity & Casualty Co of New York* (1977) 442 F Supp 455 at 456.

76 See *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155 at 168.

the strict liability (subject to defences) that arises when the conditions of Art 17 are met.

37 The repeated description of Art 21 in the travaux préparatoires to the Montreal Convention as creating "a two-tier system" of liability does not deny the unlimited nature of the Art 17 liability overall. Instead, Arts 17 and 21 create a continuous regime of unlimited liability with a limit or threshold only for the purposes of separating such liability into two tiers for the application of the "no negligence" defence in Art 21(2). In other words, first-tier liability under Art 17 operates up to the financial limit or threshold in Art 21(1), with the only defence being the claimant's or other relevant person's contributory negligence or wrongdoing (Art 20), and second-tier liability under Art 17 operates beyond that limit or threshold but has the additional partial "no negligence" defence in Art 21(2).

38 As to Art 25, the terms of that Article contemplate that a carrier can stipulate in its contract or tariff with passengers that the threshold in Art 21 be raised, including to the point of effectively excluding the "no negligence" defence altogether. Contrary to the submissions of Air Canada, the Art 21(2) threshold is one of the "limits of liability" referred to in Art 25. Indeed, the review in Art 24 applies to "the limits of liability prescribed in Articles 21, 22 and 23". There is nothing in the travaux préparatoires to suggest that Art 25 was not intended to apply to the limit or threshold in Art 21. Unlike Art 21, Art 25 was not the subject of extensive negotiation, and the draft text of Art 25 was adopted without amendment or comment.[77]

39 Moreover, Art 25 of the Montreal Convention has been described as having its "roots" in the exception in Art 22(1) of the Warsaw Convention, which permitted the carrier to depart from the limit of liability by agreeing to a higher limit of liability "by special contract".[78] As explained above, Art 22(1) was the basis in the 1995/6 IATA Agreements for the airlines' waiver of the 125,000 Poincaré gold franc limit in the Warsaw Convention. The limit, as increased by the 1995/6 IATA Agreements, then became the threshold in Art 21(2) of the Montreal

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77 International Civil Aviation Organization, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999* (1999), vol 1 at 101 [23].

78 Dempsey and Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 201.

Convention.[79] Therefore, whether or not the freedom to contract provision in Art 27 of the Montreal Convention extended (as Air Canada submitted it does) to permit an increase in the limit or threshold in Art 21(2), the appellant passengers were correct that a power to agree to such an increase fell within Art 25.

The Air Canada Tariff

The structure and provisions of r 105

40 The *Air Transportation Regulations 1987* (Canada), by s 110(1), generally require a carrier to file a tariff with the Canadian Transportation Agency before commencing the operation of an international service. That tariff is required to contain, by s 122(a), "the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff" and, by s 122(c), "the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely, (i) the carriage of persons with disabilities ... (xviii) limits of liability respecting passengers and goods, [and] (xix) exclusions from liability respecting passengers and goods".

41 Rule 105 of the Air Canada Tariff, entitled "Liability of Carriers", implements these requirements of the Canadian *Air Transportation Regulations* by describing the regime of liability for Air Canada, including the limits of that liability. The provisions of the rule relevant to this appeal are rr 105(B) and 105(C). Rule 105(B), entitled "Laws and Provisions Applicable", describes the general application of the Warsaw system and the Montreal Convention as well as other applicable laws and regulations. Rule 105(C), entitled "Limitation of Liability", then describes particular prescribed limits to Air Canada's liability under the Warsaw system and the Montreal Convention.

42 Rule 105(B)(1) describes Air Canada's liability under the Warsaw system as modified by the terms of the 1995/6 IATA Agreements. Rule 105(B)(1)(a) provides that Air Canada "shall not invoke the limitation of liability" in Art 22(1) of the Warsaw Convention. Rule 105(B)(1)(b) provides that Air Canada "shall not avail itself of any defense under Article 20(1) of the [Warsaw] Convention with respect to that portion of such claim which does not exceed 113,100 Special Drawing Rights". Rule 105(B)(1)(c) provides that "[e]xcept as otherwise provided

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79 Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (2010) at 360 [I(2)].

herein" Air Canada "reserves all defenses available" under the Warsaw Convention. These waivers, and the reservation of all other defences, effectively implement the terms of the 1995/6 IATA Agreements.

43 Rule 105(B)(2) describes details of presentation including the carrier's name and address in the ticket where the Warsaw system applies, and specifies the "agreed stopping places" for the purposes of the Warsaw Convention. Rule 105(B)(3) describes how carriage is subject to: (i) applicable laws, government regulations, orders, and requirements; (ii) provisions in the passenger's ticket; and (iii) the tariff, general conditions of carriage, and applicable fare rules.

