In our recent air carrier’s liability update, we referred to the exclusivity principle under the Warsaw and Montreal Conventions and the approach of the Australian courts to follow a line of UK and US authority, which provides that, where the relevant convention applies, the remedies available to the passenger are those exclusively under that convention. We reported that in the decision of the Western Australian District Court in Cousins v Nimvale Pty Ltd [2013] WADC 175, the parents of two deceased passengers had a right to seek dependency loss under Australian legislation, which gives effect to the relevant convention. However their claims for damages for nervous shock fell outside the scope of the legislation (and convention). In such circumstances, the parents had the right to separately claim against the carrier for their nervous shock under common law negligence or any other relevant statute.

In further support of the application of the exclusivity principle, the United Kingdom Supreme Court handed down a judgment this month in Stott v Thomas Cook Tour Operators Limited [2014] UKSC 15 in which it held that Mr Stott was unable to recover damages against the carrier for humiliation and discomfort pursuant to the UK Disability Regulations 2007, because those damages were precluded by the Montreal Convention, which would apply to his carriage by air.

Mr Stott is paralysed from the shoulders down and is a permanent wheelchair user. He has double incontinence and uses a catheter. When travelling by air he depends on his wife to manage his incontinence since he cannot move around the aircraft. He also relies on her to help him to eat and to change his sitting position.

Thomas Cook Tour Operators Limited is an air carrier with an operating licence granted by a member state of the European Union. Mr Stott made bookings on the internet for a return flight from East Midlands in the United Kingdom to Zante, Greece. He then immediately telephoned the carrier’s helpline to advise that he required his wife to be seated next to him and he was assured this would be the case.

The outward journey was unremarkable. At check-in for the return flight, Mr and Mrs Stott were told they were not seated together but this would be sorted out at the departure gate. No solution was found at the departure gate. Further, on embarkation, Mr Stott fell to the cabin floor when his wheelchair overturned during boarding by an ambulift. After being helped to his seat, he had to endure the 3 hours 20 minute flight with his wife seated behind him. The cabin crew made no attempt to request other passengers to move to allow the Stotts to sit together.
together. Mrs Stott suffered significant difficulty in assisting her husband during the flight and inevitably she obstructed the cabin crew and other passengers making their way up and down the aisle.

The Court was scathing of the carrier’s treatment of Mr Stott, which would have founded a breach of duty under the UK Disability Regulations entitling Mr Stott to damages for discomfort and injury to feelings. However, the lower courts and the Supreme Court held they were unable to award those damages because the exclusivity principle under Article 29 of the Montreal Convention prevented the making of that award.

Where EC air carriers are concerned, the Montreal Convention has force in the UK by virtue of the Montreal Regulation (which says the Convention governs the liability of Community air carriers).

The Supreme Court referred to the leading authorities of the House of Lords in Sidhu v British Airways PLC [1997] AC 430 and the US Supreme Court in El Al Israel Airlines Ltd v Tseng 525 US 155 (1999). Relevantly, in referring to the decision in Tseng, the Court said ‘the Convention’s pre-emptive effect on local law extended no further than the Convention’s own substantive scope, and that a carrier would be indisputably subject to liability under local law for injuries arising outside that scope, for example, for passenger injuries occurring before the operation of embarking’.

Importantly, the Supreme Court (agreeing with the US Court of Appeals Second Circuit in King v American Airlines Inc 284 F 3d 352 (2002)) said the pre-emptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place.

As the Montreal Convention would apply to any physical injury suffered by a passenger during embarkation and during the flight, and the Convention does not compensate a passenger for hurt feelings or ill-treatment, Mr Stott could not recover these types of damages from the carrier.