Planes, blame & claims!

Katherine Deal QC & Asela Wijeyaratne consider the meaning of 'accident' under the Montreal Convention

IN BRIEF

▶ Exclusive liability regime & the requiremnt that bodily injury is suffered as a result of an 'accident'.

In our last update we discussed recent cases under the Montreal Convention pushing the boundaries of one element of the cause of action for recovery of damages for injury under article 17(1) – the requirement that 'bodily injury' is suffered ('Flying in the face of convention', *NLJ* 14 June 2019, p9). Here, we examine the recent High Court decision of *Labbadia v Alitalia (Societa Aerea Italiana S.p.A)* [2019] EWHC 2103 (Admin), which places strain on another element of the cause of action—the requirement that the bodily injury is suffered as a result of an 'accident'.

The Montreal Convention 1999 is a multilateral treaty to which the UK is a party. The Convention applies to international carriage of passengers by aircraft. It provides (among other things) an exclusive liability regime for the death or injury to passengers. The Montreal Convention is the successor to the Warsaw Convention, which opened for signature in 1929. The Warsaw Convention had the 'primary purpose of... limiting the liability of air carriers in order to foster the growth of the fledgling aviation industry,' (Transworld Airlines Inc v Franklin Mint Corp 466 U.S. 243, citing conference minutes).

Article 17(1) of the Montreal Convention provides that: 'The carrier is liable for damage sustained in case of death or bodily injury of a passenger 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.'

The word 'accident' is a term of art under the Montreal Convention. It has been the subject of judicial consideration and interpretation in many jurisdictions. In *Labbadia*, the Deputy High Court Judge (Margaret Obi) took as the starting point for analysis the 'leading modern authority' on the point, the US Supreme Court judgment in *Air France v Saks* [1985] 470 US 392. In this case, on the identical wording in the Warsaw Convention, O'Connor J stated: 'We conclude that liability under article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding the passenger's injuries... But when the injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and article 17 of the Warsaw Convention cannot apply.'

Article 17 does not require negligence on the part of the carrier. As Lord Scott observed in re *Deep Vein Thrombosis Group Litigation* [2006] 1 AC (HL) the omission from Article 17 of any requirement of negligence is double-edged so far as an injured passenger is concerned. It is to the passenger's advantage that negligence on the part of the carrier needs to be neither alleged nor proved. It is to the passenger's disadvantage, however, that even clear causative negligence on the part of the carrier will not entitle the passenger to a remedy if the Article 17 conditions cannot be satisfied.

Labbadia

Mr Labbadia was a passenger on a flight from London Heathrow to Milan Linate, in February 2015. The aircraft landed in poor weather conditions. As Mr Labbadia disembarked from the rear of the aircraft, he fell headfirst from the aircraft stairs, sustaining bodily injury as a result. The judge found that the stairs were 'covered with snow and/or compacted snow' prior to disembarkation and it was this that caused his slip. There was no canopy covering the rear aircraft stairs from which Mr Labbadia slipped, whereas the stairs at the front of the aircraft were covered.

The judge found that the poor weather conditions were not an 'unexpected or unusual' event. However, 'the use of stairs without a canopy was a different matter'. Milan airport had a policy, in the event of bad weather, of using stairs with a canopy where possible. On occasions when canopied stairs were unavailable, there was a documented operating policy of ensuring stairs were free from the accumulation of snow or ice, prior to authorising passengers to disembark. The judge found that the use of uncovered and unswept stairs at the point of disembarkation did not comply with the airport's procedure, was not, therefore, part of the 'normal operation of the aircraft', and as such constituted the injury to Mr Labbadia was caused by an accident.

The decision appears to import a fault-based approach to the interpretation of 'accident' under Article 17(1). 'Unusual' is conflated with 'contrary to ordinary practice' for that particular airline or airport, which comes tantalisingly close to a finding of negligence. Or, put another way, in order to establish that his event was unexpected and unusual, Mr Labbadia effectively had to prove that Alitalia or those involved in the disembarkation process fell below the standard reasonably expected of them.

The decision is also difficult to reconcile with a slew of County Court cases such as *Cannon v My Travel Airways Limited* (8 July 2005, HHJ Caulfield) where a slip on a ramp to the airport building following disembarkation was found not to be an accident, but rather 'a state of affairs' to which considerations of 'negligence and foreseeable risk of harm are not relevant'; or *Kedgley v Britannia Airways* (1 September 2004, Recorder White) where water on the floor of an onboard lavatory was not unexpected or unusual and a failure to clean it up was not an event; or *Jelfs v British Airways* (26 February 2014, HHJ Moloney) where icy slush walked inside a terminal was held to be usual and expected; and many others.

County Courts will now on the face of it be bound by *Labbadia* as a judgment of a superior court. However, it also sits uneasily with US cases such as *Vanderwall v United Airlines* (80 F.Supp 3d 1324), *Rafailov v El Al Israel Airlines Ltd* (S.D.N.Y. 13 May 2008) and *Craig v Compagnie Nationale Air France* (45 F.3d 435) where slips and trips on items left in the cabin aisle of aircraft were not considered accidents.

Although, as Scalia J warned in *Hussain v Olympic Airways* [2004] 124 S Ct 1221: 'A legal construction [of the Convention] is not fallacious merely because it has harsh results', *Labbadia* is perhaps an example of a more liberal approach to the interpretation of the Convention to provide for relief where 'traditional tort law would do so.' NLJ

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