44 Rule 105(B)(4) provides that the "[n]ormal carrier limit of liability will be waived for substantiated claims involving loss[,] damage or delay in delivery to mobility aids ... [w]hen such items have been accepted into the care of the carrier as checked baggage or otherwise." But the liability of the carrier is nevertheless limited to the cost of repair or the replacement value of the mobility aid. This rule describes the effect of s 155 of the Canadian *Air Transportation Regulations*.

45 Rule 105(B)(5) provides for the "liability rules" of the Montreal Convention to be "fully incorporated herein" and for those liability rules to "supersede and prevail over any provisions of this tariff which may be inconsistent with those rules".

46 Rule 105(C) deals with death or bodily injury to passengers, as well as issues concerning delay, baggage and property, in paras (1) to (11), and various general matters in paras (12) to (15). The immediate context of r 105(C)(1)(a) concerning death or bodily injury is paras (1) to (5), which are as follows:

> "105 Liability of Carriers ...
>
> (C) Limitation of Liability
>
> (1) Where the Montreal Convention applies, the limits of liability are as follows:
>
> (a) There are no financial limits in respect of death or bodily injury.
>
> (b) In respect of destruction, loss of, or damage or delay to baggage, 1,131 Special Drawing Rights (approximately EUR 1,357; US $1,663) per passenger in most cases.

(c) For damage occasioned by delay to your journey, 4,694 Special Drawing Rights (approximately EUR 5,655; US $6,786) per passenger in most cases.

(2) Where the Warsaw Convention system applies, the following limits of liability may apply:

(a) 16,600 Special Drawing Rights (approximately EUR 20,000; US $20,000) in respect of death or bodily injury if the Hague Protocol to the Convention applies, or 8,300 Special Drawing Rights (approximately EUR 10,000; US $10,000) if only the Warsaw Convention applies[.] US regulations require that, for journeys to, from or with an agreed stopping place in the US, the limit may not be less than US $75,000.

(b) 17 Special Drawing Rights (approximately EUR 20; US $20) per kg for loss of or damage or delay to checked baggage and 332 Special Drawing Rights (approximately EUR 400; US $400) for unchecked baggage.

(c) The carrier may also be liable for damage occasioned by delay.

(3) Where neither the Montreal Convention nor the Warsaw Convention system applies the liability limit for loss or delay of, or damage to baggage is $1,500 CAD per passenger.

(4) Except as provided herein, or in other applicable law:

(a) Carrier is not liable for any death, injury, delay, loss, or other damage of whatsoever nature (hereinafter in this tariff collectively referred to as 'damage') to passengers or unchecked baggage arising out of or in connection with carriage or other services performed by carrier incidental thereto, unless such damage is caused by the negligence of carrier.

(b) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders, or requirements or from failure of passenger to comply with same.

(5) The aforementioned limits of liability apply unless a higher value is declared in advance and additional charges are paid as set out below. In that event the liability of the carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger."

The meaning of r 105(C)(1)(a)

47 The interpretation of r 105(C)(1)(a) requires consideration of the meaning of the words of that rule in their context and in light of their purpose. Contrary to the submissions of Air Canada relying upon reasoning of the Court of Appeal, it cannot be assumed that it made "no commercial sense for Air Canada to volunteer to accept unlimited liability for death or bodily injury ... on a no-fault basis" by waiving the defence in Art 21(2) of the Montreal Convention or that an acceptance of such liability by Air Canada without the benefit of the Art 21(2) defence was "unprecedented in a century of international commercial aviation".[80] Indeed, on another view, Professor Cheng observed in 2004, with reference to statements from market participants, that:[81]

> "in serious death and injury cases, major airlines tend increasingly to ignore the limits, and to pay full awardable damages. In fact, in view of the enormous cost of modern aircraft and of operating international air services, not to mention air travel claiming to be the safest means of transport, the difference in cost between insuring passenger liability for SDR100,000 a head or even for what could be compensation in full becomes negligible".

48 There is also no room in this context for the application of any expectation or "presumption", as relied upon by Air Canada, to the effect that "for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision relied upon must make it clear that that is what was intended. ... 'The more valuable the right, the clearer the language will need to

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80 *Air Canada v Evans* (2024) 114 NSWLR 433 at 457 [86].

81 Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 840.

be.'"[82] Any such principle could have no application where the "right" in question is the application of a regime that (in Art 21) establishes the limit or threshold for tiers of liability for the application of a defence but also contemplates (in Art 25) that that limit or threshold can be raised or abolished by the stipulation of a carrier.

