# TATLA

**TRAVEL AND TOURISM LAWYERS' ASSOCIATION**

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# CHRISTMAS 2018

Can it really be that time of year again? No sooner has the fully-dressed, flame-retardant plastic Christmas tree been dispatched to the cupboard under the stairs than it is time to fetch it out again. We have enjoyed another eventful year on the travel law front: ***Keefe*** (nearly) reached the Court of Justice; ***X v Kuoni*** provided (and will continue to provide) some, *ahem*, leftfield turbulence and looming over all of us is Brexit: the BIG vote is presently scheduled for 11 December 2018 (it's truly the Christmas gift that keeps on giving isn't it?)

This final edition of the year concentrates on the international carriage Conventions: Athens and Montreal. In true TATLA style we bring you a decision by the Supreme Court and a no less weighty (pun intended) judgment by a District Judge in the Pontypridd County Court: "*Man suing British Airways says 'Jonah Lomu-sized' passenger gave him back spasms*" **(© *The Mirror*).**

A Happy Brexit Christmas to you all!

***Warner v Scapa Flow Charters*** [2018] UKSC 52; [2018] 1 WLR 4974 (SC (Sc))

The Claimant in this action was Mrs Warner: the widow of Mr Lex Warner. The late Mr Warner chartered a motor vessel which was operated by Scapa Flow for the week 11 – 18 August 2012. On 14 August 2012 Mr Warner prepared for a dive on a wreck located close to Cape Wrath, Sutherland (the most north-westerly point in mainland Britain). During the course of his dive preparations, and while fully dressed in diving gear, Mr Warner fell onto the deck of the vessel. He was assisted to his feet and went ahead with the dive (to a depth of 88 metres). During the course of the dive, Mr Warner got into difficulties and was brought to the surface (with the assistance of fellow divers). He could not be revived (having lost consciousness) and was pronounced dead. The Claimant brought proceedings in which she alleged that her late husband's death was caused by the negligence of Scapa Flow.

The summons (issued in the Scottish Courts) was "*signetted*" on 14 May 2015. Scapa Flow filed a defence that the claim was time-barred pursuant to the Athens Convention (or, more accurately, the Order in Council which extends the Convention to UK waters: SI 1987/670), "*which, in the case of a death occurring during carriage, imposes a time bar of two years from the date on which the passenger would have disembarked*." The parties agreed that Mr Warner would have disembarked no later than 18 August 2012.

The principal issue in this case concerned Article 16(3) of the Convention which provides, "*The law of the court seised of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later*. [emphasis added]"

*Per* Lord Hodge (paragraph 30), "*In my view, the words in article 16(3) of the Athens Convention , "the grounds of suspension … of limitation periods" are sufficiently wide to cover domestic rules which postpone the start of a limitation period as well as those which stop the clock after the limitation period has begun. I therefore agree with Lord Glennie in the judgment of the Inner House (para 17): "the word 'suspension' … is also apt to include the deferment or suspension of something which has not yet started*."

The Court went on to consider ***Higham v Stena Sealink*** [1996] 1 WLR 1107 (CA), "*In that case a passenger raised an action for damages for personal injuries suffered while she was a passenger on a ferry. She raised the action just over two years after her accident. The shipowners sought to strike out the claim by pleading the two-year limitation period of the*

*Athens Convention. The Court of Appeal (Hirst and Pill LJJ) upheld the decision to strike out the claim. The court rejected an argument by the claimant that section 39 of the Limitation Act 1980 superseded the application of the time bar in article 16(1) of the Athens Convention . We are not concerned with that argument which the Court of Appeal correctly rejected. The other argument, which the Court of Appeal rejected, was that section 33 of the 1980 Act, which gives a court discretion on equitable grounds to allow an action for personal injuries to proceed notwithstanding the expiry of a limitation period, should be treated as a ground of "suspension" or "interruption" under article 16(3) of the Athens Convention . I agree with that conclusion. But there are two aspects of the reasoning of Hirst LJ with which I cannot agree.*

*32 First, Hirst LJ expressed the view (at p 1112C-D) that dictionary definitions of "suspension" and "interruption" all contemplated "a break in a period or course of events which are presently in train". In agreement with the Inner House, I cannot agree with that view as the dictionary definition of "suspension" to which Hirst LJ referred included "postponement" as one of its meanings. In any event, as I have discussed above, there is reason to conclude that "suspension" in the context of prescription or limitation has a broader meaning in several legal systems.*

*Secondly, Hirst LJ observed (obiter) that there were other sections in the Limitation Act 1980 , such as section 32 , which postpones the limitation period in the case of fraud, concealment or mistake, which might at first sight be eligible to qualify under article 16(3) of the Convention. But he went on to express the tentative view that the fact that in each case the section postponed the periods of limitation "prescribed by this Act" or words to that effect might disqualify them (p 1111F-G). If in expressing that view he meant that the grounds of suspension in the lex fori were to apply under article 16(3) of the Convention only if they were framed to extend beyond the scope of the domestic limitation regime of the lex fori so as to cover limitation periods in conventions such as the Athens Convention, I must respectfully disagree. In my view, where article 16(3) speaks of the law of the court seized governing "the grounds of suspension … of limitation* periods *" (in the plural) it was applying the grounds - such as minority or mental incapacity - which the lex fori would apply to domestic claims for personal injury, or death or loss or damage to property. Thus, the existence of a ground in a domestic limitation statute which suspended the limitation periods set out in that statute, such as section 32 of the Limitation Act 1980 (fraud, concealment or mistake) or in this appeal section 18 of the 1973 Act (legal disability by reason of non-age or unsoundness of mind) is sufficient to bring*

*article 16(3) into operation and extend the article 16 time bar by one year."*

This decision brings some welcome clarity to the law (and tidies up a loose end following ***Higham v Stena Sealink***).

And now for something completely different:

***Prosser v British Airways***. Pontypridd CC (November 2018). The facts are taken from the BBC News website: "*A man is suing British Airways after being "squashed" next to an obese passenger during a 13-hour flight. Stephen Huw Prosser, who is 5ft 3in, said he suffered a pelvic injury and nerve damage in his neck on the journey from Bangkok to London in January 2016. The 51-year-old from Tonypandy in Rhondda Cynon Taff told Pontypridd County Court the passenger "was built like the late rugby player Jonah Lomu". He is claiming for damages and loss of earnings, which BA is resisting. ... Mr Prosser, a civil engineer company director, was returning home from a holiday in Thailand on 10 January 2016. He was sitting by the window when a "huge man" took the seat next to him before takeoff. "In my opinion he was obese as well as tall. I would estimate he was 6ft 4in in height and in excess of 22 stones," said Mr Prosser. "He had to physically squeeze himself between the armrests. His buttocks were bulging onto my side and the rest of his bulk spilling over. The weight of this man's bulk was pushing my spine in a painful, unnatural and crooked position as I tried to remain in an upright position." Mr Prosser complained to the cabin crew but was told there was no alternative seat available as the flight was full. He remained in his seat for the rest of the journey but was in "continual pain". Asked if he complained to the passenger, Mr Prosser replied: "I didn't want to get into a confrontation with him." In the weeks that followed, he claimed he remained in constant pain, his stance was "twisted" and suffered back spasms. ... The BA customer service manager on board the flight, Chris McLindon, said he had "very rarely, if ever" dealt with such a complaint. He added: "The passenger was tall and broad but he was certainly not obese. He didn't overfill the armrest or the confines of the seat*."""

The case gave rise to an interesting legal issue: had there been an "*accident*" within the meaning of the Montreal Convention? (that is, an unusual *or* unexpected (from the passenger's viewpoint) incident causative of bodily injury: see eg. ***Ford v Malaysian Airline Systems*** [2014] 1 Lloyd's Rep 301 (CA)). Unfortunately (for the Claimant), the claim was dismissed on factual grounds (the large fellow passenger was not as large as the Claimant had suggested). The District Judge did not deal (even *obiter*) with the interesting legal point. It was ever thus …