49 Although the meaning of r 105(C)(1)(a) is not to be determined by such a priori assumptions, the provision must nevertheless be interpreted having regard to its context and purpose. That context and purpose make clear that r 105(C)(1)(a) only describes the effect of Arts 17 and 21 of the Montreal Convention, rather than stipulating a higher limit of liability for the purposes of Art 25 of the Montreal Convention. This interpretation of r 105(C)(1)(a) is supported by five matters of context and purpose.

50 First, r 105(C)(1)(a) is, in its terms, an accurate statement of the meaning of Art 17 of the Montreal Convention. As already explained, the travaux préparatoires to the Montreal Convention are replete with references to liability for personal injury or death within the terms of Art 17 being "unlimited". Indeed, the limit to the equivalent liability for personal injury or death in the Warsaw Convention was the reason that that Convention had been so controversial. The effect of Arts 17 and 21 of the Montreal Convention is to establish two tiers of liability so that the "no negligence" defence in Art 21(2) will only apply in the second tier; neither Art 17 nor Art 21 imposes any financial limits in respect of the overall Art 17 liability of carriers for death or bodily injury. The limit or threshold is only for the application of the defence in Art 21(2). Rule 105(C)(1)(a) therefore correctly declares that "[t]here are no financial limits in respect of death or bodily injury". The concern of r 105(C)(1)(a) is the subject matter of ("in respect of") death or bodily injury. It is not concerned with the limit or threshold for the application of the defence in Art 21(2) of the Montreal Convention.

51 Secondly, r 105(C)(1), like the other provisions of r 105(B) and (C), gives effect to the Canadian *Air Transportation Regulations*, including the requirement to state the limits of and exclusions from liability respecting passengers and goods. Those Regulations required the Air Canada Tariff to describe the legal effect of multiple instruments since, as Leeming JA observed in the Court of Appeal, passengers on an Air Canada flight could be subject to different legal regimes

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82 *Bahamas Oil Refining Company International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The "Cape Bari")* [2016] 2 Lloyd's Rep 469 at 476 [31], [33], quoting *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2010] QB 27 at 39 [23].

depending upon the points of connection of the flight.[83] The relevant regimes to which the relevant parts of the Air Canada Tariff are directed include the Warsaw Convention, the 1995/6 IATA Agreements, the Canadian *Air Transportation Regulations*, and the Montreal Convention.

52 Thirdly, consistently with the purpose of fulfilling the requirements of the Canadian *Air Transportation Regulations*, each of the preceding and succeeding provisions to r 105(C)(1)(a) does little more than declare the effect of the provisions of the Warsaw Convention, the 1995/6 IATA Agreements, the Canadian *Air Transportation Regulations*, and the Montreal Convention. For instance, as Leeming JA observed in the Court of Appeal, reference to "in most cases" in r 105(C)(1)(b) and (c) is "the language of a provision which is intended concisely to notify passengers of the limits to which their contract of carriage by air is subject".[84] The reference to "in most cases" reflects the possibility of exceptional circumstances such as a "special declaration" under Art 22(2) in cases where, for example, a passenger has extremely valuable baggage and is prepared to pay more for a higher limit of liability. So too, r 105C(1)(a) declares the effect of Art 17 of the Montreal Convention.

53 Fourthly, the provision that immediately precedes r 105(C)(1)(a) (namely r 105(B)(5)) is concerned to ensure that the liability rules of the Montreal Convention are "fully incorporated" in the Air Canada Tariff, even to the extent of providing that those rules prevail over any inconsistent provisions of the Air Canada Tariff. Of course, there would be no inconsistency that would arise by Air Canada exercising the power recognised in Art 25 for Air Canada to raise or waive the limit or the threshold applicable to the Art 21(2) defence, or by exercising the power in Art 27 to waive any defence. But, unlike r 105(B)(1), which, in accordance with the terms of the 1995/6 IATA Agreements, waives defences under the Warsaw Convention, r 105(C)(1)(a) does not use the language of waiver. Nor does it use the language of raising or abolishing the limit for the application of the defence in Art 21(2).

54 Fifthly, the appellant passengers' interpretation of r 105(C)(1)(a) is in tension with Air Canada's provision in r 105(C)(4) (subject to provision otherwise in the Air Canada Tariff or in applicable laws) that it has a defence to liability for

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83 *Air Canada v Evans* (2024) 114 NSWLR 433 at 449-451 [58]-[63]. See also *Gulf Air Co GSC v Fattouh* (2008) 251 ALR 183 at 191 [28]; *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 289 ALR 682 at 685-686 [14(a)-(b)].

84 *Air Canada v Evans* (2024) 114 NSWLR 433 at 454 [75].

death or injury that is not caused by its negligence. Of course, r 105(C)(4) must be read as subject to the limit or threshold for the application of the "no negligence" defence in Art 21(2). But r 105(C)(4) confirms that Air Canada did not intend to waive that defence.

Conclusion

55 The appeal must be dismissed with costs.